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 OPPOSITION TO DEFENDANTS' MOTION FOR SUMMARY JUDGMENT

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The Memorandum of Law filed by the Defendant National Labor Relations Board and its leadership (the "Board" or the "NLRB") in Support of Its Motion for Summary Judgment ("Bd. Br." or "Opening Brief") overlooks key principles of law arguing that the Board had the statutory authority to promulgate the rule entitled Notification of Employee Rights Under the National Labor Relations Act, 76 Fed. Reg. 54,006 (August 30, 2011) (to be codified at 29 C.F.R. pt. 104) (the "Rule" or the "Notice Rule").

As an initial matter, the Board cannot rely on *Mourning v. Family Publications Service, Inc.*, 411 U.S. 356 (1973), for the proposition that the Board has the broad authority to issue any regulation that is "reasonably related" to the enabling statute's purposes. Rather, courts have explained that the "reasonably related" standard set forth in *Mourning* is to be applied during a *Chevron* Step Two analysis – ***after*** the Court has already determined that Congress delegated authority to an agency to promulgate the rule at issue. The Board similarly misstates what Congress must do to make clear that an agency does not have the authority to take a particular action. The Board essentially takes the position that any time Congress is silent about an issue, it means that Congress has implicitly delegated authority to the Board to act. This clearly is not the law. Finally, the Board would have this Court overlook the limited function of the Board, a comparison of the National Labor Relations Act ("NLRA") to other similar laws, and the history of the NLRA itself, even though courts make clear this method of statutory interpretation is appropriate and necessary when determining Congressional intent.

Even if the Board could promulgate some type of Notice Rule (which Plaintiffs submit it cannot), *this* Rule exceeds the Board's authority under the NLRA. For instance, the Rule would create a new unfair labor practice ("ULP") – even though the Supreme Court has made clear that Congress did ***not*** delegate authority to create new ULPs to the Board. The Board also seeks to

create a new blanket presumption that the six-month statute of limitations set forth in the NLRA at Section 10(b) will be tolled ***unless*** the employer proves an employee already knew his or her rights. This is a complete flip of the burdens of proof normally applied in the equitable tolling context – and improperly focuses on employees' knowledge of the law rather than their knowledge of the facts, as the equitable tolling doctrine normally requires.

Even if the Board could promulgate the Notice Rule (which it cannot), the Rule is arbitrary and capricious under the Administrative Procedure Act ("APA") because the Board relied on fifteen-year-old anecdotes rather than ensuring that objective evidence supported the need for the Rule. The Board essentially takes the position that it can state the thesis that a Notice Rule is needed and then require the public to disprove the thesis. Unfortunately for the Board, that is not the law under the APA.

The Rule is similarly arbitrary and capricious in its choice of what rights the Rule ignores – specifically employees' rights under Section 14(b). The Board's rationale for omitting these rights is that employees can call the Board to ask about Section 14(b) rights. But this reasoning underscores the arbitrary nature of the Rule: if employees could call the Board to ask about Section 14(b) rights, why can't they simply call the Board to ask about all of their other rights under the NLRA?

Even if the Board could promulgate the Notice Rule (which it cannot), the Board cannot compel private businesses to disseminate the government's slanted, ideological message on private property. The Board itself conceded that the Notice represents "the government's view of what the law requires" rather than an objective recitation of law. Bd. Br. 17, 19. Such forced, subjective speech violates both the First Amendment and Section 8(c) of the NLRA.

Finally, the Board has failed to satisfy the requirements of the Regulatory Flexibility Act. The Board effectively concedes that its cost estimate has no basis in fact or the administrative record, and arbitrarily ignores its sister agencies in refusing to calculate entire categories of compliance costs, such as training and legal costs. When including all applicable cost categories, the Rule's true costs likely exceed five billion dollars, and could approach thirteen billion dollars. Because the Rule would impose a "significant economic impact," the Rule must be remanded to the Board for completion of a Final Regulatory Flexibility Analysis.

For these reasons and those set forth in the Plaintiffs' Memorandum In Support of Their Motion for Summary Judgment ("Plaintiffs' Initial Brief" or "Pl. Br."), the Board's Motion for Summary Judgment should be denied, and the Plaintiffs' Motion should be granted.

I. LEGAL ARGUMENT

Although not explained in the Board's Opening Brief, the first step in reviewing the Board's Rule is a consideration of whether the Board's action exceeded the authority delegated to it by Congress in the NLRA – a determination that must occur *before* the Court considers whether the Board is entitled to deference under *Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984). *See* 5 U.S.C. § 706(2)(C).

The Board misconstrues Supreme Court precedent when it says that *Mourning* permits an agency to take any action that is "reasonably related to the purposes of the enabling statute." Bd. Br. 4. Even if this Court concludes that the Board's rulemaking authority is as broad as that described in *Mourning* (which arguably it is not),[1] courts consistently have read the language that the Board cites from *Mourning* as describing a heightened level of deference that is due the

[1] The rulemaking authority at issue in *Mourning* included: "The (Federal Reserve) Board shall prescribe regulations to carry out the purposes of (the Act). These regulations may contain such classifications, differentiations, or other provisions, and may provide for such adjustments and exceptions for any class of transactions, as in the judgment of the Board are necessary or proper to effectuate the purposes of (the Act), to prevent circumvention or evasion thereof, or to facilitate compliance therewith." 411 U.S. at 361-62 (citing 15 U.S.C. § 1604).

agency's interpretation of an ambiguous statute under *Chevron* Step Two, rather than a warrant to override a lack of Congressional delegation of authority or a clear statute under *Chevron* Step One. *See, e.g., Colo. River Indian Tribes v. Nat'l Indian Gaming Comm'n*, 383 F.Supp.2d 123, 144 (D.D.C. 2005), *aff'd*, 466 F.3d 134 (D.C. Cir. 2006), (collecting cases) (citations omitted). Put simply, "[a]n agency's general rulemaking authority does not mean that the specific rule the agency promulgates is a valid exercise of that authority." 466 F.3d at 139.

As such, the Board does not have the authority to promulgate the Notice Rule simply because the Rule may be reasonably related to the NLRA's purposes, as the Board argues.

A. Congress's Failure to Include a Notice Provision Is Not a "Gap" that the Board is Authorized to Fill.

The Board argues that Congress's silence in authorizing a notice creates a gap that the Board is permitted to fill, but such argument is contrary to law and the history of the NLRA. *See* Bd. Br. 8-9, 12-17. The Board cannot presume Congress delegated the authority to promulgate a notice requirement simply because Congress did not expressly withhold such power. *Ry. Labor Executives Ass'n v. Nat'l Mediation Bd.*, 29 F.3d 665, 671 (D.C. Cir. 1994). Nor does Congress's failure to expressly forbid promulgation of a notice requirement create a gap that the Board can decide to fill. *See id.* In fact, silence or ambiguity is not enough *per se* to warrant deference to an agency's interpretation; rather, the ambiguity or silence "must be such as to make it appear that Congress either explicitly or implicitly delegated authority to cure that ambiguity." *Am. Bar Ass'n v. F.T.C.*, 430 F.3d 457, 469 (D.C. Cir. 2005).

Here, it is clear that Congress did not intend to give the Board the authority to pass a blanket Notice requirement. First, the NLRA as a whole demonstrates that the Board is only permitted to act in limited, quasi-judicial circumstances, such as when a petition or a charge is filed with the Board – not in any circumstance when the Board wishes to influence labor-management

relations. Second, there is extensive legislative history showing that Congress considered and rejected a narrower notice provision, thereby showing that Congress considered what (if any) notice provisions it wished to include before deciding to include none at all. *See* Congr. Amici Br. 6-17.[2] Finally, there are numerous instances where Congress expressly delegated notice requirement authority to an agency in the enabling statute when Congress wanted to do so, yet Congress failed to include such a provision in the NLRA.

Taking all of this as a whole, there is no question that Congress's so-called "silence" about notices in the NLRA is not a gap that the Board is permitted to fill, but rather a reflection that the Board does not have the statutory authority to create a notice requirement.

1. Section 6 Does Not Grant the Board the Authority To Promulgate a Notice Rule.

The Board cannot rely on Section 6 of the NLRA to promulgate this Rule because the Board's rulemaking activity is limited to those issues that are directly related to the Board's mandate in other provisions of the NLRA. *See* Bd. Br. 4-10. Section 6 grants the Board only the authority "to make, amend, and rescind, in the manner prescribed by [the APA], such rules and regulations as ***may be necessary to carry out the provisions of this [NLRA]***." 29 U.S.C § 156 (emphasis added). But the provisions that authorize the Board to act – Sections 9 and 10 – allow the Board to act only in limited circumstances. *See* 29 U.S.C. § 159(c) ("[w]henever a petition shall have been filed, in accordance with such regulations as may be prescribed by the Board…"); Lafe E. Solomon, Office of Gen. Counsel, NLRB, Mem. GC 11-03 at 2 (Jan. 10, 2011) ("[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").

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[2] Plaintiffs support and adopt the Amici Brief filed by Chairman Kline, *et al.*, on November 15, 2011 (Entry Number 26-1). As the Amici Brief demonstrates, the NLRA's legislative history refutes the Board's argument that Congress never considered the notice posting issue.

The Board's reliance on *NLRB v. J. Weingarten, Inc.*, 420 U.S. 251 (1975), for the idea that the Posting Rule simply is an extension of Section 8(a)(1) is inapposite because the Supreme Court in *Weingarten* pointed to a specific right being protected in a unionized context (the right to act in concert for mutual aid and protection). *See* Bd. Br. 14-15. The Supreme Court in *Weingarten* held only that the Board could interpret Section 8(a)(1)'s bar on interfering, restraining or coercing an employee's Section 7 rights to include prohibiting an employer from interviewing an employee represented by a union without a union representative present when the employee has made such a request and reasonably believes that the interview could result in disciplinary action. *See* 420 U.S. at 260-61; Bd. Br. 14. In so holding, the Court noted that a crucial – and explicit – Section 7 right is the right to act in concert for "mutual aid and protection." *Weingarten*, 420 U.S. at 260. Having a representative present in the unionized context merely is an extension of the "mutual aid and protection" because the union would be the party that would challenge such disciplinary action on the employee's behalf.

By undertaking the promulgation of a Notice Rule, the Board is attempting to reinvent itself after seventy-six years of existence and make itself into something it has never been and was never intended to be. The Board seeks to act like a general enforcement agency, looking for and correcting perceived denials of employee rights under the NLRA. But, as explained in detail in the Congressional Amici Brief the Board lacks the "Roving Commission" authority needed to promulgate a rule that governs employer action outside the context of union activity (either protecting employees engaging in concerted protected activity or employers and unions acting in either the election or bargaining context). Cong. Amici Br. 17-25. The Board is a quasi-judicial agency that exists to ensure that neither the union nor the employer acts in a way that impedes

employees' right to unionize or not (and then for the union and the employer to behave appropriately if unionization occurs).

The Board is not like the Department of Labor, which has as its mandate to ensure that, *inter alia*, all employees are paid properly under the Fair Labor Standards Act ("FLSA"), or like the Equal Employment Opportunity Commission, an agency developed to ensure that no employee is discriminated against because of a protected classification under a plethora of anti-discrimination laws (i.e., the Age Discrimination in Employment Act ("ADEA"); the Americans With Disabilities Act ("ADA") and Title VII of the Civil Rights Act of 1964 ("Title VII")). Indeed, unlike the FLSA that dictates how all employees be paid, or the ADA, ADEA and Title VII that require that protected classifications not be considered in employment decisions, the NLRA is structured to allow employees to decide for themselves whether to unionize or not, to engage in concerted activity or not, and to bargain collectively or not. The Board is, and always has been, a "referee," ensuring a fair and level playing field where employees can decide for themselves whether or not to exercise the rights granted to them under the NLRA. With this proposed Posting Rule, the Board seeks to take a more proactive role in encouraging employees to exercise their Section 7 rights, rather than maintain its traditional role of ensuring they have the opportunity to exercise those rights if they so desire.

Because the Board is not a Roving Commission, the Board's previous rulemaking has been limited to issues that directly implement the Board's obligations under other provisions of the NLRA. *See, e.g., Am. Hosp. Ass'n v. NLRB*, 499 U.S. 606, 609-13 (1991) ("*AHA*") (finding Board had authority to issue unit determination rule through rulemaking because such unit determination was directly tied to the Board's authority under Section 9(c)). For the reasons set forth in the Plaintiffs' Initial Brief, the Posting Rule is not limited to situations where concerted protected (or

other union activity) already has begun, nor is it directly tied to any other mandate the Board has under the NLRA.[3]

To accept the Board's argument that Section 6 provides implicit authority to promulgate the Rule, this Court would have to conclude that the Board could do by rulemaking what it cannot do under any other provision of the NLRA: dictate what an employer must say to employees prior to a petition or charge ever being filed and before an employee even engages in protected concerted activity. The Board cannot point to any provision in the NLRA that permits a notice requirement on all employers in all circumstances – especially before any activity under the NLRA has begun. To find such implicit authority in Section 6, a 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" – a step this Court should not take. *Am. Bar Ass'n*, 430 F.3d at 469 (citations omitted).

Attempting to expand the circumstances in which it is permitted to act, the Board turns the Supreme Court's decision in *AHA* on its head by asserting that the Board's rulemaking authority is limited by other provisions of the NLRA only if such provisions specifically say so. *See* Bd. Br. 4-5. But the Supreme Court in *AHA* explained that the Board has the authority to issue rules regarding unit determination under Section 6 because Section 9(c) specifically permits the Board to determine units: "even if a statutory scheme requires individualized determinations, the decisionmaker has the authority to rely on rulemaking to resolve certain issues of general applicability unless Congress clearly expresses an intent to withhold that authority." 499 U.S. at

[3] Footnote 6 in the Board's Opening Brief, Bd. Br. 10, regarding the Supreme Court's decision in *NLRB v. Wyman-Gordon Co.*, 394 U.S. 759, 764-65 (1969), makes this very point: the Board could have used rulemaking to require employers to provide the names and addresses of eligible voters to the union in advance of a Board election because the Board has the authority to require such lists under Sections 9 and 11 of the NLRA.

612. By contrast, in the present case, the Board cannot point to any specific provision under the NLRA that the Rule is carrying out, or any adjudicative mechanism through which the Board could have required a Notice be posted by all employers in all circumstances.

Moreover, courts properly have cautioned that "to presume a delegation of power absent an express withholding of such power [would grant] agencies. . .virtually limitless hegemony, a request plainly out of keeping with *Chevron* and quite likely with the Constitution as well." *Ry. Labor Executives' Ass'n*, 29 F.3d at 671. In *Railway Labor Executives' Association*, the National Mediation Board ("NMB") had concluded that in certain circumstances, the NMB or a carrier, in addition to the carrier's employees, could initiate representation proceedings because the statute did not expressly forbid such action. *Id.* at 666. After reviewing the RLA as a whole, the Court rejected the NMB's reading and concluded that when Congress wanted to give carriers or the NMB the right to intercede under the RLA, it explicitly did so in the text of the statute. *Id.* at 666. As a result, the Court held:

> To suggest, as the Board effectively does, that *Chevron* step two is implicated any time a statute does not expressly *negate* the existence of a claimed administrative power (i.e., when the statute is not written in "thou shall not" terms), is both flatly unfaithful to the principles of administrative law outlined above, and refuted by precedent.

Id. at 671 (internal citations and quotations omitted) (emphasis in original).

Finally, the other cases on which the Board relies do not stand for the proposition that the Board has unfettered authority to decide unilaterally, and in contravention of Congressional intent, on what topics it can promulgate a rule. For instance, the Supreme Court's decision in *NLRB v. Nash-Finch*, 404 U.S. 138 (1971), merely holds that certain injunctive powers are available to the Board. The Supreme Court's 1938 decision in *In re NLRB*, 304 U.S. 486 (1938), simply held that a court does not have jurisdiction over a Board decision until certain administrative prerequisites are met – not that the Board has *carte blanche* to act or make rules. Similarly, in *Amalgamated Utility*

Workers v. Consolidated Edison Co. of New York, 309 U.S. 261, 264-65 (1940), the Supreme Court concluded that Congress allowed the Board to determine the procedural mechanism for adjudicating a ULP, but that principle does not mean that the Board can create new ULPs. *See* . Nor does the fact that the Supreme Court decided that the NRLB can – like numerous other entities – be a creditor in a bankruptcy proceeding mean the Board can promulgate rules without Congressional authority. *Nathanson v. NLRB*, 344 U.S. 25, 27 (1952). In short, the Supreme Court has recognized that the Board has certain procedural authority in carrying out its duties under Sections 9 and 10. But that does not mean that Congress delegated to the Board the authority to regulate whatever it wants with regard to anything related to labor management relations.

Reading the NLRA as a whole similarly shows that Congress has permitted the Board to issue rules only in limited circumstances, which do not include the Board exercising jurisdiction to impose requirements on all employers in all circumstances. As a result, the Board's Motion for Summary Judgment must be denied, and the Plaintiffs' Motion should be granted.

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

Other canons of statutory construction – such as Congress's inclusion of a notice provision in other enabling statutes – further make clear that Congress did not intend to give the Board the authority to promulgate the Notice provision.

The Board discounts the import of the NLRA's silence regarding a notice provision in contrast to other express Congressional delegations of notice requirement authority in other labor and employment statutes, even though courts have explained that silence in such circumstances is strong evidence that Congress did not intend to delegate authority to an agency. *See, e.g., Alcoa S.S. Co. v. Fed. Maritime Comm'n*, 348 F.2d 756, 758-59 (D.C. Cir. 1965) (comparing authority expressly granted in acts regarding motor carriers, water carriers, air carriers, and carriers by

pipeline and electrical transmissions to interpret silence in the Shipping Act as failing to delegate authority); *Marshall v. Gibson's Prods. Inc.*, 584 F.2d 668, 676 (5th Cir. 1978) (finding silence in OSH Act about OSHA's ability to obtain an inspection injunction demonstrated intent that such authority was not authorized when such authority was explicitly delegated in Mine Safety and Air Pollution Control Acts).

Indeed, 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. In such circumstances, Congress's silence is strong evidence that it did not intend to grant the Board the power to enact a Notice requirement. *Eichberg & Co. v. Van Orman Fort Wayne Corp.*, 248 F.2d 758, 759 (7th Cir. 1957).[4]

The Board improperly argues that the RLA is too different from the NLRA to be meaningful. Bd. Br. 12 n.7. As the Supreme Court has explained, the RLA Section at issue (RLA Section 2) was modeled after NLRA Section 8 to ensure that railroad labor received the "same rights and privileges of the union shop that are contained in the Taft-Hartley Act." *Commc'ns Workers of Am. v. Beck*, 487 U.S. 735, 746 (1988) (internal citation omitted). 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). This further shows that, if Congress

[4] Tellingly, the Board has failed to point to a single piece of legislative history (let alone the text of the statute) that even remotely suggests it enjoys the sort of power it has claimed for itself in concluding that it has the authority to require all employers to post a Notice "setting forth the government's view of what the law requires." *See, e.g., Ry. Labor Executives Ass'n*, 29 F.3d 669; Bd. Br. 19. Moreover, during the course of its seventy-six year history, the Board never concluded that it had the latent authority to require a Notice regarding "the government's view of what the law required" be posted in every worksite (even though such idea was first introduced in 1993). 75 Fed. Reg. 80410, 80,411 (Dec. 22, 2010) (to be codified at 29 C.F.R. pt. 104). In fact the Board's numerous publications have stated that the Board is not permitted to act until after a petition or a charge has been filed. NLRB Gen. Counsel Mem. GC 11-03 at 2. While the Board is not legally bound by its past constructions of its authority, its failure to even consider that it had the power to require a Notice in every worksite during the past seventy-six years certainly supports the conclusion that such authority does not exist. *See Ry. Labor Executives Ass'n*, 29 F.3d at 670.

intended for the NLRA to have the posting requirement of the RLA, Congress would have expressly included it.

The Court's decisions in *Brotherhood of Railroad Trainmen v. Chicago River & Indiana Railroad Co.*, 353 U.S. 30 (1957), and *Trans World Airlines, Inc. v. Independent Federation of Flight Attendants*, 489 U.S. 426 (1989), do not support the Board's assertion that this Court cannot consider Section 2 of the RLA when interpreting Section 8 of the NLRA. The Court in *Brotherhood of Railroad* held that the NLRA does not trump the RLA on the issue of whether federal courts have jurisdiction to issue labor injunctions. 353 U.S. at 40. And the Court in *Trans World* extensively considered the NLRA and its parameters when the court held that "[n]either the RLA itself *nor any analogies to the NLRA* indicate that the crossover policy adopted by TWA during the period of self help was unlawful." 489 U.S. at 443 (emphasis added). In fact, the Court in *Trans World* specifically noted "carefully drawn analogies from the federal common labor law developed under the NLRA may be helpful in deciding cases under the RLA." *Id.* at 432.

Moreover, the Board's reliance on *Cheney Railroad Co. v. ICC*, 902 F.2d 66, 69 (D.C. Cir. 1990) for the proposition that the *expressio uninus est exclusion alterius* canon is "'an especially feeble helper' in *Chevron* cases," Bd. Br. 12 n.7, is disingenuous. In a later case, the Court of Appeals for the District of Columbia explained: "True, we have rejected the canon in some administrative law cases, but only where the logic of the maxim-that the special mention of one thing indicates an intent for another thing not be included elsewhere-simply did not hold up in the statutory context." *Indep. Ins. Agents of Am. v. Hawke*, 211 F.3d 638, 644 (D.C. Cir. 2000). Indeed, as described above, Courts repeatedly have looked to the inclusion of language in similar statutes when interpreting an agency's authority in the administrative context. *See Alcoa*, 348 F.2d at 758-59, *Marshall*, 584 F.2d at 676, *supra*.

Even after the Board argues that other statutes are invalid as statutory interpretation tool in the administrative context, the Board mistakenly attempts to rely on the notice promulgated under the FLSA as granting the Board authority. As an initial matter, there is no indication that any court has ever been asked to consider whether the Department of Labor ("DOL") exceeded its statutory authority in promulgating such rule. Moreover, the FLSA is an entirely different enabling statute than the NLRA. As the Board concedes, the FLSA contains a recordkeeping requirement upon which DOL relied to issue such Rule. Bd. Br. 13. *Compare* 29 U.S.C. § 211(c) *with* 76 Fed. Reg. at 54,013. And DOL does not impose any penalties for the failure to post such FLSA notice (including not tolling any statute of limitations or creating presumptions of illegal animus). Finally, as discussed in more detail above, a primary purpose of DOL is to ensure that every employee is paid within certain parameters under the FLSA, while the NLRA does not require that all employees unionize, act in a concerted manner, or bargain collectively.

It is therefore clear that Congress intended to ***withhold*** from the Board the regulatory authority to compel a Notice being posted by all employers in all circumstances. *See Estate of Romani*, 523 U.S. 517, 530-31 (1998).

3. Congress Discussed Various Forms of Notice Requirements in the NLRA, and Ultimately Decided Not to Include Any Such Requirement.

Congress considered – and ultimately rejected – a narrower, blanket notice provision in the NLRA, even as it considered and ultimately passed a notice provision within the RLA. Congress's rejection of even a narrow notice provision in the NLRA demonstrates Congress's intent that the Board should not have the authority to promulgate a broad notice requirement.

Early versions of the Wagner Act (the precursor to the modern NLRA) included an explicit ULP for failing to post a notice under proposed-section 304(b). *See* S. 2926, § 5(5), 73d Cong. (1934), *reprinted in* 1 NLRB, Legislative History of the National Labor Relations Act, *1935,* at 1

(1935); H.R. 8423, § 5(5), 1 NLRB, Legislative History of the National Labor Relations Act, *1935,* at 1128. Section 304(b) required any employer who was part of a contract or agreement that violated the Wagner Act to notify its employees that such contract was abrogated. S. 2926, § 304(b); H.R. 8434, § 304(b).

As the Congressional Amici Brief explains in more detail, at the same time that Congress was considering this more limited notice provision, Congress introduced and ultimately passed a broad notice provision found in the RLA, and also introduced (but ultimately rejected) the narrower notice provision regarding abrogation of contracts in the NLRA.[5] Cong. Amici Br. 12; RLA §§ 2, Fifth and Eighth, 45 U.S.C. §§ 152, Fifth and Eighth. Moreover, after Congress passed these notice provisions in the RLA in 1935, Congress significantly amended the NLRA on no less than three occasions (1947, 1959 and 1974) and never granted the Board any notice authority.

This legislative history, coupled with the ordinary rules of statutory construction, demonstrate that Congress did not leave a gap for the Board to fill regarding a notice provision. Rather, Congress intended not to delegate to the Board the authority to compel such a posting.

B. The Board Does Not Explain How the Creation of a New ULP Is Within the Scope of Its Statutory Authority.

The Board's Opening Brief is silent about why it believes it has the authority to create a new ULP. The Board previously argued that the posting requirement somehow is subsumed by the prohibition set forth in Section 8(a)(1).[6] *See, e.g.*, 76 Fed. Reg. at 54,032. Tellingly, however, the

[5] The RLA notice provision reads as follows: "Every carrier shall notify its employees by printed notices in such form and posted at such times and places as shall be specified by the Mediation Board that all disputes between the carrier and its employees will be handled in accordance with the requirements of this chapter, and in such notices there shall be printed verbatim, in large type, the third, fourth, and fifth paragraphs of this section. The provisions of said paragraphs are made a part of the contract of employment between the carrier and each employee, and shall be held binding upon the parties, regardless of any other express or implied agreements between them." 45 U.S.C. § 152, Eighth.

[6] 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).

Board does not point to a single Section 7 right with which the employer would interfere by failing to post a notice, let alone explain 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's reliance on the Family and Medical Leave Act ("FMLA") to justify imposing a new ULP is unwarranted where even the Board concedes the FMLA has a statutory posting provision. *See* 76 Fed. Reg. at 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.

C. The Board's Individual Equitable Tolling Decisions Do Not Grant It the Authority to Presume That Tolling of Congress's Statutorily Mandated Statute of Limitations Is Appropriate Unless the Employer Proves Otherwise.

The Board's attempt to recharacterize the tolling remedy of its Rule is disingenuous because, despite what it says in its Opening Brief, the Board's Rule creates a blanket presumption that the tolling remedy is appropriate ***unless the employer proves that*** the charging party knew about his or her NLRA rights. *See* 76 Fed. Reg. at 54,049, identifying proposed 29 C.F.R. § 104.214(a) (noting that the tolling provision will apply "***unless*** the employee has received actual or constructive notice that the conduct complained of is unlawful") (emphasis added).

The Board previously has made individualized exceptions to the limitations period under the doctrine of equitable tolling. 76 Fed. Reg. at 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). *Accord District Lodge 64, Int'l Ass'n of Machinists & Aerospace Workers, AFL-CIO v. NLRB*, 949 F.2d 441, 443 (D.C. Cir. 1991) (affirming the Board's rule that a charge that was dismissed within the Section 10(b) period (of six months) may not be reinstated outside the 10(b) period "*absent special circumstances in which a respondent fraudulently conceals the operative facts underlying the alleged violation*") (emphasis added).

Moreover, many of the cases cited (and previously decided) by the Board 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. 6, 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 v. Ritz-Carlton San Juan Hotel*, 410 F.3d 41, 46 (1st Cir. 2005).

The Board then relies heavily 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.*, *id.*

(addressing Title VII's posting requirement); *Vance v. Whirlpool Corp.*, 716 F.2d 1010, 1012 (4th Cir. 1983) ("*Congress imposed this requirement* to insure that covered employees would be informed of their rights, and in the present case Whirlpool's failure to post such a notice prevented Vance from learning of his ADEA rights at the time of his discharge") (emphasis added). In fact, 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* 410 F.3d at 48–50.[7] *Accord District Lodge 64*, 949 F.2d at 443 (providing presumption that the statute of limitations will not be tolled unless the party seeking to toll the statute shows that respondent fraudulently concealed the operative facts underlying the alleged violation).

Yet, the Board's Rule provides the opposite: that lack of actual or constructive knowledge of the statutory rights will be presumed unless the employer proves otherwise—a presumption that fundamentally misconstrues the equitable tolling doctrine.

D. The Board Concedes that the Rule Forces Employers to Post a Notice that is the "Government's View of What the Law Requires."

The Board admits that the purpose of Section 8(c) is "to encourage the free flow of information from both unions and employers to employees," and in so admitting, concedes that Section 8(c) does not provide for the government inserting its "view of what the law requires." *See* Bd. Br. 19 (citing *Lake Butler Apparel Co. v. Sec'y of Labor*, 519 F.2d 84, 89 (5th Cir. 1975)).

The Board's Rule would dictate what and the manner in which the employer must tell employees regarding labor-management relations. As even the Board admits, this mandatory Notice provides "the government's view of what the law requires," not an objective recitation of

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[7] Although the Board is correct that the Supreme Court in *Zipes v. Trans World Airlines, Inc.*, 455 U.S. 385, 395 n.11 (1982), held that Section 10(b) can be equitably tolled, the Supreme Court in *Zipes* did not discuss the parameters of such equitable tolling in any regard.

legal requirements. Bd. Br. 19. As described in more detail in Section I.G.1, the Notice is heavily biased in favor of unions, and thus the Rule impermissibly forces employers either to engage in speech that they otherwise would not make, or face a ULP. As such, the Rule runs afoul of the Section 8(c) protections an employer has to say – or not say – what it wants.

E. 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*. For the reasons set forth in Section I.A, *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*, 29 F.3d at 666.

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

F. Even if the Board Had Authority to Promulgate the Rule, the Rule Violates the APA.

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).

[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 I.A, *supra*. *See Chevron*, 467 U.S. at 843.

1. The NLRB Cannot Require Employers or the Public to Put Forth Data or Evidence Disproving the Need for the Rule.

It is the Board's obligation under the APA to show that the Rule and posting of the Notice is required – not the public's burden to disprove the Board's "inference," as the Board argues. The Board specifically argues that it can "reasonably infer[]" that a posting requirement is needed, Bd. Br. 24-27, but the APA requires the Board to point to actual evidence and then explain a rational connection between facts actually found and the choice made. *See Motor Vehicles Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 52 (1983); *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 cases that the Board cites in its Opening Brief do not relieve it of its obligation to point to actual evidence and then explain a rational connection between the facts found and the choice made – particularly because those cases make clear that an agency can only be excused from conducting an independent study in very limited circumstances such as a need to act quickly or where no factual certainty exists. *See* Bd. Br. 26 n.21 (citations omitted). Neither of those circumstances is present here. For instance, in *National Association of Regulatory Utility Commissioners v. FCC*, 737 F.2d 1095 (D.C. Cir. 1984), the FCC had conducted a study on part of the issues being decided (i.e. on the issue of bypass), but the Court recognized that because the FCC was required to act in an expedited manner on the subject matter of issue, the FCC was forced to bypass the "highly desirable" process of "independently assess[ing] the raw data; verify[ing] the accuracy of that data; apply[ing] that data to consider several alternative courses of action; and reach[ing] a result confirmed by the comments and submissions of interested parties" for part of the subject at issue. *Id.* at 1121, 1124. Similarly, in *Chamber of Commerce of the United States of*

America v. SEC, 412 F.3d 133 (D.C. Cir. 2005), the Court recognized that studies are often not required "where no factual certainties exist or where facts alone do not provide the answer." *Id.* at 360 (quoting *BellSouth Corp. v. FCC*, 162 F.3d 1215, 1221 (D.C. Cir. 1999)). And in *Mausolf v. Babbitt*, 125 F.3d 661, 664 n.3, 669 (8th Cir. 1997), the Department of Interior based its rule (as it was required to do by its enabling statute) on a biological opinion issued by the Fish and Wildlife Service (FWS) that includes "a written statement setting forth the [FWS's] opinion, and a summary of the information on which the opinion is based, detailing how the agency action affects the species or its critical habitat."[9] *Id.* at 664 n.3.

As discussed in the Plaintiffs' Initial Brief, the Board has not made any assertion or showing that the Board could not obtain the evidence needed to prove its thesis that "American workers are largely ignorant of their rights under the NLRA" (assuming such evidence exists). Pl. Br. 17. Nor has the Board explained why it needed to promulgate a rule on notice posting so quickly that it could not take the time to do a proper factual collection and analysis. In fact, the Board would be hard pressed to defend that explanation, since unions and employers have operated more than seventy-six years without a notice requirement. Finally, the Board cannot point to another study on which it relied in promulgating the Notice Rule.

Even if the Board is correct that it can flip its burden under the APA to require the public to disprove its thesis, the Board ignores the evidence showing that the Board had alternative methods for informing employees about union rights – methods which would be much more timely than the law review articles from the 1980s and 1990s on which it relies. 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.

[9] It should be noted that the Fish and Wildlife Service is a Bureau within the Department of Interior, so indeed the Department of Interior had conducted its own study (through one of its bureaus) in the *Mousolf* case. *See* 16 U.S.C. § 742b(b) ("There is established within the Department of the Interior the United States Fish and Wildlife Service").

Comments of Fisher & Phillips at 2, A.R. NLRB-003758; *see also* Comments of Epstein Becker & Green at 3, A.R. NLRB-003915 ("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"); Comments of Ass'n of Corporate Counsel at 8, A.R. NLRB-003620 (noting that 77.3% of the U.S. population has internet access). Yet, the Board inexplicably argues "the Board has been presented with no evidence persuasively demonstrating that knowledge of NLRA rights is widespread among employees." 76 Fed. Reg. at 54,015. 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. *See, e.g.,* 76 Fed. Reg. at 54,006 n.3.

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 rule-making proceeding to promulgate rules on the basis of inadequate data").

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

In promulgating the Rule, the Board makes only two cursory references to right-to-work laws in the preamble, and fails to explain why it omitted these ***statutorily mandated*** employee rights. 76 Fed. Reg. at 54,019. 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 cavalier explanation at the time of implementing the Rule 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 of their NLRA rights. Because the Board failed to include 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.

G. The Rule Violates Employers' First Amendment Rights.

In its Opening Brief, the Board misapprehends both the criteria for determining whether its Notice represents compelled controversial speech, and the applicable framework for evaluating such speech. The Board argues that the Notice is "governmental speech" and, therefore, "not subject to scrutiny under the Free Speech Clause." Bd. Br. 17 (quoting *Pleasant Grove City v. Summum*, 555 U.S. 460, 467 (2009)). Rather when, as here, the government compels a private party to display another's message on private property, the government's action receives heightened scrutiny under the First Amendment. *E.g.*, *Wooley v. Maynard*, 430 U.S. 705, 715 (1977).

1. The Notice Constitutes Subjective Speech that Favors Unions.

As an initial matter, the Board cannot argue that the Notice contains a purely factual, non-controversial message when the Board admits that the Notice "set[s] forth the *government's view* of what the law requires." Bd. Br. 19 (emphasis added). Based on the concession that the Notice subjectively portrays the law, and fails to discuss integral portions of the law, this Court should conclude that the Notice is subjective speech subject to a strict scrutiny analysis. *See Wooley*, 430 U.S. at 715.

Indeed, as explained in Plaintiffs' Initial Brief, the Notice expresses a message that favors unions. *See* Pl. Br. 20-22. The Notice elevates as central the rights of employees to join unions and the benefits thereof, while downplaying the costs of a union, and in most respects ignoring the rights that employees have to refrain from joining a union. *See id.* In purely numerical terms, the Notice's first six bullet points trumpet the rights of employees to organize and join a union, whereas only bullet point seven mentions, in passing, that employees can choose not to do so. Similarly, the Notice spends twice as much space identifying illegal conduct by employers as by

unions. It lists seven bullet points, totaling twenty-one lines of text, discussing illegal employer activity, but only five bullet points, totaling only eleven lines of text, discussing illegal union activity. Plaintiffs are unaware of a single comment complaining that the Notice favors employers, whereas numerous comments read the Notice as biased in favor of unions. *See id.*

Moreover, in the Rule itself, the Board implicitly concedes that the Notice is biased in favor of unions. The Rule declares that an employer's failure to post the Notice "may be found to be an unfair labor practice." *See* 76 Fed. Reg. at 54,031. An employer's failure to post the Notice, however, could serve as a ULP *only* if the Notice is pro-union. In other words, if the Notice was completely neutral, its absence would be neither pro-union nor anti-union. Because the Notice favors unions, however, its absence deprives unions of a pro-union message. In this way, and only in this way, can a failure to post be "unfair" to unions.

Furthermore, in its Opening Brief, the Board admits that the Notice "set[s] forth the government's view of what the law requires." Bd. Br. 19. The Board cannot plausibly argue that the Notice contains a purely factual message when the Board acknowledges that it made subjective decisions about what to include and exclude from the Notice—precisely the type of editorial discretion that belongs to the *employer* on its private property. *See* Bd. Br. 20-23. The Board did not simply quote the language of the NLRA. Instead, the Board acknowledges that the Notice does not list a variety of specific rights that employees have against unions, such as *Beck* rights, and conceded that it exercised "basic editorial judgment" to exclude anti-union rights. *See id.* In so doing, whether for reasons of brevity or, more likely, political viewpoint, the Board exercised its subjective judgment on a controversial subject. In many parts of the country, including South Carolina, "right to work" has become a divisive political topic. By excluding any discussion of this and other issues, the Notice necessarily conveys a slanted message on a controversial topic.

As a result, the Notice differs substantially from the types of messages that courts have occasionally upheld as purely factual and noncontroversial. *Cf. Zauderer v. Office of Disciplinary Counsel*, 471 U.S. 626, 651 (1985). The Notice instead presents "the government's view of what the law requires," which is, at best, a selective, slanted, and incomplete view of what options are available to employees and, consequently, what options employees *should* exercise.

2. The Notice Neither Serves a Compelling State Interest, Nor is it 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. *Wooley*, 430 U.S. at 715. To survive strict scrutiny, the government must demonstrate that it has a compelling state interest and has narrowly tailored the compulsion to serve that interest. *Citizens United v. FEC*, 130 S. Ct. 876, 892 (2010); *Pac. Gas & Elec. Co. v. Public Utils. Comm'n*, 475 U.S. 1, 19 (1986); *Entm't Software Ass'n v. Blagojevich*, 469 F.3d 641, 652 (7th Cir. 2006). Here, the Board has failed to articulate (let alone demonstrate) a compelling state interest because (among other reasons) Congress has never expressly authorized the NLRB to impose a notice requirement, and the Board did not narrowly tailor the Rule because (among other reasons) it applies to virtually every employer in the country. *See* Pl. Br. 22-24.[10]

[10] Based on *Wooley*, Plaintiffs believe that the Notice is subject to strict scrutiny. Citing *Pleasant Grove*, the government contends that the Notice is not subject to any scrutiny under the Free Speech Clause. Bd. Br. at 17. In addition to these approaches, courts have articulated an intermediate framework for analyzing compelled speech in the commercial context. As one court recently explained, "courts apply a lesser standard of scrutiny to this narrow category of compelled speech, through which the Government may require disclosure only of purely factual and uncontroversial information. Even under this paradigm, however, compelled disclosures containing 'purely factual and uncontroversial information' may still violate the First Amendment if they are 'unjustified or unduly burdensome.'" *See R.J. Reynolds Tobacco Co. v. FDA*, No. 11-1482, 2011 WL 5307391, at *7 (D. D.C. Nov. 7, 2011) (citations and quotations omitted). For reasons discussed in the text, the Board has not satisfied even this intermediate level of scrutiny. The Rule is "unjustified" because the government has failed to identify any credible factual basis for believing that employees are unaware of their rights. Even if the Board simply sought to inform employees of their legal rights – a rationale undermined by the selective nature of the Notice – the Board did not seriously investigate whether there is a genuine need to disseminate such information through compelled speech. Furthermore, as explained in our Initial Brief, even if such evidence existed, the Rule is "unduly burdensome" because it burdens virtually every employer in the country. The Board has numerous, less-burdensome alternative ways to inform employees of their rights under the NLRA. Nowhere

Rather than show that the Rule survives strict scrutiny, the Board argues that it "reasonably concluded" that the Notice comports with the First Amendment on grounds that it constitutes government speech. *See* Bd. Br. 17-18. As an initial matter, of course, the Board's constitutional analysis gets no deference, whether that analysis is "reasonable" or not.

More to the point, the Board fundamentally misconstrues the nature of government speech, as shown by the cases it cites in its brief. For instance, in *Pleasant Grove*, the Court held that public monuments on public property constitute government speech. 555 U.S. at 470. As the Court explained, "[p]ermanent monuments displayed on public property typically represent government speech" because "[p]ublic parks are often closely identified in the public mind with the government unit that owns the land." *Id*. at 470, 472. There is nothing analogous between these circumstances and the Notice requirement, and the Board offers no explanation of why *Pleasant Grove* would have any bearing on the present case.

To the extent it has any relevance, *Pleasant Grove* actually undermines the Board's position. Based on the reasoning of *Pleasant Grove*, the Board's Notice would become identified with the *employer*, not the government. The Board's Rule requires private employers to spread an ideological message *on private property*, not government property. Because the employer controls the space on which the Notice would be posted, the government's compulsion necessarily associates the businesses with the government's ideological message, i.e., "the government's view of the law." Even absent such an association, the Notice violates the First Amendment by forcing the employer to forego its own decisions about what messages to deliver or to refrain from delivering on its property.

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does the Board accept its burden or seriously attempt to demonstrate why its Notice passes muster under the First Amendment under any level of scrutiny.

Instead of *Pleasant Grove*, the Supreme Court's decision in *Wooley* presents the proper analytical framework. In *Wooley*, the Supreme Court held that the government could not require an individual to use his private property, a car, as a "mobile billboard" for the government's ideological message that individuals should "Live Free or Die." 430 U.S. at 715. In his dissent in *Wooley*, then-Justice Rehnquist, like the Board here, argued that the license plate represented government speech because the message was "prescribed by the State," and because nothing precluded car owners "from displaying their disagreement" with the license plate's message. *Id.* at 721-22 (Rehnquist, J., dissenting); Bd. Br. 17-18. The Court flatly rejected these arguments, holding that the government's compelled speech would improperly associate a private individual with the government's ideological message. Accordingly, *Wooley* forbids the Board from forcing employers to turn their businesses into permanent stationary billboards for the Board's pro-union message.

Moreover, the Board's proposed framework proves too much. Under its reasoning, the Notice becomes government speech because it carries the Board's seal, contains the Board's contact information, and states that it is an "official Government Notice." Bd. Br. 17. Under this rationale, any agency could compel private individuals to spread the government's message on their private property, or even their persons, regardless of the message's content, accuracy, or ideological bias. For instance, simply by slapping on a seal, the NLRB could require businesses to post a Notice saying that, "Unions Raise Wages", or even, "Unions are Good, Employers are Evil." Although the NLRB can post such messages on its property and website, and spread such messages through speeches and paid media without running afoul of the First Amendment, the NLRB cannot require private businesses to display biased, controversial, and incomplete messages on their

private property. The doctrine of "government speech" does not give the government *carte blanche* to force individuals to spread the government's controversial message.

The Notice's slanted ideological message also undercuts the Board's attempted reliance on *Lake Butler* and *UAW-Labor Employment & Training Corp. v. Chao*, 325 F.3d 360 (D.C. Cir. 2003). In *Lake Butler*, a pre-*Wooley* case, the court upheld an OSHA posting requirement. *Lake Butler*, however, involved a completely different calculus under the First Amendment. In *Lake Butler*, unlike here, the company did not contend that the notice was biased or ideological, and there was no dispute that the notice "merely states what the law requires." *See id*. at 86 n.3, 89. Here, in contrast, the Board already has conceded the Notice "set[s] forth the government's view of what the law requires." Bd. Br. 19. Moreover, in *Lake Butler, Congress* itself had found that such a poster was "essential" and expressly required a notice regulation. 325 F.3d at 89. Again, here, Congress has not expressly authorized the NLRB to impose a posting requirement at any point during the past seventy-six years. *See* Pl. Br. 23 (explaining that the failure of Congress to expressly authorize a notice requirement underscores the lack of compelling interest). The First Amendment calculus also differed in *UAW-Labor,* where there was no contention that the relevant notice was biased. 325 F.3d at 364-65.

At bottom, the Board's Notice is nothing more than a piece of advocacy, designed not to inform but instead to motivate an audience of employees to take certain pro-union action. This motivation is simply not a legitimate objective for infringing the protected speech rights of employers. *See R.J. Reynolds Tobacco*, 2011 WL 5307391, at *7. For these reasons, the Rule impermissibly violates employers' free speech rights under the First Amendment. For similar reasons, the Rule also violates employers' rights under Section 8(c) of the NLRA by forcing them either to engage in speech that they otherwise would not make, or face a ULP. *See* Pl Br. 10-11.

H. The Board Violated the Regulatory Flexibility Act by Failing to Perform a Final Regulatory Flexibility Analysis.

The Board certified that the Rule would not impose a "significant economic impact" because, in its view, compliance would require only two hours of employee time to understand and post the Notice. Yet in its Opening Brief, the Board effectively concedes that this cost estimate has no basis in fact or the administrative record. Moreover, the Board wrongly asserts that it need not calculate entire categories of compliance costs, including training and legal costs, even though much of the authority cited by the Board itself recognizes that these costs are cognizable as compliance costs. As explained in the Plaintiffs' Initial Brief and in more detail below, 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, the Board's conclusory certification cannot qualify as a "reasonable, good-faith effort" to comply with the Regulatory Flexibility Act (RFA). *S. Offshore Fishing Ass'n v. Daley*, 995 F. Supp. 1411, 1437 (M.D. Fla. 1998). *See also Business Roundtable v. SEC*, 647 F.3d 1144, 1148-49 (D.C. Cir. 2011) (invalidating an agency rule under the APA where the agency "inconsistently and opportunistically framed the costs and benefits of the rule; failed adequately to quantify the certain costs or to explain why those costs could not be quantified; neglected to support its predictive judgments; contradicted itself; and failed to respond to substantial problems raised by commenters"). For this reason alone, the Rule must be invalidated.

1. The Board's Cost Estimate Lacks a Factual Basis in the Record.

The Board cites only one authority for its two-hour time estimate, namely, a similar notice rule proposed by DOL for federal contractors. *See* Bd. Br. 32 n.27; DOL Notification of Employee Rights Under Federal Labor Law, 75 Fed. Reg. 28,368, 28,394 (May 20, 2010) (to be codified at 29

C.F.R. pt. 471); 76 Fed. Reg. at 54,007. DOL estimated that compliance with its rule would take 3.5 hours of employee time.[11]

DOL's time estimate, however, cannot provide an evidentiary foundation for the Board's Rule because DOL pulled its own estimate out of thin air. *Nat'l Truck Equip. Ass'n v. Nat'l Highway Traffic Safety Admin.*, 919 F.2d 1148, 1157 (6th Cir. 1990) ("a conclusory statement with no evidentiary support in the record does not prove compliance with the [RFA]"). Like the Board, DOL cites no studies, surveys, articles, or anecdotes for its time estimate. DOL does not cite to the administrative record created as part of its rule. Moreover, and contrary to the Board's suggestion, DOL does not purport to rely on its experience in overseeing notice requirements for other statutes, such as OSHA. *See* 75 Fed. Reg. at 28,394. The Board cannot reasonably rely on another agency's cost estimate that itself was conjured out of thin air. Otherwise, federal agencies could circumvent the RFA's protections simply by citing each other's baseless estimates.

Even assuming that DOL's time estimate had some basis in fact, the Board arbitrarily cut DOL's estimate almost in half, from 3.5 hours of employee time to 2 hours of employee time. For example, DOL concluded that a federal contractor would require ninety minutes to understand DOL's notice requirements, whereas the Board asserts that a small business would need only thirty minutes to understand the Board's notice requirements. The Board's estimate, of course, lacks any factual basis in the record, but in addition, even its underlying assumptions are suspect. Federal contractors typically have some experience with complex federal requirements, whereas many small businesses lack sophisticated legal and compliance staff.

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[11] According to DOL, "The Department estimates that each contractor will spend a total of 3.5 hours per year in order to comply with this rule, which includes 90 minutes for the contractor to learn about the contract and notice requirements, train staff, and maintain records; 30 minutes for contractors to incorporate the contract clause into each subcontract and explain its contents to subcontractors; 30 minutes acquiring the notice from a government agency or Web site; and 60 minutes posting them physically and electronically, depending on where and how the contractor customarily posts notices to employees." 75 Fed. Reg. at 28,394. DOL cited no support for these time estimates.

In sharp contrast to the Board's baseless estimates, three small businesses detailed exactly how much time they would have to spend to understand and post the Notice. *See* Declarations of Jeanie McPherson, Stephen Snipes, and Neil Whitman, attached as Exhibit B to Pl. Br. (Entry Number 22-3). In delineating every step of the process, Ms. McPherson explains that her small business would have to spend 27-31 hours to understand and post the Notice. McPherson Decl. ¶ 20. Mr. Whitman estimates that his company would have to spend up to 40.5 hours to understand and post the Notice, and Mr. Snipes estimates that his smaller company would have to spend at least 4 hours on these tasks. Whitman Decl. ¶ 20; Snipes Decl. ¶¶ 15-17. These small business declarations create "serious questions whether [the agency] violated the RFA by refusing to conduct a final flexibility analysis." *Am. Fed'n of Labor v. Chertoff*, 552 F.Supp.2d 999, 1013 (N.D. Cal. 2007) ("*AFL*").

Finally, the administrative record contains numerous comments from businesses and business groups estimating that small businesses would have to spend substantial time to understand and post the Notice. As these comments explain, the Rule contains several ambiguities regarding where, how, and in what languages the Notice must be posted. *See* Pl. Br. 29 n.14. The Board, however, cites absolutely nothing in the administrative record to support its two-hour time estimate. Accordingly, the Board has failed to carry its burden of providing an evidentiary foundation for its Rule. *Bowen v. Am. Hosp. Ass'n*, 476 U.S. 610, 643 (1986).

2. The Board Arbitrarily Ignores Training Costs and Legal Costs.

In its Opening Brief, the Board argues that entire categories of costs, such as training and legal costs, do not qualify as compliance costs under the RFA. Instead, the Board labels as "speculative and discretionary" such employer expenses as the costs of educating human resource professionals, management, and employees about the notice, answering questions regarding the

notice, and monitoring the notice. Bd. Br. 33. Nevertheless, the RFA's legislative history, court cases, and the Board's own authority indicate that an agency must calculate training costs and legal costs for purposes of a Final Regulatory Flexibility Analysis. These costs place the Rule's true economic impact in the range of five to thirteen billion dollars. Pl. Br. 24-25.

Simply put, training costs are compliance costs under the RFA. In *AFL*, for example, the court explicitly held that compliance costs included costs "for the *training* of in-house counsel and human resources staff." 552 F.Supp.2d at 1013 (emphasis added). Although the Board argues that the Rule does not explicitly mandate training, as a practical matter, employers will have to educate their employees about the Notice. As one declarant explained, "While training may not formally be required, as a practical matter, the requirement will force me to educate our employees about the new notice, in part so that I can correct any misimpressions from the biased and incomplete notice." Whitman Decl. ¶ 22. Similarly, in *AFL*, the court rejected an argument that the agency need not include costs that might be incurred on a "voluntary" basis: "This Court's concern, however, is with the practical effect . . . of the rule, not its formal characteristics." 552 F.Supp.2d at 1013 (internal citation and quotation omitted).[12]

Moreover, the Board's own authority indicates that it should have calculated training costs. Although the Board cites the administrative guidance offered by the Small Business Administration, Bd. Br. 33-34, the SBA states that cognizable "[c]osts might include…employee skill and *training*." SBA, *A Guide for Governmental Agencies: How to Comply with the*

[12] The Board contends that employers may protect their rights under the First Amendment and Section 8(c) by educating their employees about the Notice. *See* Bd. Br. 19 (stating that "the notice-posting requirement does not trench upon employers' ability to express their own 'views' because 'employers remain free under this rule—as they have in the past—to express noncoercive views regarding the exercise of these rights as well as others"). An employer, however, would incur substantial legal and compliance costs in order to protect its First Amendment rights. These costs represent another cost of compliance with the Rule, yet the Board inexplicably excludes these costs from its calculation of compliance costs.

Regulatory Flexibility Act at 30 (June 2010) (emphasis added).[13] Likewise, DOL's notice rule for federal contractors recognizes that the RFA requires it to consider the costs to "train staff." 75 Fed. Reg. at 28,394. Even among the federal agencies that it cites as support, the Board stands alone in its refusal to consider training costs under the RFA.

Finally, the Board's General Counsel has completely undermined the Board's position on training costs. On December 2, 2011, the Office of General Counsel issued a Memorandum to the NLRB's Regional Directors. Ex. A. In the Memorandum, the General Counsel states that the NLRB's Office of Employee Development "will conduct *training* on the Employee Notice Posting. Regional staff is *strongly encouraged* to attend one of these sessions." *Id.* (emphasis added). The General Counsel "strongly encouraged" employee training to educate employees about the numerous questions that are raised by the Rule. *See id.* By "strongly encouraging" its employees to receive training, yet denying that private employers need to train their employees, the Board is engaged in rank hypocrisy.[14]

In the same vein, the Board improperly excludes legal costs as costs of compliance under the RFA. Congress enacted the RFA in part because, "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. In *AFL*, the court expressly held that compliance costs included the costs of "*hiring 'legal and consultancy services*.'" 552 F.Supp.2d at 1013 (emphasis added). Again, the Board's own authority supports the inclusion of legal costs. The Board cites *Mid-Tex Elec. Coop., Inc. v. FERC*, 773 F.2d 327, 341 (D.C. Cir. 1985), for the proposition that the

[13] The SBA Guide is available at http://www.sba.gov.

[14] The General Counsel's Memorandum also demonstrates the feasibility of achieving the Rule's goals through a less burdensome alternative. It describes the NLRB's aggressive efforts to contact and educate the public about the Notice Rule, noting that "staff members from Regional offices throughout the country have met with hundreds of constituent groups, organizations, and agencies." Numerous commenters suggested that the NLRB conduct this type of aggressive outreach as an alternative to imposing the Notice Rule on small businesses. *See* Pl. Br. 34.

RFA is concerned with only the costs of compliance. Bd. Br. 33. In *Mid-Tex*, however, the court approvingly quoted the RFA's Congressional Findings and Declaration of Purpose, which identify legal costs as a cost of compliance: "uniform Federal regulatory and reporting requirements have in numerous instances *imposed* unnecessary and disproportionately burdensome demands including **legal**, accounting and consulting costs upon small businesses." 773 F.2d at 341 (italics in original, bold added). Like training costs, legal costs are compliance costs.

3. The Board Arbitrarily Ignores the Negative Impact on Labor Relations.

Finally, the Board also discounts the Rule's intangible costs. According to the Board, the "Chamber speculates, without support, about 'adverse impact on employee relations and interference with normal business operations.'" Bd. Br. 34 n.31. To the contrary, the Board's own authority predicts that the Rule will harm labor relations. Peter DeChiara wrote one of the three seminal articles cited by the Board to justify the Rule. 76 Fed. Reg. at 54,006 n.3. According to him, placement of the Notice could cause "some minor, short-term disruption to production." Peter D. DeChiara, *The Right to Know: An Argument for Informing Employees of Their Rights Under the NLRA*, 32 Harv. J. on Legis. 431, 467 (1995), A.R. NLRB-000078. Moreover, all three declarants, and numerous comments in the administrative record, predict that the Notice's biased and misleading language could harm employer-employee relations. *See* Pl. Br. 32.

Together, these legal, training, and intangible costs put the Rule's true economic impact in the range of five to thirteen billion dollars. *See* Pl. Br. 24-25. Virtually every employer in the country would have to spend dozens if not hundreds of hours learning about the Rule, training managers and human resources professionals, and educating employees. Some subset of these employers would hire lawyers to ensure compliance. These costs would impose a significant economic impact on small businesses throughout South Carolina and the country. Accordingly, the

Rule is invalid and, at a minimum, must be remanded for the completion of a Final Regulatory Flexibility Analysis, including consideration of significant alternatives to the Notice Rule.

II. CONCLUSION

For the foregoing reasons, Plaintiffs respectfully submit that Defendants' Motion for Summary Judgment should be denied, and that the Plaintiffs 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, alternately, remand the Rule to the Board to conduct a Final Regulatory Flexibility Analysis.

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Respectfully submitted,

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