RECORD NO. 12-1757

In The
United States Court of Appeals
For The Fourth Circuit

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

Plaintiffs – Appellees,

v.

NATIONAL LABOR RELATIONS BOARD; MARK GASTON PEARCE, in his official capacity as Chairman of the National Labor Relations Board; BRIAN E. HAYES, in his official capacity as Member of the National Labor Relations Board; RICHARD F. GRIFFIN, JR., in his official capacity as Member of the National Labor Relations Board; SHARON BLOCK, in her official capacity as Member of the National Labor Relations Board; and LAFE E. SOLOMON, in his official capacity as Acting General Counsel of the National Labor Relations Board,

Defendants – Appellants.

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

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CORPORATE DISCLOSURE STATEMENT

Appellee Chamber of Commerce of the United States of America is a membership organization, not a publically held corporation. No publically held corporation owns 10 percent or more of any stock in the organization.

Appellee South Carolina Chamber of Commerce is a membership organization, not a publically held corporation. No publically held corporation owns 10 percent or more of any stock in the organization.

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ISSUE PRESENTED

Whether the District Court properly ruled that the National Labor Relations Board ("NLRB" or "Board"), in promulgating a rule requiring all employers subject to the National Labor Relations Act ("NLRA" or the "Act") to post notices informing employees of their rights under the NLRA, exceeded its statutory authority in violation of the Administrative Procedure Act.

STATEMENT OF THE CASE

This case concerns the scope of authority of the NLRB, an agency which has two specific functions under the NLRA: (1) to conduct and certify elections, upon the filing of a petition, to determine whether workers wish to be represented by a labor union; and (2) to determine, upon the filing of a complaint, whether employers and/or unions have committed one of the enumerated unfair labor practices. The Board has repeatedly acknowledged that it is a reactive agency, addressing petitions and complaints which come before it.

Specifically, Appellees Chamber of Commerce of the United States of America and the South Carolina Chamber of Commerce (collectively, "Chamber") challenged an unprecedented attempt by the NLRB to go beyond its statutory mandate by promulgating a controversial rule imposing new, affirmative obligations on some six-million employers which have no basis in the carefully crafted statutory scheme enacted by Congress. For the first time in its seventy-six

year history, the NLRB now asserts that it has authority to require all employers to post a notice describing certain unionization rights—regardless of whether a petition or charge has been filed against that employer, or protected concerted activity has occurred. Any employer who fails to post the notice is subject to: (1) a finding that it has committed a newly created unfair labor practice; (2) tolling of statutes of limitation for charges of any other unfair labor practices; and (3) a finding of anti-union animus that would weigh against it in any proceedings before the Board.

In 2010, a divided NLRB published a Notice of Proposed Rulemaking that would require some six-million employers to post a notice describing certain selected rights, including the right to form a union. *See* J.A.7;[1] 75 Fed. Reg. 80,410. The proposed rule also sought to penalize employers who failed to post the Notice. J.A.7; 75 Fed. Reg. 80,410. The Board received more than 7,000 comments, most opposed to the proposed rule. J.A.153. Among other comments, employer groups complained that "the notice reads more like a union manifesto than an unbiased explanation," and that "the Notice makes no pretense about the poster's primary purpose—the promotion of union organizing." J.A.126. Numerous commenters also noted that the Board lacked authority to impose an

[1] The citations to the Joint Appendix utilize the "J.A.__" pagination, found at the bottom of each page.

affirmative notice obligation on all employers and to impose penalties for failing to comply with any such requirement. J.A.154.

Notwithstanding the opposition, in 2011, a divided NLRB promulgated a final rule requiring employers to post the Notice. *See* J.A.152; 76 Fed. Reg. 54,006. In his dissent, Member Hayes argued, *inter alia*, that the Board exceeded its statutory authority in promulgating the Rule. J.A.185; 76 Fed. Reg. 54,039.

After the Rule was finalized, Appellees filed suit challenging the Rule. J.A.197. The Chamber contended, among numerous other infirmities, that the Rule was *ultra vires*. The District Court—based on the plain language, structure and legislative history of the NLRA, and a consistent history of Congress expressly including notice-posting requirements in other federal labor statutes, when it wanted to do so—held that the Board lacked authority under the NLRA to promulgate the notice-posting rule and thus granted summary judgment to the Chamber. J.A.275. Because it held the rule was *ultra vires*, the District Court did not address the Chamber's other challenges. J.A.276 n.20.

This appeal by the Board followed.

STATEMENT OF FACTS

In 1935, Congress enacted the Wagner Act, the precursor to the modern NLRA, and created the Board, to govern labor relations. The NLRA authorizes the Board to function as a reactive agency with "two main functions: to conduct

representation elections and certify the results, and to prevent employers and unions from engaging in unfair labor practices." J.A.249 (quoting *NLRB, Basic Guide to the National Labor Relations Act* 33 (1997) ("NLRB Basic Guide"), http://www.nlrb.gov/sites/default/files/documents/224/basicguide.pdf). President Roosevelt, upon signing the Act, described the reactive nature of the Board as follows: "[The Act] establishes a National Labor Relations Board to hear and determine cases in which it is charged [that the] legal right [to self-organization] is abridged or denied, and to hold fair elections to ascertain who are the chosen representatives of employees." Presidential Statement on Signing the NLRA, *reprinted in* 2 NLRB, Legislative History of the NLRA, 1935, at 3269 (1935). As the Board candidly and readily acknowledges, Congress did not, as it did in other labor and employment statutes and with other labor and employment agencies, delegate "roving investigatory powers" to the Board. J.A.156; 76 Fed. Reg. at 54,010.

A. The National Labor Relations Act

Like many statutes, the first five Sections of the NLRA are purely structural: Section 1 sets forth Congress's aspirations; Section 2 defines certain terms; and Sections 3, 4 and 5 establish and lay out the composition of the Board, along with some of its authority and obligations. 29 U.S.C. §§151-55 (2006).

Section 6 confers broad rulemaking authority on the Board: "The Board shall have authority from time to time to make, amend, and rescind, in the manner prescribed by the Administrative Procedure Act, such rules and regulations *as may be necessary to carry out the provisions of this Act*." *Id.* §156 (emphasis added).

Section 7, on which the Board heavily relies, lists the core labor rights of employees. These include employees' rights "to self-organization;" "to form, join, or assist labor organizations;" "to bargain collectively through representatives of their own choosing;" "to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection;" and "to refrain from any or all such activities." *Id.* §157. Nothing in Section 7 or elsewhere in the Act authorizes the Board to require employers to educate employees about their Section 7 rights.

Sections 8 through 11 establish the Board's authority over unfair labor practice disputes and representation elections. *Id.* §§158-161. Sections 8 and 10 authorize the Board to investigate, prevent and remedy "unfair labor practices" ("ULPs") that violate employees' Section 7 rights. *Id.* §§157, 158, 160. Congress prohibited five specific ULPs by employers, each of which is listed in Section 8. *Id.* §158. Section 9 authorizes the filing of representation petitions and provides the Board authority to investigate questions of representation, conduct hearings, hold secret-ballot elections, and certify the results thereof. *Id.* §159. Section 11

gives investigatory powers to the Board in relation to its authority under Sections 9 and 10. *Id.* §§159-161.[2]

Notably, there is no provision in the NLRA that provides the Board with the authority to proactively require all employers to engage in affirmative activity—such as posting a notice. Similarly, there is nothing in the NLRA that requires employers to educate their employees about their rights under the Act.

B. The Limited Authority Of The NLRB As Compared To Other Employment Agencies

Through the express text and structure of the NLRA, Congress made clear its intent that the NLRB be a quasi-judicial body with the two specific—and limited—functions outlined above: conducting elections upon an appropriate showing and deciding (much like a court) complaints that come before it. As the Board has explained, "[i]n both kinds of cases the processes of the NLRB are begun *only when requested*." NLRB Basic Guide at 33 (emphasis added). The Board readily acknowledges that it lacks "roving investigatory powers" and instead traditionally functions as a reactive agency. J.A.156; 76 Fed. Reg. at 54,010. In its most recent Performance and Accountability Report, the Board emphasized that "[t]he NLRB acts *only* on those cases brought before it, and does not initiate cases. *All* proceedings originate with the filing of charges or petitions by labor unions,

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[2] The remaining sections of the Act have not been cited or relied upon by the Board in its briefing.

private employers, and other private parties." NLRB, 2011 FY Performance and Accountability Report 12 (emphasis added). The Acting General Counsel, Lafe Solomon, has explained that 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." NLRB GC Mem. 11-03, 2 (Jan. 10, 2011) (emphasis added).

Consistent with this vision of the Board as a referee for labor disputes in the workplace, Congress did not, as with many similar labor and employment statutes, authorize the Board to require employers to post notices about employees' rights under the statute. J.A.253-54. For the next seventy-six years, the NLRB enforced the NLRA without attempting to impose any such affirmative obligation. J.A.246. 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 require posting. J.A.272-73.

During this same time span, Congress expressly granted notice-posting authority to numerous other agencies to enforce numerous other labor and employment statutes. For instance, as the District Court noted, "[i]n 1934, at the same time it was drafting the Wagner Act, Congress amended the Railway Labor

Act ('RLA') to include an express notice-posting requirement." J.A.270 (citing 45 U.S.C. §152, Eighth (1934)).

At least nine additional times Congress has expressly granted notice-posting authority in other labor and employment statutes: the Fair Labor Standards Act (29 U.S.C. §211); Title VII of the Civil Rights Act of 1964 (42 U.S.C. §2000e-10(a)); the Age Discrimination in Employment Act (29 U.S.C. §627); the Occupational Safety and Health Act (29 U.S.C. §§651, 657(c)); the Americans with Disabilities Act (42 U.S.C. §§12101, 12115); the Family Medical Leave Act (29 U.S.C. §§2601, 2619(a)); the Uniformed Service Employment and Reemployment Rights Act (38 U.S.C. §4334); the Employee Polygraph Protection Act (29 U.S.C. §2003); and the Migrant and Seasonal Agricultural Workers Protection Act (29 U.S.C. §1821). J.A.8. Indeed, a few years ago Congress *amended* USERRA to require employers to provide notice to employees of their "rights, benefits and obligations" under USERRA. J.A.272 (citing 33 U.S.C. §4344(a)).

The grant of notice-posting authority to the Equal Employment Opportunity Commission ("EEOC") and the Department of Labor ("DOL") to enforce these statutes is consistent with the proactive, investigatory powers granted to such agencies in their enabling statutes.

C. The NLRB's First Ever Assertion Of Power To Create Affirmative Duties, A New Unfair Labor Practice Charge, And A New Statute Of Limitations

In 2011, for the first time in its seventy-six year history, a divided NLRB imposed a notice-posting requirement on all employers. J.A.152. The Final Rule contains three subparts. Subpart A requires approximately six-million employers to post, on their private property, a Notice that emphasizes employees' rights to join a union and the purported benefits thereof. J.A.164. 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." J.A.194; 76 Fed. Reg. at 54,048. In bullet point seven, the Notice mentions, in passing, that employees can "[c]hoose not to do any of these activities." *Id.* The Notice also omits any discussion of specific rights that employees have against unions, such as rights pursuant to state right-to-work laws or the Supreme Court's decision in *Communications Workers of America v. Beck*, 487 U.S. 735 (1988). *See id.*

Even though the NLRA sets forth exactly five ULPs that can be lodged against an employer, Subpart B of the Rule seeks to establish an entirely new, sixth ULP: "Failure to post the employee notice may be found to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed by NLRA Section 7." J.A.195. Subpart B also seeks to extend the applicable statute of limitations for

other ULPs beyond what Congress set forth in the NLRA. J.A.177. Subpart C addresses so-called "ancillary matters."

SUMMARY OF ARGUMENT

There is no dispute that Congress granted the Board broad rulemaking authority under the NLRA by expressly authorizing the Board to promulgate "rules and regulations as may be necessary *to carry out the provisions of this Act*." 29 U.S.C. §156 (emphasis added). The Board's authority and discretion, however, are not boundless. The Board does not have *carte blanche* to issue rules that directly contradict the NLRA or, as in this case, to legislate labor law beyond its designated authority under the NLRA.

As the District Court correctly held, the familiar *Chevron* two step analysis applies. Under *Chevron* step one, the Board's Notice Posting Rule plainly exceeds the authority delegated to it by Congress in the NLRA. 5 U.S.C. §706(2)(C); *Chevron, U.S.A., Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837 (1984). As the District Court correctly held, the text, structure, and legislative history of the Act, as well as the express inclusion of notice requirements in other, related statutes but not in the NLRA, plainly demonstrate that the Board lacks authority to impose an affirmative notice obligation on some six-million employers.

The Board's repeated contention that the absence of an express prohibition against notice means that there is a gap for the agency to fill is plainly incorrect. As the District Court aptly observed,

> "To suggest…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 shalt not' terms), is both flatly unfaithful to the principles of administrative law…and refuted by precedent. Were courts to *presume* a delegation of power absent an express *withholding* of such power, agencies would enjoy virtually limitless hegemony, a result plainly out of keeping with *Chevron* and quite likely with the Constitution as well."

J.A.274 (quoting *Ry. Labor Execs. Ass'n v. NMB*, 29 F.3d 655, 671 (D.C. Cir. 1994) (*en banc*)). Here, it is plain that Congress did not delegate to the Board the authority to promulgate new, affirmative obligations on employers such as the notice posting at issue in this case. Thus, the District Court properly held at *Chevron* step one that the Board lacked authority to issue the Rule.

Perhaps recognizing that the Rule cannot withstand scrutiny under *Chevron* step one, the Board devotes nearly its entire brief to arguing that a pre-*Chevron* decision, *Mourning v. Family Publications Service, Inc.*, 411 U.S. 356 (1973), creates an alternative framework under which this Court should review the Rule. Under the Board's argument, the rule is valid if it merely "reasonably relate[s]" to any of the Act's purposes. However, as the District Court correctly noted, *Mourning*'s "reasonably related" test does not usurp the requirement that courts first apply *Chevron* step one to determine whether a gap in the statute in fact exists.

Rather, as courts have repeatedly held, *Mourning* applies under *Chevron* step two. Moreover, as noted above, the plain language and structure of the Act compels the conclusion that the Act does not give the Board broad authority to issue any regulation it deems is "reasonably related" to the purposes of the NLRA.

Similarly, the Board's heavy reliance on this Court's decision in *Harmon Mining Co. v. Director, Office of Workers Compensation Programs, U.S. Department of Labor*, 826 F.2d 1388 (4th Cir. 1987) and on *American Hospital Association v. NLRB*, 499 U.S. 606 (1991) ("*AHA*") is wholly misplaced. *Harmon*, like many of the other cases the Board relies on, involved a straightforward question of whether an agency's interpretation of an ambiguous statutory term was permissible. As this Court explained:

> The statute does not require either the employer's or the Secretary's construction to be accepted, and so, *the language being less than clear as to this point, there is no plain meaning to 30 U.S.C. § 932(g)* with which the regulation conflicts. In such a situation, we usually defer to the Secretary's construction.

Id. at 1390 (emphasis added). Here, by contrast, there is no statutory term—let alone an ambiguous statutory term—which the Notice Posting Rule is purportedly interpreting.

Similarly, *AHA* affords no help to the Board's efforts to dramatically expand its statutory reach. *AHA* involved the question of whether Section 9(b) of the NLRA, which requires the Board to make bargaining unit determinations "in each

case," prohibited the Board from using its rulemaking authority to define, in general terms, the bargaining unit for acute care hospitals. Unlike the instant case, which concerns the Board's authority in the first instance to require a notice posting, *AHA* concerned whether the Board was required to use individual adjudication rather than rulemaking. It is beyond peradventure that the Board could not, in an individual adjudication, impose broad, affirmative obligations on all employers to post specific notices.

None of the Board's other attempts to save the impermissible rule stands up to examination.

ARGUMENT

I. UNDER *CHEVRON* STEP ONE, THE BOARD LACKS AUTHORITY TO PROMULGATE ITS NOTICE-POSTING RULE

The District Court correctly employed the familiar *Chevron* framework to conclude that the Board exceeded the authority delegated to it by Congress under the NLRA. 5 U.S.C. §706(2)(C).

Under *Chevron* step one, the question presented is "whether Congress delegated authority to the Board to regulate employers in this manner." J.A.258; *see also*, *e.g.*, *Brown & Williamson Tobacco Corp. v. FDA*, 153 F.3d 155, 161 (4th Cir. 1998) ("The District Court framed the issue as 'whether Congress has evidenced its clear intent to *withhold* from FDA jurisdiction to regulate tobacco products as customarily marketed.' However, we are of the opinion that the issue

is correctly framed as whether Congress intended to *delegate* such jurisdiction to FDA." (citations omitted; emphasis in original)), *aff'd*, 529 U.S. 120 (2000); *cf. Republic Steel Corp. v. NLRB*, 311 U.S. 7, 10 (1940) ("The question is, Has Congress conferred the power upon the Board to impose such requirements."). As this Court explained: "Applying the principles set forth by the Supreme Court in *Chevron*, we examine whether Congress intended to give the [Board] jurisdiction [to require all employers to post a notice.]" *Brown & Williamson*, 153 F.3d at 161.

Step two "*Chevron* deference comes into play, of course, only as a consequence of statutory ambiguity, and then only if the reviewing court finds an implicit delegation of authority to the agency." *Texas v. U.S.*, 497 F.3d 491, 501-02 (5th Cir. 2007) (internal quotation omitted). As the District Court correctly observed, "The court must only employ the deference of *Chevron* step two when the 'devices of judicial construction have been tried and found to yield no clear sense of congressional intent.'" J.A.258 (quoting *Gen. Dynamics Land Sys., Inc. v. Cline*, 540 U.S. 581, 583 (2004)). In the present case, the Court need not look beyond *Chevron* step one. As the District Court correctly found, a straightforward statutory analysis demonstrates that the NLRB lacks statutory authority to promulgate the Rule.

Statutory construction, of course, begins with the language of the statute, as "the plain language of the statute in question is deemed the most reliable indicator

of Congressional intent." *Soliman v. Gonzales*, 419 F.3d 276, 281-82 (4th Cir. 2005). The court must "look to the statutory language as a whole, construing each section in harmony with every other part or section[.]" *Id.* at 282.

Context also plays a "crucial role" in statutory construction. "Thus, the traditional rules of statutory construction to be used in ascertaining congressional intent include: the overall statutory scheme, legislative history, the history of evolving congressional regulation in the area, and a consideration of other relevant statutes." *Brown & Williamson*, 153 F.3d at 162 (citations and internal quotation marks omitted). "A court must therefore interpret the statute 'as a symmetrical and coherent regulatory scheme,'…and 'fit, if possible, all parts into an harmonious whole[.]" *Brown & Williamson*, 529 U.S. at 133 (quoting *Gustafson v. Alloyd Co.*, 513 U.S. 561, 569 (1995) and *FTC v. Mandel Bros., Inc.*, 359 U.S. 385, 389 (1959)). Courts "'must not be guided by a single sentence or member of a sentence, but look to the provisions of the whole law, and to its object and policy.'" *Brown & Williamson*, 153 F.3d at 162 (quoting *U.S. Nat'l Bank of Ore. v. Indep. Ins. Agents of Am., Inc.*, 508 U.S. 439, 455 (1993)).

Moreover, this Court has expressly "note[d] that ascertaining congressional intent is of *particular importance where, as here, an agency is attempting to expand the scope of its jurisdiction*." *Id.* (emphasis added) (citing *ACLU v. FCC*, 823 F.2d 1554, 1567 n.32 (D.C. Cir. 1987) ("'When an agency's assertion of

power into new arenas is under attack, therefore, courts should *perform a close and searching analysis of congressional intent, remaining skeptical of the proposition that Congress did not speak to such a fundamental issue*.'") (emphasis added) (other citations omitted). Indeed, quoting the exact passage from the Third Circuit's decision in *Hi-Craft Clothing Co. v. NLRB*, 660 F.2d 910 (3d Cir. 1981) quoted by the District Court below, this Court has emphasized, that the "'more intense scrutiny that is appropriate when the agency interprets its own authority may be grounded in the unspoken premise that government agencies have a tendency to swell, not shrink, and are likely to have an expansive view of their mission.'" *Brown & Williamson*, 153 F.3d at 162 (quoting *Hi-Craft*, 660 F.2d at 916).[3]

Properly "utilizing the tools of statutory interpretation," the District Court correctly found that "the Board lacks authority to promulgate the notice-posting rule." J.A.276.

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[3] Thus, the Board's contention that the District Court failed to apply Fourth Circuit law by citing *Hi-Craft* is at best misplaced. Nor is the Board's cite to *EEOC v. Seafarers International Union*, 394 F.3d 197 (4th Cir. 2005)—a case which did *not* cite *Hi-Craft*—on point. The issue in *Seafarers* was whether "the more probing inquiry of *Skidmore v. Swift & Co.*, 323 U.S. 134 (1944)," should be applied instead of the *Chevron* framework because it concerned an agency's jurisdiction. *Id.* at 200-01. The Court held that *Chevron* applied. *Id.* at 201 ("[T]he Supreme Court has never held that *Chevron* should not apply to interpretations of statutory provisions that delimit agencies' jurisdiction."). In the present case, the District Court applied the *Chevron* framework and correctly resolved the issue under step one.

A. The Plain Text Of The NLRA

The plain language of the Act conclusively demonstrates that the Board lacks authority under Section 6 to promulgate the notice-posting rule. "[T]he plain language of Section 6 requires that rules promulgated by the Board must be 'necessary to carry out' other provisions of the Act." J.A.262. The Board has not identified, and cannot identify, any provision in the Act that requires employers to post (or otherwise notify) employees of their rights. As the District Court correctly explained, "the Act places no affirmative obligation on employers to post notices of employee rights or inform employees of those rights, so the rule cannot be 'necessary' to carry out such a nonexistent provision." J.A.263.

Nor has the Board identified any other provision for which the notice-posting rule is necessary. The Rule is not necessary for the Board to carry out Sections 1, 7, 8, 9 and 10 of the NLRA. *See* 76 Fed. Reg. at 54,011.

Section 1 simply recites the NLRA's purposes and does not provide the Board any authority to act. *See* 29 U.S.C. §151. Indeed, the Board conceded in other litigation over the Rule that Section 1 does not provide an independent basis for authority to regulate and it does not attempt to argue otherwise here. When asked if the Board could make rules about industrial policy generally, the Board responded:

> Ms. Goldstine [sic]: If we were to only have a rule that only, try to further a goal that's only in Section 1 we can't do that under

> the *Colorado River [Indian Tribes v. National Indian Gaming Commission*, 466 F.3d 134 (D.C. Cir. 2006)] Decision….

Tr. of Oral Argument at 24:3-5, *NAM v. NLRB*, No. 12-5068 (D.C. Cir. Sept. 11, 2012).

Moreover, there is no provision in the NLRA that authorizes the Board—or requires employers—to educate employees about Section 7 rights. Nor has the Board shown that notifying employees of their rights under Section 7 is necessary for employees to have the right to self-organization, collective bargaining, *etc*. and the right to refrain from such activities. The Board's justification for issuing the notice-posting rule, to supplant the unions—the traditional source of information about the NLRA—in their role of providing information to employees (Bd. Br. at 13 & n.5) may be laudable, but "[r]egardless of how serious the problem an administrative agency seeks to address, … it may not exercise its authority 'in a manner that is inconsistent with the administrative structure that Congress enacted into law.'" *Brown & Williamson*, 529 U.S. at 125 (quoting *ETSI Pipeline Project v. Mo.*, 484 U.S. 495, 517 (1988)). Congress has simply not authorized the Board to assume this role under the Act, and this is precisely what the District Court found. J.A.247.

The Board has previously noted that it has no independent mechanism or authority to enforce an employee's Section 7 rights unless and until a ULP charge is filed under Section 8. *See* Defs.' Mem. in Supp. of Cross Mot. for Summ. J. at 6

(No. 11-2516, Docket No. 21-1); *see also* 29 U.S.C. §160(b) ("Whenever it is charged that any person has engaged in or is engaging in any such unfair labor practice ...."). The Board has also previously noted that its authority to carry out Section 9 (union elections) begins only *after* a representation petition has been filed. *See*, *e.g.*, 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.").

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. at 54,039. Section 8 provides that it shall be an unfair labor practice for an employer, for example, "to *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, by viewing the failure to educate employees as interference, restraint, and/or coercion, and placing a burden on employers to *affirmatively* educate employees about certain Section 7 rights. *See*, *e.g.*, 76 Fed. Reg. at 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 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 premise that an employer's failure to educate its employees about their rights under the NLRA somehow interferes with or restrains the exercise of those rights means both that all employers have been violating the NLRA for more than 75 years, and that the proposed Rule is wholly unnecessary, since the Board already has the authority to address such action. This premise, of course, is plainly wrong.[4]

Given that neither Section 6 nor any other section of the Act even mentions the issue of notice posting, nothing in the plain text of the NLRA supports a finding that Congress gave the Board the authority to issue a Notice Posting Rule.

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[4] The Board's assertion (at 29-30) that Section 11's limitation on the Board's subpoena power is indicative of unlimited rulemaking power is also incorrect. Contrary to the Board's contention, it was not "superfluous" for Congress to limit the Board's subpoena power to "hearings and investigations … necessary and proper for the exercise of the powers vested in [the Board] by section [9] and [10]." 29 U.S.C. §161. As an initial matter, since the Board can conduct hearings and investigations for other purposes (for example hearings related to rulemakings) the reference to sections 9 and 10 enabled Congress to identify those hearings and investigations that would and those that would not be subject to the Board's subpoena power. Moreover, it would not have made sense for Congress to limit the Board's rulemaking authority only to Section 9 and 10 of the Act because that would have prevented the Board, for example, from promulgating rules defining any ambiguous provisions in Section 8. Finally, the fact that the Board's rulemaking authority is broader than its subpoena power does not mean the Board can ignore the text, structure and legislative history of the Act, as well as Congress's express inclusion of notice requirements in other statutes.

B. The Structure Of The NLRA

The structure of the Act further demonstrates what the text makes clear—that the Board lacks authority to promulgate the Rule. "Congress authorized the Board to regulate employers' conduct in two essential areas: preventing and resolving ULP charges and conducting representation elections." J.A.265. "The Act is essentially remedial." *Republic Steel Corp.*, 311 U.S. at 10. Under the NLRA the Board is authorized to scrutinize and dictate employers' conduct only *after* a charge of an unfair labor practice or a petition for representation is filed. Section 10 provides that "[w]henever it is charged that any person has engaged in or is engaging in any such unfair labor practice, the Board…shall have power to issue…a complaint[.]" 29 U.S.C. §160(b). Section 9 authorizes an investigation, hearing, and election on a representation petition only when "a petition shall have been filed, in accordance with such regulations as may be prescribed by the Board[.]" 29 U.S.C. §159(c).

As the Board noted (at 12), "[t]he Board's processes [under Sections 8, 9, and 10] are *not* self-initiating." Bd. Br. at 12 (emphasis added). "Under Section 10, the Board may not adjudicate an unfair labor practice case involving a violation of Section 8 *unless a charge has been filed* …. Likewise, under Section 9, union election procedures are set in motion *with the filing* of a representation petition." *Id.* (emphasis added; internal quotation marks omitted).

Based on this statutory framework, it is clear "that Congress intended the Board's authority over employers to be triggered by an outside party's filing of a representation petition or ULP charge." J.A.265.[5] "The remedial purposes of the Act are quite clear. … Th[e] right[s] of employees [are] safeguarded through the authority conferred upon the Board to require the employer to desist from the unfair labor practices described and to leave the employees free to organize and choose their representatives." *Republic Steel Corp.*, 311 U.S. at 10.

As the court below correctly held, "[t]he structure of the Act [thus] places the Board in a reactive role in relation to employers covered by the Act." J.A.264. Instead of respecting the scope of its statutory role, the Board effectively argues that the proactive notice-posting rule is necessary for it to "carry out" its reactive role under Sections 8, 9, and 10 of the NLRA: "The Act…presupposes employee awareness of and participation in the Board's processes." Bd. Br. at 12. This circular logic should be rejected. Congress has prescribed that the function of the Board is to respond to charges and representation petitions. The Board may not justify expanding its role under the Act—to proactively regulating employers' conduct by legislating new labor laws—by noting its reactive role under the Act.

[5] The District Court did not conclude, as the Board asserts (at 23), that the Board's rulemaking authority had to "be triggered by an outside party's filing of representation petition or ULP charge." Instead, the District Court concluded that the Board's reactive role under the Act elucidated its authority under Section 6. J.A. 265.

"It is axiomatic that an administrative agency's power to promulgate legislative regulations is limited to the authority delegated by Congress." *Bowen v. Georgetown Univ. Hosp.*, 488 U.S. 204, 208 (1988); *see also*, *e.g.*, *Republic Steel Corp.*, 311 U.S. at 12 ("[I]t is not enough to justify the Board's requirement to say that they would have the effect of deterring persons from violating the Act. … [I]f such a deterrent effect is sufficient to sustain an order of the Board, it would be free to set up any system of penalties ….").

In reality, the Board's rulemaking authority is thus tailored to its role under the Act: "Where Congress has in the statute given the Board a question to answer, the courts will give respect to that answer; *but they must be sure the question has been asked*." *NLRB v. Ins. Agents' Int'l Union*, 361 U.S. 477, 499 (1960) (emphasis added). The Board's attempt, with the notice-posting rule, to "proactively dictate[ ] employer conduct prior to the filing of any petition or charge" is thus inconsistent with the plain language and structure of the Act.

It is also inconsistent with a long-line of caselaw. Since shortly after the enactment of the NLRA, the Supreme Court has repeatedly rejected attempts by the Board to expand its jurisdictional reach. For example, in *Local 357, International Brotherhood of Teamsters v. NLRB*, 365 U.S. 667 (1961), the Supreme Court held:

> [W]here Congress has adopted a selective system for dealing with evils, *the Board is confined to that system*. Where, as here, Congress

> has aimed its sanctions only at specific discriminatory practices, *the Board cannot go farther and establish a broader, more pervasive regulatory scheme.*

Id. at 676 (citation omitted) (emphases added). Indeed, the Supreme Court could hardly have been clearer that even in the context of an employer who *had committed an unfair labor practice*, the ability of the Board to require measures is limited by the NLRA: "We do not think Congress intended to vest in the Board a virtually unlimited discretion to devise punitive measures, and thus to prescribe penalties or fines which the Board may think would effectuate the policies of the Act." *Republic Steel Corp.*, 311 U.S. at 11-12 (citations omitted).[6]

Surely, the Board cannot be allowed to do through rulemaking something it could not do in response to a finding of an unfair labor practice. It is thus clear from the text and structure of the Act that the Board has no authority to impose an affirmative notice posting on some six-million employers.

C. Legislative History

To the extent it is relevant, the legislative history confirms what the text and structure make plain—that the Board does not have the authority to promulgate the Notice Posting Rule. The legislative history confirms that Congress intended a reactive role for the Board. When Congress enacted the NLRA, House and Senate

[6] Thus, the Board's contention (at 43 and elsewhere) that courts have long held that the Board can direct "the performance of *affirmative employer duties*" provides no support for the rule. Those cases concerned affirmative employer action to remedy a ULP or to avoid committing a ULP.

reports emphasized the adjudicative function of the Board, even as Congress rejected statutory language that would have given the Board the authority of a roving commission. *See NLRB v. Jones & Laughlin Steel Corp.*, 301 U.S. 1, 31-32 (1937) (holding that Congress's grant of authority to the Board "purports to reach only what may be deemed to burden or obstruct commerce, [which is] to be determined *as individual cases arise*." (citations omitted; emphasis added)).

Committee reports also indicate that Congress intended to restrict the Board's authority to those labor practices explicitly listed in the Act. *See* S. Rep. No. 73-1184 (1934), *reprinted in*, 1 NLRB, Legislative History of the NLRA, *1935*, at 1100 (1949). For example, a 1935 Senate Report emphasized the limited, adjudicative nature of the NLRB by explaining that, "[n]either 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. 74-573 (1935), *reprinted in*, 2 NLRB, Legislative History of the NLRA, 1935, at 2307-08 (1949). Similarly, a House Report explained that Section 11 of the Act permitted the Board "the exercise of powers and functions embodied in sections 9 and 10," but did not grant the Board the powers of a "roving commission." H.R. Rep. No. 74-969 (1935), *reprinted in*, 2 NLRB, Legislative History of the NLRA, 1935, at 2919 (1949). In other words, Congress explicitly tied the Board's Section 6

authority to the Board's enumerated powers under the other provisions of the NLRA.

The legislative history further shows that Congress considered and rejected a narrower, blanket notice provision in the NLRA, even as it considered and ultimately passed a notice provision within the RLA. Early versions of the Wagner Act 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 NLRA, 1935, at 1 (1935); H.R. 8423, §5(5), (1934), *reprinted in*, 1 NLRB, Legislative History of the NLRA, 1935, at 1128. In particular, 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). Although this narrow notice provision differs from the broad notice mandated by the Board's Rule, Congress introduced and ultimately passed a broad notice provision for the RLA *at the same time* that Congress rejected the narrow notice provision for the NLRA.[7] RLA §§2, Fifth and

[7] 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.

Eighth, 45 U.S.C. §152, Fifth and Eighth. *See also* Br. for Members of the U.S. House of Representatives as Amici Curiae at 6-12 (No. 11-2516, Docket No. 26-1) (providing detailed timeline comparing the legislative histories of the NLRA and RLA). The similarities between the RLA and NLRA, and the near simultaneous timing of Congress's deliberations regarding these enactments, strongly suggest that Congress never intended for the NLRA to include a broad notice-posting feature—and negates the Board's argument that there is no evidence that Congress ever considered a notice-posting provision.

D. While Excluding Any Notice Posting In The NLRA, Congress Expressly Included Such A Requirement In Numerous Other Labor And Employment Statutes

The contrast between the NLRA and other labor and employment statutes also strongly suggests Congress's intent to withhold notice-posting authority from the NLRB. *See*, *e.g.*, *U.S. v. Estate of Romani*, 523 U.S. 517, 530-31 (1998); *Brown & Williamson*, 529 U.S. at 133 ("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*") (emphasis added; citation omitted); *accord 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).

During the seventy-six years since enacting the NLRA, Congress has regularly included notice-posting provisions in nine other labor or employment statutes and *amended* USERRA in 2004 to add such a notice provision, but never gave such authority to the NLRB. *See supra* pp. 7-8. Congress did not add a notice-posting provision in the extensive amendments to the NLRA in 1947, 1959, or 1974—even though Congress had included a posting provision in Title VII in 1964, the ADA in 1990, the FMLA 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.[8]

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[8] Even though the Board argues (at 35-36) that other statutes are invalid as a statutory interpretation tool in the administrative context, it then mistakenly attempts to rely on the notice promulgated under the Fair Labor Standards Act ("FLSA") as evidence that the Board has authority to issue the Notice Posting Rule. As an initial matter, there is no indication that any court has ever been asked to consider whether the DOL exceeded its statutory authority in promulgating such rule. Moreover, the FLSA is an entirely different enabling statute than the NLRA, and the Board concedes (at 37) that the FLSA contains a recordkeeping requirement upon which DOL relied to issue its Rule that is not present in the NLRA. C*ompare* 29 U.S.C. §211(c) *with* 76 Fed. Reg. at 54,013. Additionally, Congress mandated that the DOL was to have a proactive role in enforcing the FLSA, while Congress gave the Board only a reactive role in enforcing the NLRA. Finally, the DOL's notice requirement is based on a longstanding interpretation (since 1949), while the Board has only recently asserted such authority under the NRLA after over seven decades of enforcing the NLRA. *See, e.g.*, *Ry. Labor*

Thus, the Board's contention that the Notice Posting Rule "corrects a long-standing anomaly" (Bd. Br. at 2) is simply wrong. "Where Congress has consistently made express its delegation of a particular power, its silence is strong evidence that it did not intend to grant the power." *Alcoa*, 348 F.2d at 758; *see also infra* at Section II.D.

Moreover, there is good reason for Congress's differential treatment. The various labor and employment statutes address different concerns, balance different interests, and thus create different regulatory schemes for their enforcement. The DOL, for example, is not limited to a reactive role like the Board's. The Occupational Safety and Health Act ("OSHA"), for example, mandates minimum safety standards. The role of enforcement for workplace safety standards is inherently different from the Board's role as "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.

Based on the plain language, structure and legislative history of the NLRA, as well as the express inclusion of a notice-posting requirement in other labor and employment statutes, Congress clearly neither explicitly nor implicitly authorized the Board to promulgate a notice-posting rule. The Board is a reactive agency,

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Execs., 29 F.3d at 669 ("We find it telling that only in the last five years of its sixty-year history has the NMB claimed that Section 2, Ninth affords it the authority to initiate representation disputes or to permit carriers to do so.").

getting involved with the labor relations of a particular workplace only after a charge or petition is filed (and not anytime the Board wishes to influence labor-management relations nationwide). The Board only has authority to promulgate rules to carry out its reactive role set forth in the Act. Accordingly, the District Court properly struck down the Board's *ultra vires* rule under *Chevron* step one.

II. THE BOARD FAILS TO SHOW THAT THE *CHEVRON* FRAMEWORK IS INAPPLICABLE OR THAT THE BOARD OTHERWISE HAS AUTHORITY TO PROMULGATE ITS NOTICE-POSTING RULE

Perhaps recognizing that its Rule fails under *Chevron*, the Board spends much of its brief arguing instead that, under the Supreme Court's decision in *Mourning*, it can promulgate any rule "reasonably related to the purposes of the enabling legislation." As the District Court explained, "Courts…view *Mourning* as providing a heightened level of deference to the agency's interpretation of its statute under *Chevron* step *two*, rather than under step one." J.A.263 n.10.

The Board raises a series of other arguments in an effort to save its *ultra vires* rule. None of the Board's arguments challenging the District Court's thorough and well-reasoned statutory analysis holds water. Rather, the cases relied upon by the Board actually support the District Court's decision to strike down the Rule.

A. *Mourning* Does Not Create An Alternative Framework Under Which Regulations Are Analyzed And Provides No Support For The Board's *Ultra Vires* Rule

The Board contends that because it has "broad rulemaking authority" under the NLRA, any regulation "reasonably related to the purpose of the enabling legislation" should be upheld. Bd. Br. at 8-9, 14-16 (citing *Mourning*, 411 U.S. at 369). *Mourning*, however—a case decided over a decade before the Supreme Court's seminal decision in *Chevron*—does not provide an alternative test under which regulations are reviewed.

Rather, as the District Court correctly explained, the "reasonably related" standard set forth in *Mourning* is to be applied only during *Chevron* step two—*after* the Court has already determined that Congress delegated authority to an agency to promulgate the rule at issue. J.A.263 & n.10; *see also*, *e.g.*, *Int'l Swaps & Derivatives Ass'n v. U.S. Commodity Futures Trading Comm'n*, No. 11-2146, 2012 WL 4466311, *12 (D.D.C. Sept. 28, 2012) ("*Mourning* has been interpreted by courts in our Circuit to apply during the *Chevron* Step Two analysis … ." (citations omitted)); *First Premier Bank v. U.S. Consumer Fin. Protection Bureau*, 819 F. Supp. 2d 906, 918 n.3 (D.S.D. 2011) (quoting *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)) ("[C]ourts have consistently read [*Mourning*] to describe a heightened level of deference that is due the agency's interpretation of

an ambiguous statute under *Chevron* step two, rather than warrant to override a clear statute under *Chevron* step one") (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." *Colo. River*, 466 F.3d at 139.

Mourning itself clearly demonstrates this approach. The Board studiously avoids describing the facts and analysis of *Mourning*, relying instead on what it believes is a helpful snippet of language. However, in *Mourning*, unlike here, the Supreme Court determined that Congress had provided a clear statutory predicate for the Federal Reserve to promulgate a rule compelling sellers to comply with certain disclaimer requirements of the Act. *Mourning*, 411 U.S. at 377-78. The Court could hardly have been clearer that the Federal Reserve's rule was squarely within its delegated authority:

> Congress was clearly aware that merchants could evade the reporting requirements of the Act by concealing credit charges. In delegating rulemaking authority to the Board, Congress emphasized the Board's authority to prevent such evasion. To hold that Congress did not intend the Board to take action against this type of manipulation would require us to believe that, despite this emphasis, Congress intended the obligations established by the Act to be open to evasion by subterfuges of which it was fully aware.

Id. at 371. And, it is clear that *Mourning* itself engaged in a two step process. After reaching the above-quoted conclusion, the Court then explained (foreshadowing *Chevron*): "Given that some remedial measure was authorized, the

question remaining is whether the measure chosen is reasonably related to its objectives." *Id.* As is evident, the "reasonably related to its objectives" language was applied *after* the Court determined that the type of rule in question was within the Federal Reserve's authority.[9]

Adopting the Board's contention would give the Board virtually limitless power to legislate labor law, including the creation of new requirements on employers never intended by Congress. Under the Board's interpretation, for example, it could promulgate any rule "reasonably related" to Congress's aspirations set forth in Section 1: to address "the inequality of bargaining power between employees…and employers[;]" to "encourag[e] the practice and procedure of collective bargaining[;]" and to "protect[] the exercise by workers of full freedom of association, self-organization, and designation of representatives of their own choosing[.]" 29 U.S.C. § 151. Courts, like the District Court below, have repeatedly declined to apply *Mourning* in such circumstances when doing so would give the agency "limitless power to write new law, without any regard for the language or legislative history of the governing statute, so long as it arguably

[9] The Board (at 9) also curiously cites *Ragsdale v. Wolverine World Wide, Inc.*, 535 U.S. 81 (2002), a case which fully demonstrates the flaws in the Board's argument. In *Ragsdale,* the Supreme Court struck down DOL's rule even though DOL had authority to "issue regulations 'necessary to carry out' the [FMLA]." *Id.* at 86. Indeed, in the very next sentence after the language quoted in the Board's brief (at 9), the Court quoted from *Chevron*. The Court also made clear, by citing both *Chevron* and *Mourning* in its opinion, that *Mourning* does not replace the *Chevron* two step analysis.

fits within the purposes of the statutory scheme[.]" *Colo. River*, 383 F. Supp. 2d at 143-44.

The cases relied upon by the Board (at 14) demonstrate this application of *Mourning*. For example, the Board relies heavily on this Court's decision in *Harmon*, *supra*. However, *Harmon* was a straightforward case involving the Labor Department's interpretation of an ambiguous term in the statute, the quintessential case in which an agency is entitled to deference.

At issue in *Harmon* was the authority of the Secretary of Labor to promulgate a rule regarding the payment of federal benefits under the Federal Coal Mine Health and Safety Act, 30 U.S.C. §§ 901 *et seq*. This Court held that the statute at issue in *Harmon* was ambiguous on the key issue. The Federal Coal Mine Health and Safety Act provides that the "[t]he amount of benefits payable under this section shall be reduced, on a monthly or other appropriate basis, by the amount of any compensation received under or pursuant to any…State workmen's compensation law," 30 U.S.C. § 932(g), but it "does not specify when state benefits must be received in order to qualify for an offset." *Harmon*, 826 F.2d at 1390. "[T]he language being less than clear as to this point, there is no plain meaning to 30 U.S.C. § 932(g) with which the regulation conflicts. In such a situation, we usually defer to the Secretary's construction." *Id.* In light of the statutory ambiguity, this Court applied *Mourning* and concluded that the regulation

was "reasonably related" to the statutory purpose of providing a minimum level of income and thus was a valid interpretation of an ambiguous provision. *Id.*

Indeed, all the cases cited by the Board as "progeny" of *Mourning* (Bd. Br. at 15-16 & n.7) are similarly distinguishable from the present case, as all involved situations where the regulation at issue fell squarely within an agency's statutory function and the court had concluded that the agency had authority to promulgate the regulation *before* applying *Mourning*. In *Janick Paving & Construction, Inc. v. Brock*, 828 F.2d 84 (2d Cir. 1987), for example, the issue was "whether the Secretary of Labor has the statutory authority to 'debar' a contractor which has violated overtime hours and pay provisions of the Contract Work Hours and Safety Standards Act ('CWHSSA')." *Id.* at 86. The Second Circuit concluded (before applying *Mourning*), that the power of debarment is an implied power that is inherent and necessarily incidental to the enforcement of the CWHSAA against government contractors. Because debarment was within the DOL's statutory function of administrative enforcement, the Second Circuit concluded that the agency was not trying to make new law or expand its power: "To be sure, an agency may not, in the guise of interpreting its enabling legislation, make new law or fill gaps in its regulatory authority to meet its perceived needs." *Id.* at 91.

Similarly, in *Checkovsky v. SEC*, 23 F.3d 452 (D.C. Cir. 1994), another case cited by the Board (at 16 n. 7), the issue was whether the SEC had the authority to

discipline professionals practicing before it. The D.C. Circuit stressed that even when Congress grants an agency wide discretion to carry out its mandate, the agency does not have unreviewable rulemaking power "to prescribe *whatever the agency sees fit*." *Id.* at 469 (emphasis added). Broad rulemaking authority to carry out a statute is limited by the substantive provisions of the statute the agency is charged with carrying out. *Id.* The D.C. Circuit, analyzing the relevant statutory provisions, thus concluded that the SEC's rule was within its designated function: "Suspending or barring accountants who, for example, deliberately violate the securities laws surely implements at least some of the provisions just recited." *Id.* at 471. The SEC's assertion of such authority was also bolstered by the fact that the rule at issue, *unlike* the rule at issue in the present case, was "added in the Commission's early days, [and thus] reflects the agency's contemporary interpretation of the extent of its rulemaking power." *Id.* at 471.[10]

[10] Numerous other cases cited by the Board (at 16 n. 7) are similarly inapposite. *See Cmty. for Creative Non-Violence v. Kerrigan*, 865 F.2d 382, 385 (D.C. Cir. 1989) (concluding that a regulation prohibiting "Props and Equipment" within U.S. Capitol Grounds for more than 24 consecutive hours each day, which was intended to maintain day-to-day control over Capitol Grounds, was within the Capitol Police Board's statutory authority to regulate traffic on Capitol Grounds); *Graham Eng'g Corp. v. U.S.*, 510 F.3d 1385, 1389 (Fed. Cir. 2007) ("The rulemaking authority vested in the agency… explicitly conditions allowance of the benefits of section 1313 on compliance with regulations Customs has prescribed. The rulemaking in question here … is essentially procedural in nature … [to confirm compliance with the regulations and] does not affect the substantive statutory provision."); *Jackson v. Richards Med. Co.*, 961 F.2d 575, 581-85 (6th Cir. 1992) (applying the *Mourning* test because the regulation at issue was *procedural* and concluding that

As the District Court correctly held, "[w]here Congress has prescribed the form in which the Board may exercise its authority—in this case, in reaction to a charge or petition—[a] court 'cannot elevate the goals of an agency's action, however reasonable, over that prescribed form.'" J.A.267 (quoting *Amalgamated Transit Union v. Skinner*, 894 F.2d 1362, 1364 (D.C. Cir. 1990)). "To do so would allow deference owed to agencies to 'slip into a judicial inertia,' resulting in the 'unauthorized assumption by an agency of major policy decisions properly made by Congress.'" *Id.* (quoting *Am. Ship Bldg. Co. v. NLRB*, 380 U.S. 300, 318 (1965)). Under the framework of the NLRA, Congress has defined the role of the Board. The Board may not invoke *Mourning* to avoid the *Chevron* framework and redefine its role in a way never envisioned by Congress.

EEOC regulation authorizing it to reconsider no cause determinations and issue second right to sue letters was within EEOC's authority under Title VII of the Civil Rights Act of 1964 to issue "procedural regulations"); *Nat'l Med. Enters., Inc. v. Sullivan*, 957 F.2d 664, 665, 667 (9th Cir. 1992) ("[T]he statute expressly delegates the task of defining 'equity capital' to the Secretary. If Congress has explicitly left a gap for the agency to fill, we will give the resulting regulations controlling weight unless it is manifestly contrary to the statute.") (internal quotation marks omitted); *Gallegos v. Lyng*, 891 F.2d 788, 790-91 (10th Cir. 1989) (concluding that the Secretary of Agriculture's regulation is consistent with the Food Stamp Act before applying *Mourning*); *Williamson Shaft Contracting Co. v. Phillips*, 794 F.2d 865, 869 (3d Cir. 1986) (concluding that "the Secretary's interpretation of the 1977 Act is supported by cannons of statutory construction").

B. The Rule Is Not "*Necessary*" To Carry Out The Provisions Of The Act

In an effort to focus the Court away from the substantive provisions of the Act, the Board challenges the District Court's interpretation of "necessary." Bd. Br. at 17-20. However, the District Court's analysis is plainly in line with other cases (including those cited by the Board itself) interpreting broad rulemaking provisions, like the one at issue in this case, within the context of the substantive provisions of the statute. The case law is clear that even when Congress has stated that an agency may do what is "necessary" to carry out its mandate under a statute, the agency does not have limitless rulemaking power: "'Necessary or appropriate,' like 'necessary and proper,' is potentially opened-ended language as Chief Justice Marshall demonstrated in *McCulloch v. Maryland*, 17 U.S. (4 Wheat) 316 (1819). *But no one would suppose that the Commission's rulemaking power is the power to prescribe whatever the agency sees fit*." *Checkovsky*, 23 F.3d at 469 (emphasis added). "There are limits, derived from the substantive provisions of the statute." *Id.*[11] As the Supreme Court stated in *Republic Aviation Corp. v. NLRB*, 324 U.S.

[11] The Board's reliance (at 18) on *AFL-CIO v. Chao*, 409 F.3d 377 (D.C. Cir. 2005) is curious. In that case, even after concluding that the provisions at issue were ambiguous and proceeding to *Chevron* step two, the court explained "the court's deference to the Secretary is still limited by the particular language" and noted that "[e]ven when Congress has stated that the agency may do what is 'necessary,' … whatever ambiguity may exist cannot render nugatory restrictions that Congress has imposed." 409 F.3d at 384 (internal citation omitted). As a result, the word "necessary" was not considered in isolation, but rather the court

793 (1945), a case cited by the Board, the Board has "administrative flexibility *within appropriate statutory limitations*. *Id.* at 798 (emphasis added).

There is thus no basis for the Board's argument (at 18) that skipping directly to *Chevron* step two is appropriate whenever Congress has used the word "necessary." As explained above, this would inappropriately give the Board *carte blanche* to issue rules that go beyond its designated function under the NLRA. While the word "necessary" is *potentially* opened-ended, the issue under the *Chevron* framework is whether "[t]he statute is ambiguous *on the point in question*." *Krause v. Titleserve, Inc.*, 402 F.3d 119, 126 (2d Cir. 2005) (emphasis added) ("Krause focuses too narrowly on the word 'essential.' The meaning of the phrase 'an essential step in the utilization of the computer program' is equally dependent on the word 'utilization.'"). Here, as discussed *supra* Section I, the statute is not ambiguous.

Similarly, the Board's reliance (at 18) on cases such as *Commodity Futures Trading Commission v. Schor*, 478 U.S. 833 (1986), is wholly misplaced. Rather than "primarily entrusting" the CFTC with unbridled power to decide whether a

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considered the substantive provisions to determine whether itemization was "necessary" to disclose a union's "financial condition and operations" and whether general trust reporting was "necessary" to prevent evasion of reporting requirements. *Id.* The court concluded that while itemization might be necessary for the statutorily required disclosure, general trust reporting went further than necessary to prevent evasion and thus exceeded the Secretary's authority. *Id.* at 391.

regulation is "necessary," the Supreme Court performed its own statutory analysis and concluded that "Congress's assumption that the CFTC would have the authority to adjudicate counterclaims [the question at issue in that case] is *evident on the face of the statute*." *Id.* at 841-42 (emphasis added).[12] The Court also noted that the CFTC's view was "long-held." *Id.* at 844. Here by contrast, the Board's newfound view after three-quarters-of-a-century is nowhere to be found in the statute, and contrary to the text and structure of the Act.

Moreover, the Board's citation of four cases (on page 19) for the proposition that courts give broad construction to general rulemaking grants adds nothing to the essential question to be answered: Whether there is any ambiguity in the NLRA with regard to the Board's authority to require notice posting. If there is not, then this Court's analysis never gets to the deference under *Chevron* step two. In addition, in all four cases cited by the Board, the court independently determined whether the agency had the statutory authority to issue the rule. *See Lincoln Sav. & Loan Ass'n v. Fed. Home Loan Bank Bd.*, 856 F.2d 1558, 1561 (D.C. Cir. 1988) (concluding that the board could require insured institutions to obtain approval before making certain investments because the subchapter the agency is authorized to carry out "deals with every aspect of the savings and loan

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[12] Moreover, the grant of rulemaking authority to the CFTC was broader than it is here: "necessary *to effectuate any of the provisions or* ***to accomplish any of the purposes*** *of* [the CEA]." *Schor*, 478 U.S. at 842 (quoting 7 U.S.C. §12a(5); bold emphasis added).

insurance program."); *Nat'l Ass'n of Pharmaceutical Mfrs. v. FDA*, 637 F.2d 877, 879 (2d Cir. 1981) (concluding that FDA's authority to "promulgate regulations for the efficient enforcement of this chapter" included the power to issue regulations having the force of law); *Thorpe v. Housing Auth. Of Durham*, 393 U.S. 268, 281 (1969) (concluding that—where one of the purposes of the relevant act is to provide a decent home and suitable living environment for every American family that lacks financial means—Congress granted HUD authority to require minimal procedural safeguards prior to eviction); *Alcoa*, 348 F.2d at 761 (concluding that the amendment of 1961, which expanded the agency's responsibilities, also authorized it to adopt certain corresponding procedural rules).

Likewise, the Board's repeated citation of *AHA* is to no avail. At issue in *AHA* was a substantive rule promulgated by the Board defining the employee units appropriate for collective bargaining in a particular line of commerce. 499 U.S. at 608. Section 9(b) of the NLRA requires the Board to make bargaining unit determinations "in each case." *Id.* The Board's rule was challenged on the grounds that the words "in each case" precluded the Board from making such a determination under its rulemaking authority and required use of its adjudication authority. *Id.* at 608-09. The Supreme Court rejected that challenge, holding that Section 9(b)'s "in each case" does not limit the Board's rulemaking authority under Section 6. *Id.* at 614. Instead, Section 9(b) allows the Board to use *either*

rulemaking or adjudication to fulfill its obligation to make bargaining unit determinations. *AHA*, therefore, stands for the undisputed proposition that the Board may decide whether to fulfill its role through "rulemaking" or "adjudication." *AHA* simply did not address the question at issue in this case, whether the Board may promulgate rules clearly outside of its mandated function under the NLRA. Of course, if cannot. The Board's attempt (at 25-26) to transform the issue into rulemaking versus adjudication thus similarly misses the point. The issue is not whether the Board can or should use adjudication instead of rulemaking. Additionally, the District Court clearly did not, as the Board asserts, challenge the Board's "authority under Section 6 to make rules of general or particular applicability and future effect." Bd. Br. 25-26 (internal quotation marks omitted). The Board's notice requirement, however instituted, is inconsistent with its function under the Act and thus exceeds its authority.

There is also no basis for the Board's astonishing claim (at 45 n. 19) that it could have developed the same general notice and education obligation on six-million employers through case-by-case adjudication. As set forth above, an employer's supposed failure to educate its employees about their rights under the NLRA does not somehow interfere with or restrain the exercise of those rights and does not violate the NLRA. More importantly, the Board cannot, in adjudicating a

single ULP Charge, impose an affirmative posting duty on all employers in the country.

Moreover, the Board's premise that it has "used adjudication to create new substantive rules" (at 21) is incorrect and does not, in any event, save *this* substantive rule. As an initial matter, the Supreme Court, in fact, rejected this very argument when it was made by the Board in one of the cases the Board now attempts to rely upon: "Adjudicated cases may and do, of course, serve as vehicles for the formulation of agency policies.... But this is far from saying, as the Solicitor General suggests, that commands, decisions, or policies announced in adjudication are 'rules' in the sense that they must, without more, be obeyed by the affected public." *NLRB v. Wyman-Gordon Co.*, 394 U.S. 759, 765-66 (1969). And, even if the Board could impose some substantive rules in adjudication, the Board obviously would not have authority to impose any substantive rule it wanted in an adjudication without regard to the statutory limits placed on the Board by Congress.

In short, as the District Court correctly explained, the crucial question is "whether the Rule is 'necessary' to carry out other sections of the Act." J.A.260; *see also*, *e.g.*, *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*." (emphasis added)). The Board's erroneous attempt to narrowly focus on the word "necessary" only highlights the fact that it has completely failed to identify any provision of the Act that the Notice Posting Rule is necessary to carry out. "[T]he role assumed by the Board in this area is fundamentally inconsistent with the structure of the Act and the function of the sections relied upon." *Am. Ship Bldg. Co.*, 380 U.S. at 318.

C. Congress Did Not Use Silence To Delegate Authority To The Board To Impose A Notice-Posting Obligation On Six-Million Employers

The Board next asserts (at 31-35, 38) that silence creates a gap that it is entitled to fill by promulgating the Notice Posting Rule. In fact, the Board essentially contends that the only limitation on its authority is not "contradict[ing] what Congress has said elsewhere in the enabling act." This is not surprising, given that throughout this case the Board has failed to identify any limit to the expansive rulemaking authority it now claims. In fact, below the Board provided the following explanation of its interpretation of the limits of Section 6:

> THE COURT: Silence then—if silence is the key, then doesn't the Board have carte blanche to do anything?
>
> MS. GOLDSTEIN [attorney for the Board]: No, Your Honor. We understand that we are completely constrained by the wording of the Act ***and we don't see anything in the Act that relates to notice posting.***

Tr. of Mot. Hr'g Before the Hon. David C. Norton, U.S. District Judge, Feb. 6, 2012, at 28 (No. 11-2516, Docket No. 46) (emphasis added).

Notwithstanding the Board's bold claim, as set forth above, the issue must be framed as whether Congress *granted* such authority to the Board: "Agencies owe their capacity to act to the delegation of authority, either express or implied, from the legislature." *Ry. Labor Execs.*, 29 F.3d at 670 (citations omitted); *see also*, *e.g.*, *Brown & Williamson*, 153 F.3d at 161 ("[T]he issue is correctly framed as whether Congress intended to *delegate* such jurisdiction to [the Board].") (emphasis in original). Courts routinely reject agencies' attempts to appropriate additional rulemaking authority when a statute is silent. *See*, *e.g.*, *Am. Bar Ass'n v. FTC*, 430 F.3d 457, 468 (D.C. Cir. 2005) ("Plainly, if we were 'to *presume* a delegation of power' from the absence of 'an express *withholding* of such power, agencies would enjoy virtually limitless hegemony …." (quoting *Ry. Labor Execs.*, 29 F.3d at 671)) (emphasis in original); *Sierra Club v. EPA*, 311 F.3d 853, 861 (7th Cir. 2002) ("Courts will not presume a delegation of power based solely on the fact that there is not an express withholding of such power." (internal quotation omitted)); *Texas*, 497 F.3d at 502-03 ("[T]o 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." (internal quotation omitted)).

"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 … is both flatly unfaithful to the principles of administrative law and refuted by precedent." *Texas*, 497 F.3d at 503 n.9 (internal citation omitted).[13] Therefore, "[e]ven when a statute is silent as to a specific issue, before applying *Chevron* deference under step two, the court must ask whether 'Congress either explicitly or implicitly delegated authority to cure that ambiguity." J.A.258 (*quoting Am. Bar Ass'n*, 430 F.3d at 469).[14] As set forth above, the District

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[13] The Board attempts to argue that the silence in the NLRA regarding notice posting authority means *de facto* that this Court must move directly to the *Chevron* step two analysis. Bd. Br. at 38-39 (*citing Nat'l Elec. Mfrs. Ass'n v. U.S. Dep't of Energy*, 654 F.3d 496, 505 (4th Cir. 2011)). However, the "silence" to which this Court referred in *NEMA* was silence about the meaning of words and phrases that appear in a statute—not silence as to whether Congress had delegated authority to an agency in the first instance. *NEMA*, 654 F.3d at 505 (interpreting the meaning of "small electric motors" when term was left undefined by statute); *accord Md. Dep't of Health & Mental Hygiene v. Ctrs. for Medicare & Medicaid*, 542 F.3d 424, 436 (4th Cir. 2008) (finding silence in defining phrase "not covered under the State plan" warrants deference to agency interpretation of the phrase). To say that the Board has authority to act anytime it is not expressly restricted would flip the analysis on its head so that the Court would have to determine whether Congress evidenced a clear intent to withhold authority rather than ask the question this Court requires: "whether Congress intended to *delegate* such jurisdiction" to the Board. *See Brown & Williamson*, 153 F.3d at 161.

[14] This Court, in *Fernandez v. Keisler*, 502 F.3d 337 (4th Cir. 2007), cited by the Board (at 39), made clear that it would not abdicate the judicial role of statutory interpretation, even in immigration cases where deference to the Executive Branch is "especially appropriate." *Id.* at 343-47 ("[S]tep one remains *Chevron* step one … no amount of *Chevron* two step posturing on the part of the agency will undo the court's interpretation.").

Court—based on the text, structure and legislative history of the Act, and the express inclusion of notice requirements in other related statutes—correctly concluded that "Congress did not intend to impose a notice-posting obligation on employers, nor did it explicitly or implicitly delegate authority to the Board to regulate employers in this manner." J.A.273.

The Board's attempted reliance on silence is particularly misplaced given Congress's attention to notice posting in numerous other statutes. *See supra* pp. 7-8, 28. Thus, the Board's assertion (at 35-36) that the Court should ignore other statutes is simply wrong. "[W]hen Congress legislates in one area with explicit reference in a statute on an area of concern, but fails to reference that same subject matter in another statute, *its silence is evidence that Congress did not intend for there to be applicability in the latter statute." N.Y. State Bar Ass'n v. FTC*, 276 F. Supp. 2d 110, 135 (D. D.C. 2003). Indeed, courts repeatedly have looked to similar statutes when interpreting an agency's authority in the administrative context. *See*, *e.g.*, *Marshall*, 584 F.2d at 676; *Alcoa*, 348 F.2d at 758-59; *S.E.C. v. Warner*, 652 F. Supp. 647, 649 (S.D. Fla. 1987); *see generally supra* p. 28.[15]

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[15] The Board's reliance (at 31-32) on *Cheney Railroad Co. v. ICC,* 902 F.2d 66, 69 (D.C. Cir. 1990) for the proposition that the *expressio unius est exclusio alterius* canon is "'an especially feeble helper' in *Chevron* cases,'" is disingenuous. In a later case, the Court of Appeals for the District of Columbia explained: "[t]rue, 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."

Similarly, cases such as *U.S. Immigration & Naturalization Service v. Federal Labor Relations Authority*, 4 F.3d 268 (4th Cir. 1993), which are cited by the Board (at 31-32), do not help the Board. In that case the issue was whether the Federal Labor Relations Authority ("FLRA"), which is authorized to resolve disputes and claims of unfair labor practices under the Federal Service Labor-Management Relations Statute, can authorize "official time" for employees involved in proceedings before the FLRA for activities not specifically identified as "official time" activities under the statute *Id.* at 271-72. The issue of authorizing official time for activities related to proceedings before the FLRA clearly falls within the role of the FLRA mandated by Congress. Recognizing this, this Court concluded that "[w]here, as here, the statute displays not an effort at legislative micro-management of federal labor relations, but rather a positive intention to leave complexities and trivialities to FLRA and the bargaining table, *expressio unius* is not a particularly helpful tool." *Id.* at 272. While Congress clearly granted the Board flexibility and discretion for carrying out its mandate under the NLRA, imposing a brand new affirmative notice-posting requirement on

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Indep. Ins. Agents of Am. v. Hawke, 211 F.3d 638, 644 (D.C. Cir. 2000). More importantly, in the 47 days between when the *Cheney* decision affirming this Court's decision in *Brown & Williamson*, in which the Supreme Court explicitly stated: "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." 529 U.S. at 133.

employers is not a "complexity or triviality" of carrying out one of the Board's role under the Act.

The Board's attempt to use Congress's silence to extend its authority under the Act should be rejected. The Board is clearly attempting, in the words of the District Court, to "stretch the basic meaning of a 'gap' in a statute." J.A.274-75 ("[T]here is not a single trace of statutory text that indicates Congress intended for the Board to proactively regulate employers in this manner."). After all, "the purpose of a statute includes not only what it sets out to change, but also what it resolves to leave alone." *W. Va. Univ. Hosps., Inc. v. Casey*, 499 U.S. 83, 98 (1991).

D. None Of The Board's Remaining Arguments Save The *Ultra Vires* Rule

Finally, the Board throughout its brief raises in passing a series of arguments, clearly hoping one might resonate with the Court and save its *ultra vires* rule. All lack merit.

First, the Board argues that it has the authority to promulgate any rule "to prevent frustration of the purposes of the Act." Bd. Br. at 29.[16] This argument lays

[16] The case cited by the Board for this proposition, *NLRB v. Nash-Finch Co.*, 404 U.S. 138 (1971), is inapposite. The issue in *Nash-Finch* was "whether the National Labor Relations Board [in connection with unfair labor practice charges] may, through proceedings in a federal court, enjoin a state court which regulates peaceful picketing governed by the federal agency." *Id.* at 139-40. The Court concluded that peaceful picketing (under certain circumstances) is a protected

bare the Board's attempt to reinvent its function from reactively protecting employees' rights to proactively molding labor relations as it sees fit. This would give the Board virtually unlimited power to legislate new labor laws and policy. For example, the Board could prescribe measures to further the aspirational goals set forth by Congress in Section 1, as set forth above. The Board's proposed shift in its role, however, must be rejected because it contradicts the plain meaning and structure of the NLRA. The Board's rulemaking authority must be understood within the context of the entire Act, not one section.

Second, the Board's attempt (at 27 n.13) to distinguish *Railway Labor Executives*, *supra*, highlights how the Board is attempting to make law rather than carry out the provisions of the Act. In *Railway Labor Executives*, the D.C. Circuit addressed the National Meditation Board's ("NMB") attempt to transform its reactive role to a proactive one:

> For more than fifty years following the enactment of the RLA, the Board acted to address representation disputes *only* when it received requests from or on behalf of employees….[However,] the Board announced in 1989 that carriers, as well as the Board itself, could initiate representation proceedings in the wake of railroad mergers and acquisitions, on the theory that such events were likely to precipitate uncertainty as to the proper representation of employees.

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activity under the NLRA and, therefore, should be free from state law interference. *Id*. at 144. Federal preemption of state law is not an issue in this case and notice posting is not a "protected activity."

Id. at 658 (citation omitted) (emphasis in original). The D.C. Circuit rejected NMB's attempt to expand its mandate: "[O]ur analysis leads us to the firm conclusion that…the [NMB] may investigate a representation dispute *only* upon request of the employees involved in the dispute." *Id.* at 664 (emphasis in original). The Board—focusing solely on Section 6—argues that the present case is distinguishable because the Board has "general rulemaking authority." *Railway Labor Executives* is relevant to the present case, however, because NMB's reactive role is similar to the Board's reactive role under the NLRA, which is the context in which Section 6 must be interpreted. Indeed, the Board, in effect, is arguing that it can use its "general rulemaking authority" to do what NMB could not do, expand its role under the NLRA from reactive to proactive. Under the Board's position, therefore, it has the authority, for example, to *sua sponte* investigate and bring its own unfair labor practice allegations even though, as explained above, it is undisputed that Congress did not delegate the Board "roving investigatory powers."

Third, the Board also argues (at 20-26) that proactive substantive rules are consistent with its reactive function under the Act. None of the cases cited by the Board, however, are inconsistent with its reactive role under the statute or support imposing an affirmative obligation on six-million employers. *See*, *e.g.*, *NLRB v. Wash. Aluminum Co.*, 370 U.S. 9, 12-13 (1962) ("[The Board found that] discharge

of these workers by the company amounted to an unfair labor practice under § 8(a)(1) of the Act[.]"); *Republic Aviation Corp.*, 324 U.S. at 795 ("The Board determined that the [employer's] promulgation and enforcement of the 'no solicitation' rule violated Section 8(1) of the National Labor Relations Act[.]"). Indeed, the fundamental point the Board overlooks is that the "rules" it announces in adjudications concern conduct that if engaged in by the employer *would* violate the NLRA. As the Board's own citations make clear, the adjudications "'announce[] that certain conduct would, or presumptively would, violate one of the broad prohibitions of the Labor Relations Act….'" Bd. Br. at 22 (quoting Henry J. Friendly, *The Federal Administrative Agencies: The Need for Better Definition of Standards*, 75 Harv. L. Rev. 863, 891 (1962)). By contrast, there is nothing in the NLRA that makes the failure to post the Board's notice a violation of anything in the Act itself.

Fourth, NLRB v. J. Weingarten, Inc., 420 U.S. 251 (1975), cited at the end of the Board's brief, provides no assistance to the Board. Unlike this case, in *Weingarten* there was a specific right being protected: namely, the right to act in concert for mutual aid and protection. 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 id.* at 260-61. 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." *Id.* at 260. Having a representative present in the unionized context is an extension of the "mutual aid and protection" concept because the union would be the party that would challenge such disciplinary action on the employee's behalf.

Finally, the Board's overarching argument that it is authorized to issue rules that account for changing times, and that the Notice Posting Rule is such a rule, designed to remedy the perceived lack of knowledge among the current American workforce, simply misses the point. The argument overlooks the central truth at the heart of this case. No matter if the Board is wrong or right about its underlying assumptions about today's workforce; no matter if notice posting would be an effective manner of addressing the perceived problem—which Appellees deny; the fact remains that the Board can do only that which Congress has authorized it to do. As has been shown above, nowhere has Congress in any way authorized the Board to impose a requirement on nearly every employer in the United States to affirmatively educate its workers about the NLRA.

CONCLUSION

This Court "begin[s] with the basic proposition that agency power is 'not the power to make law. Rather, it is the power to adopt regulations to carry into effect the will of Congress as expressed by the statute.'" *Brown & Williamson*, 153 F.3d at 161 (quoting *Ernst & Ernst v. Hochfelder*, 425 U.S. 185, 213-14 (1976)). The District Court correctly applied *Chevron* step one and—based on the plain language, structure and legislative history of the Act, and express congressional enactments of notice requirements in other statutes—concluded that the Board exceeded the authority delegated to it by Congress in the NLRA. With its Notice Posting Rule, the Board is thus impermissibly attempting to expand its traditional and statutorily-mandated role under the NLRA. Under its interpretation, the Board would be recreated with unfettered and unprecedented authority to nationally legislate and steer all facets of labor law policy by proactively regulating the conduct of employers. The Board's attempt to expand its authority under the NLRA is clearly inconsistent with the intent of Congress, Supreme Court and this Court's precedents, and should be rejected.[17]

[17] Appellees note that briefs supporting the position of the Board were filed by amici Professor Charles Morris and the AFL-CIO. Rather than respond individually to the arguments raised in those briefs, appellees have addressed the relevant arguments within their response to the Board.

For the foregoing reasons, the Chamber requests that this Court affirm the District Court's decision and strike down the Board's *ultra vires* rule.[18]

Dated this 4th day of December, 2012.

Respectfully submitted,

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[18] Before the District Court, the Chamber also challenged as *ultra vires* the Board's creation of a new ULP for not posting the notice and tolling the statute of limitation. The Chamber also argued that the Board violated the APA because the Rule is arbitrary and capricious. In addition, the Chamber argued that the Rule violates employers' First Amendment rights and rights under Section 8(c) of the NLRA, 29 U.S.C. §158(c), by compelling them to post a biased, misleading notice that promotes unionization. Finally, the Chamber argued that the Board violated the Regulatory Flexibility Act, 5 U.S.C. §§603 and 604, by failing to conduct a regulatory flexibility analysis of the Rule's costs on small businesses. As the Board points out (at 47), should this Court reverse the District Court's grant of summary judgment, this Court should remand the case to the District Court for consideration of these remaining arguments.

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Dated: December 4, 2012

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CERTIFICATE OF FILING AND SERVICE

I hereby certify that on this 4th day of December, 2012, I caused this Corrected Brief of Appellees to be filed electronically with the Clerk of the Court using the CM/ECF System, which will send notice of such filing to the following registered CM/ECF users:

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I further certify that I caused the required copies of the Corrected Brief of Appellees to be hand filed with the Clerk of the Court.

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