No. 12-1757

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

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

v.

CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA and the SOUTH CAROLINA CHAMBER OF COMMERCE,

Plaintiffs-Appellees

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

REPLY BRIEF OF THE NATIONAL LABOR RELATIONS BOARD

ABBY PROPIS SIMMS
Deputy Assistant General Counsel

DAWN L. GOLDSTEIN
Supervisory Attorney

JOEL F. DILLARD
KEVIN P. FLANAGAN
MICAH P.S. JOST
MARK G. ESKENAZI
Attorneys

National Labor Relations Board
1099 14th Street, N.W.
Washington, D.C. 20570
(202) 273-2930

LAFE E. SOLOMON
Acting General Counsel
CELESTE J. MATTINA
Deputy General Counsel
JOHN H. FERGUSON
Associate General Counsel
MARGERY E. LIEBER
Deputy Associate General Counsel
ERIC G. MOSKOWITZ
Assistant General Counsel

National Labor Relations Board

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Argument

The thrust of the Chamber's argument is that the NLRA's silence on the topic of notice posting is a gap the Board is not authorized to fill. As explained in the Board's main brief, however, the Board's authority to require employers to post a government-supplied notice of their employees' NLRA rights has two independent sources: the Board's authority to enact legislative rules, and the Board's authority to enact rules interpreting the NLRA's provisions. As discussed below, the Chamber's contrary arguments are meritless.

I. Under NLRA Section 6, the Board has authority to issue this notice-posting Rule.

Section 6 expressly empowers the Board to issue "such rules and regulations as may be necessary to carry out the provisions of this [Act]." 29 U.S.C. § 156. Courts have repeatedly recognized that when Congress uses words like these it delegates to an agency the broad discretion to issue rules that "affect substantial individual rights and obligations," *Morton v. Ruiz*, 415 U.S. 199, 232 (1974), so long as such rules are not only "consistent with the [statute]," *id.*, but also "reasonably related to the purposes of the enabling legislation," *Mourning v. Family Publ'ns Serv., Inc.*, 411 U.S. 356, 369 (1973) (internal quotation omitted).

The Chamber argues that *Mourning* is just a subset of *Chevron* step 2, and that the NLRA *only* authorizes the Board to issue rules that interpret "an

ambiguous statutory term," or are within the Board's "statutory function." Ch. Br. 12, 35-37; *see Chevron USA, Inc. v. NRDC, Inc.*, 467 U.S. 837 (1984). But the Chamber entirely fails to prove that this Rule is *not* within the Board's "statutory function."

It should be beyond dispute that Section 6 authorizes the Board to make substantive, legislative rules like this one. A legislative rule "impose[s] *distinct obligations on members of the public in addition to those imposed by statute*, as long as the rule is within the scope of rulemaking authority conferred on the agency by statute." 1 Richard J. Pierce, Administrative Law Treatise § 6.4 (5th ed. 2010) (Pierce) (emphasis added).[1] The Chamber's cramped reading of Section 6 is inconsistent with the very concept of legislative rulemaking.

Over the last fifty years, a multitude of prominent administrative law scholars and jurists have urged the Board to conduct more of its legislative policymaking through the APA notice-and-comment process because of the many advantages of notice-and-comment rulemaking over adjudicatory rulemaking.[2] In 1989, the Board took this advice in a significant substantive

[1] In contrast, an interpretive rule cannot impose such obligations, except for those "fairly attributable to Congress through the process of statutory interpretation." *Id.*

[2] Samuel Estreicher, *Improving the Administration of the National Labor Relations Act Without Statutory Change*, 5 F.I.U. L. Rev. 361, 373 (2010) (mandating NLRA notice posting through rulemaking "provid[es] for a uniform

rulemaking regarding the scope of health care bargaining units. The Supreme Court upheld the rule as within the Board's "broad rulemaking authority" under Section 6. *Am. Hosp. Ass'n v. NLRB*, 499 U.S. 606, 613 (1991) (*AHA*).

The Chamber tries to distinguish *AHA*, asserting that it concerns "whether the Board was required to use individual adjudication rather than rulemaking" to determine bargaining units. Ch. Br. 13. The Chamber ignores the relevant similarity that in *AHA*, as here, the challengers claimed that the Board's authority to make a rule under Section 6 was contradicted by the structure and text of the NLRA.

Unlike here, the challengers in *AHA* actually had some NLRA text that they could rely on for their argument—specifically, that Section 9(b) "requires the Board to make a separate bargaining unit determination 'in each case.'" *AHA*, 499 U.S. at 608. But after examining "the structure and the policy of the

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rule where nationwide uniformity makes sense"); Samuel Estreicher, *Policy Oscillation at the Labor Board: A Plea for Rulemaking*, 37 Admin. L. Rev. 163, 172-73 (1985); Merton C. Bernstein, *The NLRB's Adjudication-Rule Making Dilemma Under the Administrative Procedure Act*, 79 Yale L.J. 571 (1970); Cornelius J. Peck, *The Atrophied Rule-Making Powers of the National Labor Relations Board*, 70 Yale L.J. 729, 761 (1961); *see also NLRB v. Majestic Weaving Co.*, 355 F.2d 854, 860 (2d Cir. 1966) (Friendly, J.) ("[T]he 'function of filling in the interstices' of regulatory statutes 'should be performed, as much as possible, through this quasi-legislative promulgation of rules to be applied in the future.'" (quoting *SEC v. Chenery Corp.*, 332 U.S. 194, 202 (1947))); Pierce, § 6.8.

NLRA," the Court held that the test for "whether Congress had intended to curtail in a particular area the broad rulemaking authority granted in § 6," is whether there is "language expressly describing an exception from that section or at least referring specifically to the section." *Id.* at 613. Finding no such limitation, the Court upheld the Rule as within the Board's authority.

AHA thus refutes the Chamber's oft-repeated assertion that the Board is acting here without properly delegated authority. Ch. Br. 13, 14, 23, 27, 28, 31, 32, 44, 45, 46, 47. Section 6 supplies the necessary delegation. *AHA*, 499 U.S. at 609-10 ("This grant was unquestionably sufficient to authorize the rule at issue in this case unless limited by some other provision in the Act.").

The Board's "statutory function" includes making rules which are reasonably related to the protection of Section 7 rights and the sound administration of labor law under Sections 1, 8, 9, and 10.

A. *Mourning* applies to legislative rules like this one.

Because Section 6 authorizes the Board to promulgate legislative rules, the validity of the Rule is properly analyzed under *Mourning*. However, the Chamber insists that *Chevron*'s two-step test is the *only* analytical framework for measuring the scope of the Board's rulemaking power. *Chevron*, the Chamber says, effectively supersedes *Mourning*. *See* Ch. Br. 31-32.

This is incorrect. The two cases address related but distinct issues: *Chevron* is designed to "review[] an agency's construction of the statute which it administers," 467 U.S. at 842, while *Mourning*'s aim is to analyze substantive rules that carry out an agency's enabling act, but do not necessarily interpret specific statutory language.

Mourning's distinct analysis is illustrated by *Thorpe v. Housing Authority of Durham*, 393 U.S. 268, 272-74 (1969). There, the Supreme Court upheld a substantive rule of the federal Department of Housing and Urban Development (HUD) requiring landlords of federally-assisted housing projects to provide their tenants pre-eviction notice and an opportunity to reply. This rule did not interpret any particular language in the statute, but because HUD had "general rulemaking power" and its rule "reasonably related to the purposes of the enabling legislation," the rule was within HUD's authority. *Id.* at 274, 280-81. As *Thorpe* shows, the analysis of *Mourning*—and of *Harman Mining Co. v. DOL*, 826 F.2d 1388 (4th Cir. 1987)—applies where an agency is making a truly legislative rule, designed to address problems Congress left to the agency's expert, discretionary judgment. Thus, the Chamber's efforts to limit these cases to their facts must fail.

The Chamber criticizes *Mourning* on policy grounds, claiming that it is a "'warrant to override a clear statute.'" *See* Ch. Br. 31-32 (quoting *Colo. River Indian Tribes v. Nat'l Indian Gaming Comm'n*, 383 F. Supp. 2d 123, 144 (D.D.C.

2005)). But the Board has never claimed that *Mourning* permits agencies to disregard Congress's clearly expressed intent. In the Rule, the Board expressly "agree[d] that it may not exercise its rulemaking authority in a way contrary to that intended by Congress." J.A. 154; 76 Fed. Reg. at 54,008. For reasons the Board went on to explain at great length, it "d[id] not believe that it ha[d] done so." *Id.* Neither the Chamber, nor House Amici, nor the district court has demonstrated otherwise.

Similarly, the Chamber's fear that accepting the Board's arguments "would give the Board virtually limitless power to legislate labor law" is unfounded. *See* Ch. Br. 33. As the Board stated in its opening brief, "an agency cannot rely on its general rulemaking authority to contradict what Congress has said elsewhere in the enabling act." NLRB Br. 20; *see AHA*, 499 U.S. at 613 (stating that reliance on Section 6 will not suffice if another section of the Act specifically exempts a subject from the Board's rulemaking authority); *see also Stinson v. United States*, 508 U.S. 36, 44 (1993) (legislative rules "of course must yield to the clear meaning of a statute"). Besides the plain text of the Act, other limits exist as well.

For example, the Board cannot rely solely on Section 1's general policy declarations to justify a regulation. *See* Ch. Br. 17-18. Moreover, the Board cannot use Section 6 to usurp "major policy decisions" that reside with Congress.

Am. Ship Bldg. Co. v. NLRB, 380 U.S. 300, 318 (1965) (Board rule on employer lockouts usurped congressional authority); *see also* NLRB Br. 36-37.

But the Rule violates none of these limits. Rather, the Rule is entirely consistent with the Act, *see* NLRB Br. 20-30; it carries out several of the Act's operative provisions, *see id.* at 11-13; and it addresses an interstitial matter, much like the Department of Labor's 1949 regulation requiring employers to post a notice of employee rights under the Fair Labor Standards Act (FLSA) even though such a notice was not statutorily required, *see* NLRB Br. 36-37 (discussing FLSA Notice Posting Regulation, 14 Fed. Reg. 7516 (Dec. 16 1949)). In short, accepting the Board's authority to issue this Rule as an exercise of its Section 6 authority would not be a slippery slope to "rules about industrial policy generally." Ch. Br. 17.

B. Even if a *Chevron* is the sole measure of the Rule's validity, the Rule is consistent with this Court's *Chevron* Step 1 analysis in *Seafarers*.

Even if the Chamber was correct that *Mourning* is no longer viable and *Chevron* is the sole measure of the Board's authority to issue its notice-posting Rule, the Rule should be upheld under a *Chevron* Step 1 analysis like the one this Court performed in *EEOC v. Seafarers International Union*, 394 F.3d 197 (4th Cir. 2005). In *Seafarers*, the Equal Employment Opportunity Commission (EEOC) promulgated a regulation "pursuant to explicit congressional delegation" through a broad grant of rulemaking authority in the Age Discrimination in Employment Act

(ADEA). *Id.* at 200. Although the ADEA's prohibitions only included employers, employment agencies, and labor organizations, in 1996 "the [EEOC] promulgated a rule . . . that brought age discrimination in apprenticeships within the purview of the Act." *Id.* at 207. The EEOC justified reversing its longstanding interpretation to the contrary, explaining that times had changed—"'dislocations in the American economy' ha[d] recently made age discrimination in apprenticeships a more significant obstacle to employment for older workers than it had been before." *Id.* at 205 (citation omitted).

In addressing at *Chevron* Step 1 the issue of "whether the EEOC exceeded its authority under the ADEA in promulgating its 1996 regulation," *id.* at 202, the Court was not swayed by the fact that the ADEA did not mention apprenticeships programs. "Congress," the Court noted, "can employ general terms in defining the reaches of its laws. And these definitional provisions often support a continuum of permissible administrative constructions." *Id.* Nor was the Court convinced by the challengers' reliance on Congress's specific mention of apprenticeship programs in Title VII—the statute upon which the ADEA was modeled—and its failure to use the term in the ADEA. *Id.* at 204. Instead, the Court concluded that coverage provisions common to both statutes were "broad enough to permit, but not require, application of th[e] Act[s'] strictures to apprenticeships." *Id.* Even when comparing closely related statutes, the Court recognized that "'inferences from

congressional silence,' in the context of administrative law, are often 'treacherous.'" *Id.* at 202 (citation omitted).

A similar analysis vindicates the Board's Rule as well. Like the EEOC in *Seafarers*, the Board here interpreted general terms, including those in Sections 6, 7, and 8(a)(1) of the NLRA. The ADEA was drafted to permit the EEOC to extend its reach to apprenticeships, *if and when the agency determined that this was necessary*. *See id.* at 201 ("Whether the ADEA covers apprenticeships . . . involves a multitude of issues that fall squarely within the agency's special competence."). Just so, the NLRA's provisions are broad enough to require notice posting where the Board, applying its institutional expertise to the changing realities of the American workplace, has found that notice posting is necessary to carry out the provisions of the Act. At *Chevron* Step 1, the *Seafarers* Court construed the ADEA to maintain the flexibility the EEOC needed "to meet the regulatory needs of changing conditions." *Seafarers*, 394 F.3d at 205. Applying the same approach, the Court should uphold the Board's Rule.

The Chamber, citing *Brown & Williamson Tobacco Corp. v. FDA*, 153 F.3d 155 (4th Cir. 1998), *aff'd*, 529 U.S. 120 (2000), argues that heightened scrutiny is appropriate at *Chevron* Step 1 because, in the Chamber's view, the validity of the Rule is a "jurisdictional" question. Ch. Br. 16. But the "jurisdictional" issue presented in *Brown & Williamson* was of a different order than the issue presented

here. *Brown & Williamson* was an "extraordinary case[]" in which the Food and Drug Administration (FDA) attempted to assert jurisdiction to regulate an industry—tobacco—"constituting a significant portion of the American economy." *Brown & Williamson*, 592 U.S. at 159. It did so even though Congress had "created a distinct regulatory scheme for tobacco products, squarely rejected proposals to give the FDA jurisdiction over tobacco, and repeatedly acted to preclude any agency from exercising significant policymaking authority in the area." *Id.* at 159-60. Under these circumstances, this Court was justifiably "skeptical of the proposition that Congress did not speak to [the] fundamental issue" the FDA had decided for itself. *See Brown & Williamson*, 153 F.3d at 162 (quotation omitted).

Here, by contrast, the Rule merely outlines the duties of employers who are *already* within the Board's jurisdiction. *See* NLRB Br. 22-23. Thus, the Board's Rule no more "attempt[s] to expand the scope of its jurisdiction," *Brown & Williamson*, 153 F.3d at 162, than have its past interpretations of "the scope of the 'concerted activities' clause in Section 7," *NLRB v. City Disposal Sys. Inc.*, 465 U.S. 822, 830 n.7 (1984) (quotation omitted); the Section 7 right "to have a union representative present at [an] investigatory interview," *id.* (citing *NLRB v. J. Weingarten, Inc.*, 420 U.S. 251, 266-67 (1975)); or the "definition of agricultural worker" under the Act, *id.* (citing *Bayside Enters., Inc v. NLRB*, 429 U.S. 298, 302-

03 (1977)). The Supreme Court "ha[s] not hesitated to defer to the Board's interpretation of the Act in the context of issues substantially similar to that presented here." *Id.*[3]

Moreover, the Rule addresses an interstitial matter Congress left within the Board's "regulatory discretion." *Seafarers*, 394 F.3d at 204. Unlike tobacco regulation by the FDA, notice posting is not a major policy decision the Court can assume Congress considered.[4] *See* NLRB Br. 36-37.

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[3] The Supreme Court will decide this term whether *Chevron* applies to an agency's determination of its own jurisdiction, in a case dealing with an agency's interpretation of statutory language specifically designed to constrain its regulatory authority in a particular area. *See City of Arlington v. FCC*, 668 F.3d 229, 247-48 (5th Cir. 2012) *cert. granted in part*, 133 S. Ct. 421 (Oct. 5, 2012) *and* 133 S. Ct. 524 (Oct. 5, 2012) (No. 11–1545). The Chamber has pointed to no such language in this case.

[4] For the same reason, little insight can be gained from the Chamber's comparisons between the NLRA and the notice provisions in the Railway Labor Act, 45 U.S.C. § 152, Eighth, and other statutes. Ch. Br. 27-30. Such comparisons are only appropriate when the rule at issue is *not* interstitial, but is of such importance that meaningful inferences may be drawn from legislative silence. NLRB Br. 35-37. The complete absence of any mention of the RLA's notice provision in that Act's *own legislative history* is strong support for the common-sense conclusion that such notice provisions are not so momentous that any limit can be inferred from Congressional silence on the matter. *Id.* at 35-36.

Marshall v. Gibson's Products, Inc. of Plano, 584 F.2d 668 (5th Cir. 1979) is likewise inapposite. There, the Secretary of Labor promulgated a regulation that purported to "create federal [court] jurisdiction" for agency compliance officers to obtain inspection injunctions. *Id.* at 678. The court struck down the regulation because the authority to define federal court jurisdiction "lies solely with Congress." *Id.* To the extent that the Fifth Circuit contrasted the enabling act in that case with other acts in which Congress had provided the express power to

C. **Contrary to the Chamber, neither the text nor structure of the Act precludes the Board from making rules placing affirmative obligations upon all employers within its jurisdiction.**

The Chamber asserts that this is "the first time," the NLRB is exercising its jurisdiction "on some six-million employers." Ch. Br. 1-2, 9; *see also* 10, 24, 42, 44, 51. It argues that Congress did not empower the Board to make "new, affirmative obligations," and points to "the structure of the Act," meaning, primarily, the fact that the Board's *adjudicatory* processes "are *not* self-initiating." Ch. Br. 11, 17-24.

This argument fundamentally misunderstands the nature of Board adjudications, and the role the Board has played as a policymaking agency for over seventy-five years. Contrary to the Chamber, Ch. Br. 42-43, the Board in fact *can* "in adjudicating a single ULP Charge, impose an affirmative posting duty on all employers in the country," *see* NLRB Br. 45 n.19. Though Board proceedings under Sections 9 or 10 must begin with a charge or petition filed by a private party, that does not mean that the Board is merely a "reactive agency." Ch. Br. 22, 24, 50.

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obtain inspection injunctions, it was to emphasize the point that endowing an agency with such authority is a major policy decision that only Congress could make.

As explained previously, Board rules announced in adjudication set forth a standard that all employers within the Board's jurisdiction are expected to heed. NLRB Br. 20-30; *e.g.*, *NLRB v. Washington Aluminum Co.*, 370 U.S. 9, 16-17 (1962); *Republic Aviation Corp. v. NLRB*, 324 U.S. 793, 798 (1945). Employers who violate rules promulgated by the Board are subject to its enforcement powers if unfair labor practice charges are filed. The impact of these rules on some six million employers is a natural consequence of the fact that the National Labor Relations Act "is federal legislation, administered by a national agency, intended to solve a national problem on a national scale." *NLRB v. Natural Gas Util. Dist.*, 402 U.S. 600, 603-04 (1971).

In prior cases, the Chamber has shown that it understands the Board's authority to make nationwide rules. In its 1974 amicus brief to the Supreme Court in *Weingarten*, for example, the Chamber correctly argued that "in determining the extent to which employees may insist upon union representation during private interviews with management," the Court would decide "*the validity of a rule*." Brief for Chamber as *Amicus Curiae*, *NLRB v. J. Weingarten, Inc.*, 420 U.S. 251 (1975), 1974 WL 185833, at *2-3 (emphasis added). Indeed, the Chamber argued, "*the resolution of this question will govern*, in an important respect, management's ability to secure . . . information from its employees." *Id.* at *3 (emphasis added). The Chamber observed that "the issue posed here is one which confronts all

employers," and warned that "the *Board's new rule imposes new and rigorous restrictions upon employers* as they attempt to elicit information necessary to maintain efficient operations." *Id.* (emphasis added).

It should be beyond cavil that an "agency can announce a new 'rule' or decisional standard in the process of resolving a particular adjudicative dispute." Pierce, § 6.1; *see also NLRB v. Bell Aerospace Co.*, 416 U.S. 267, 294 (1974). As Justice Black explained in his three-Justice concurrence in *NLRB v. Wyman-Gordon Co.*, 394 U.S. 759 (1969), the Board exercises *both* its quasi-legislative—i.e., rulemaking—and quasi-judicial power when it decides cases:

> The two functions [of quasi-legislative and quasi-judicial power] merge at many points. For example, in exercising its quasi-judicial function an agency must frequently decide controversies on the basis of *new doctrines*, not theretofore applied to a specific problem, though drawn to be sure from *broader principles reflecting the purposes of the statutes* involved and from the rules invoked in dealing with related problems. . . . Congress gave the Labor Board both of these separate but almost inseparably related powers. *No language in the National Labor Relations Act requires that the grant or the exercise of one power was intended to exclude the Board's use of the other.*

Id. at 770-71(Black, J., concurring) (footnote omitted) (emphases added).[5]

[5] The Chamber's only counter-argument is based on Justice Fortas's observation on behalf of the plurality in *Wyman-Gordon* that commands announced in adjudication are not rules which must "without more, be obeyed by the affected public." 394 U.S. at 766. That observation is beside the point because, as a practical matter, an employer who flouts the Rule will only be compelled to obey it after an adjudication resulting in a court-enforced order. NLRB Br. 23; J.A. 195; 76 Fed. Reg. at 54,049.

At issue in *Wyman-Gordon* was the legislative rule announced by the Board in *Excelsior Underwear, Inc.*, 156 NLRB 1236 (1966), which requires employers to provide a list of employees' names and addresses to the unions before a Board election. *Id.* at 1239-40. Like the rules that the courts have upheld under *Mourning*, *Excelsior* construed no specific statutory language, but rather was based on the Board's view of what was "necessary to insure an informed electorate" in a Section 9 election proceeding. *Id.* at 1242.[6]

Since then, the Board has repeatedly used its power to make prospective legislative rules by adjudication, which it sometimes does not apply to the particular parties in the case before it. *See, e.g., Dresser Indus., Inc.*, 264 NLRB 1088, 1089 (1982). Here, the Board merely chose to use the *other* method *Bell*

And in any event, in the quoted passage Justice Fortas was criticizing the Board for *not* using rulemaking. Justice Fortas clearly agreed that the Board had authority to make quasi-legislative rules, and, indeed, noted that "the substance of the Board's command is not seriously contestable." *Id.* at 766 n.6.

Ultimately, in *Bell Aerospace*, the Court held that "the Board is not precluded from announcing new principles in an adjudicative proceeding and that the choice between rulemaking and adjudication lies in the first instance within the Board's discretion." 416 U.S. at 294.

[6]As this Court observed in *NLRB v. J.P. Stevens & Co.*, 409 F.2d 1207, 1209 (4th Cir. 1969), "[t]he Board promulgated the *Excelsior* rule in order to assure that the employee's freedom of choice in the election was not hampered by lack of information." A similar concern about "lack of information" underlies the present Rule.

Aerospace approved for exercising its quasi-legislative power: notice-and-comment rulemaking. The Chamber has demonstrated no reason to believe that this policymaking choice was unlawful.

D. The Act's legislative history does not support an inference that Congress intended to preclude the Board's requirement that notices of NLRA rights be posted in the workplace

Both the Chamber and twenty-one Members of the U.S. House of Representatives (House Amici) claim that Congress considered and rejected requiring employers to post notices of their employees' NLRA rights. In so arguing, they rely on legislative history which both district courts to consider the issue agreed was irrelevant. J.A. 271 n.15; *Nat'l Ass'n of Mfrs. v. NLRB*, 846 F. Supp. 2d 34, 47 n.8 (D.D.C. 2012) (*NAM*), *appeal and cross-appeal pending*, D.C. Cir. Case Nos. 12-5068 and 12-5138. House Amici rely upon Section 304(b) of the earliest introduced version of what would later become the Wagner Act:

> Any term of a contract or agreement of any kind which conflicts with the provisions of this Act is hereby abrogated, and every employer who is a party to such contract or agreement shall immediately so notify his employees by appropriate action.

S. 2926, 73d Cong. § 304(b) (1934), *reprinted in* 1 NLRB, Legislative History of the National Labor Relations Act, 1935, at 14 (1959) (hereinafter "Leg. Hist."); H.R. 8423, 73d Cong. § 304(b) (1934), *reprinted in* 1 Leg. Hist. at 1140. That version further provided under Section 5(5) that it would be an unfair labor practice "to fail to notify employees in accordance with the provisions of section

304(b)." S. 2926 §5(5), *reprinted in* 1 Leg. Hist. at 3; H.R. 8423 § 5(5), *reprinted in* 1 Leg. Hist. at 1130.

Contrary to House Amici's claim, Congress's withdrawal of Section 304(b) and Section 5(5) appears to have been predicated on concerns about the abrogation provision, not the notice-posting provision. For example, the United Mine Workers President (*see* House Amici 21 n.19) objected to the scope of abrogation, not employee notice. *Hearing on S. 2926 Before the S. Comm. on Educ. & Labor*, 73d Cong. 157 (1934) ("*S. 2926 Hearing*"), *reprinted in* 1 Leg. Hist. 187 (statement of John L. Lewis seeking to exclude certain dispute resolution procedures from Section 304(b)); *id.* at 652-53, 656, *reprinted in* 1 Leg. Hist. 690-91, 694 (testimony of L.L. Balleisen objecting to Section 304(b)'s abrogation, not Section 5(5) requiring notice of abrogation (*see* House Amici 20 n.19)). House Amici italicize portions of the testimony of James A. Emery, General Counsel of the National Association of Manufacturers. House Amici Br. 21-22. But as House Amici's own account demonstrates, these references were ancillary to Mr. Emery's repeated objection that, if an employer had "initiated or participated" in setting up a plan for dealing with its employees, Section 304(b) abrogated such arrangements "no matter how old they may be, or agreeable to the parties . . . . [T]hey are not only abrogated by this bill, but the employer must immediately so notify his employees, and they are destroyed." S. 2926 Hearing 360, *reprinted in* 1 Leg.

Hist. 394. In fact, it was when Mr. Emery raised the abrogation issue that Senator Wagner acknowledged "there is raised there a more serious question of constitutional law," and the Committee unanimously agreed to eliminate Section 304(b). *Id.* at 360-61, *reprinted in* 1 Leg. Hist. 394-95.

In addition, the type of notice implicated by Section 304(b) differs in kind from the notice in the Rule, and as both district courts recognized, the rejection of one in no way implies rejection of the other. J.A. 271 n.15; *NAM*, 846 F. Supp. 2d at 47 n.8. Section 304(b) required an individualized notice prepared by the employer, not a uniform government-supplied notice. The rejected notice was exclusively devoted to detailing the provisions of private agreements no longer in effect at particular facilities, and was not an official government statement of key provisions of a public law applicable to employees nationwide.[7]

In sum, neither House Amici nor the Chamber offer any legislative history documenting Congress's consideration of whether employers subject to the NLRA should post a government-provided notice setting forth the core provisions of the Act and informing employees of their rights and how to exercise them. Thus, their arguments disregard the accepted legal principle that weight should be given to

[7] House Amici's sole response to these points, that "the notice provisions removed from Wagner Act legislation specifically dealt with an employer's failure to satisfy notice obligations," House Amici Br. 7 n.2, does not speak to the Board's point here, that 304(b) is not similar in any relevant way to the Board's notice posting rule.

Congress's rejection of a bill or amendment *only* if it is clear that Congress considered and rejected the very position argued before the court. *Blau v. Lehman*, 368 U.S. 403, 411-12 (1962); *see also* NLRB Br. 34.

II. Contrary to the Chamber, Section 8(a)(1) authorizes the Board to require employers to post official notices informing employees of their NLRA rights.

With regard to the Board's alternative argument that this Rule is authorized as an interpretation of Section 8(a)(1), the Chamber's response is perfunctory and erroneous, and does not meaningfully dispute that the Board is entitled to interpret Section 8(a)(1) and Section 7 in this way. NLRB Br. 38-45. On this basis alone the Board should prevail.

A. Section 8(a)(1) is deliberately broad and indeterminate, and authorizes the Board to adapt the Act.

The Chamber concedes that the Board can "promulgat[e] rules defining any ambiguous provisions in Section 8." Ch. Br. 20 n.4. The Chamber fails to recognize that this is precisely what the Rule does. NLRB Br. 38-45.

Section 8(a)(1) is the quintessential example of an unclear statutory provision within the meaning of *Chevron*. Indeed, in *Republic Aviation*, which was relied upon in *Chevron*, 467 U.S. at 844-45, the Supreme Court stated that Section 8(a)(1) "did not undertake the impossible task of specifying in precise and unmistakable language each incident which would constitute an unfair labor practice." *Republic Aviation*, 324 U.S. at 798. On the contrary, that Act left to the

Board the work of applying the Act's general prohibitory language in the light of the infinite combinations of events which might be charged as violative of its terms." *Id.* Congress deliberately designed Section 8(a)(1) as a "general provision" authorizing the Board to construe the statute to address problems that are not "spell[ed] out with particularity" in the other unfair labor practice provisions. S. Rep. No. 74-573, at 9 (*discussed* at NLRB Br. 43-45).

Congress intended for the interpretation of Section 8(a)(1) to evolve over time, because the Board has "[t]he responsibility to *adapt* the Act to changing patterns of industrial life." *See Weingarten*, 420 U.S. at 266 (emphasis added); *cf. AHA*, 499 U.S. at 618 (Section 6's authority "'from time to time to make, amend, and rescind' rules and regulations *expressly contemplates the possibility that the Board will reshape its policies on the basis of more information and experience in the administration of the Act*" (emphasis added)). For this reason, the Chamber errs in arguing that the Board's Rule would mean that "all employers have been violating the NLRA for more than seventy-five years."[8]

[8] As in *Weingarten*, the Chamber's argument "misconceive[s] the nature of administrative decisionmaking," and would inappropriately "fr[ee]ze the development" of the law. 420 U.S. at 265-66. Indeed, "the APA allows an agency to adopt an interpretation of its governing statute that differs from a previous interpretation and . . . such a change is subject to no heightened judicial scrutiny." *Air Transport Ass'n v. Nat'l Mediation Bd.*, 663 F.3d 476, 484 (D.C. Cir. 2011); *see FCC v. Fox Television Stations, Inc.*, 556 U.S. 502, 515 (2009) ("[I]t suffices that the new policy is permissible under the statute, that there are good reasons for it,

The Chamber's analysis of Section 8(a)(1) is little more than a bare assertion that the Board is "extending" Section 8(a)(1) by "placing a burden on employers to affirmatively educate employees." Ch. Br. 19. But the Rule does *not* require employers to educate employees—their only "burden" is to *post a government notice* like many other government-issued workplace notices. It is the government which is educating employees.

Nor is Section 8(a)(1) limited to negative proscriptions, as the Chamber suggests. Ch. Br. 19. The Board has already demonstrated that Section 8(a)(1) also encompasses many affirmative duties necessary to the effective exercise of Section 7 rights, such as the duties to bargain and provide information. NLRB Br. 43-45.; *Tech. Serv. Solutions*, 324 NLRB 298, 301-02 (1997).[9] In addition, the Board has found that Section 8(a)(1) is violated by an employer's failure to take action in response to an employee's interference with Section 7 rights of a co-worker. *St. Francis Med. Ctr.*, 347 NLRB 368, 369 (2006); *Champagne Color, Inc.*, 234 NLRB 82, 82 (1978). The Chamber attempts to distinguish such cases as requiring only affirmative employer action "to avoid committing a ULP." Ch. Br.

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and that the agency *believes* it to be better, which the conscious change of course adequately indicates.").

[9] Since *Art Metals Construction Co. v. NLRB*, 110 F.2d 148, 150-51 (2d Cir. 1940), Section 8(a)(1) has consistently been found to include the affirmative employer duty to bargain. *See Standard Oil Co. of Cal., W. Ops., Inc. v. NLRB*, 399 F.2d 639, 641-42 (9th Cir. 1968) (describing this point as "elementary").

24 n.6. But the duty to post official notices of NLRA rights likewise involves affirmative employer action required to avoid committing an unfair labor practice. *See* J.A. 195; 76 Fed. Reg. at 54,049 (setting forth 29 C.F.R. § 104.210).

B. The Chamber erroneously claims that Section 8(a)(1) precedent does not support the Board's notice-posting Rule.

The Chamber attempts to distinguish *Weingarten* on the grounds that there was a "specific right being protected: namely, the right to act in concert for mutual aid and protection." Ch. Br. 52-53. But the Chamber admits that *Weingarten*'s rule is itself an "extension of the 'mutual aid and protection' concept," and is not explicitly described in the Act. *Id.* at 53. As in *Weingarten*, the Board's notice-posting Rule is a common-sense application of Section 7's protection of rights to engage in, among other things, "concerted activities," because it informs employees of those rights, thus eliminating the ignorance that impedes their free exercise.

The Chamber's suggestion that the Board's notice-posting Rule involves Section 8(a)(1) regulation that is different in kind from the regulation upheld in *Weingarten* does not bear close scrutiny. To dismiss the one as impermissibly "proactive" and accept the other only because it is "reactive," as the Chamber does, Ch. Br. 49-53, is to ignore the relevant similarities. In both situations, the Board is reacting to evidence of interference with employee rights. The Board crafted its notice-posting Rule on the basis of an administrative record documenting the

harms that flow from employees lacking notice of their NLRA rights in their workplace. Similarly, the Board formulated its *Weingarten* rule based on an administrative record documenting the need for that rule. And in both instances, the rules that the Board devised to respond to that documented interference are enforceable only when, in reaction to unfair labor practice filed by a private party, the Board finds merit in those charges and issues an order that is subject to review in the courts of appeals. *See NLRB v. Jones & Laughlin Steel Corp.*, 301 U.S. 1, 47 (1937) (recognizing that Board orders are not self enforcing and "only when sustained by the court may the order be enforced.").

Nor is there merit to the Chamber's argument that *Weingarten* and other similar Section 8(a)(1) cases are different in kind because they respond to employer conduct that arguably violates Section 8(a)(1), while the notice-posting Rule addresses a mere failure to act. The Chamber claims that this failure cannot violate Section 8(a)(1), because "there is nothing in the NLRA that makes the failure to post the Board's notice a violation of anything in the Act itself." Ch. Br. 52. The Chamber's argument ignores that Congress deliberately crafted Section 8(a)(1) in terms broad enough to permit the Board to create other affirmative duties in addition to the one affirmative duty Congress identified in Section 8(a)(5). *See* NLRB Br. 43-44.

As a practical matter, moreover, the suggestion that the notice-posting Rule is regulation of employer inaction is wide of the mark. To be an employee is to be subject to employer direction and control. *See* Restatement (Third) of Agency Section 7.07 cmt. f (2006) ("[A]n agent is an employee only when the principal controls or has the right to control the manner and means through which the agent performs work."). As illustrated by the numerous employee handbook cases that have come before the Board and the courts, the directions employers give employees are too often cast in terms that interfere with the employees' Section 7 rights. In these cases, the Board has been faced with employer rules which—even when they do not cover protected conduct explicitly—nonetheless violate Section 8(a)(1) because employees could reasonably read the rules as prohibiting conduct protected by the Act. *See Guardsmark, LLC v. NLRB*, 475 F.3d 369, 374 (D.C. Cir. 2007) (handbook prohibited "fraternizing"); *Lafayette Park Hotel*, 326 NLRB 824, 825 (1998), *enforced mem.*, No. 98-1625, 1999 WL 1215578, at *1 (D.C. Cir. Nov. 26, 1999)); *see* NLRB Br. 45 n.19. The implicit predicate for these cases is the understanding that employees do not know their rights. *Ingram Book Co.*, 315 NLRB 515, 515-16 (1994) (so-called "savings clause" for Section 7 rights is insufficient because "[t]here is no way an employee is likely to know if any of the handbook provisions run afoul of some law or other unless the employer so advises him or her").

On a case-by-case basis, the Board with court approval has required individual employers to clarify their overly broad rules and to post a government supplied remedial notice that informs their employee of their Section 7 rights. *See Cintas Corp. v . NLRB*, 482 F.3d 463, 467 (D.C. Cir. 2007) (remedial notice required where the handbook prohibited the "unauthorized release of confidential information").

Through this gradual process of elucidating litigation, Section 8(a)(1) already operates to address the problem that employees subject to the direction and control of their employer are at a disadvantage vis-à-vis their employers in understanding their NLRA rights. The Board's Section 8(a)(1) decisions work to ameliorate that problem by placing obligations on employers to cease engaging in specific conduct that the Board has identified as interfering with Section 7 rights and by posting official notices calling attention to particular rights. But the record underlying the Board's notice-posting Rule demonstrated that particular instances of employer rules interfering with Section 7 rights reflect a more general problem that employees dealing with their employers are unaware that they have NLRA rights. 76 Fed. Reg. at 54,016. The Rule addresses this problem.

As previously argued, the Rule corrects the long-standing anomaly that, until now, the Board has been almost unique among agencies and departments administering major federal labor and employment laws in not requiring covered

employers to routinely post notices at their workplaces informing employees of their statutory rights and the means by which to remedy violations of those rights. The prevailing practice reflects a common understanding that such notices are a minimal necessity to ensure that employees are informed of their workplace rights.

Exercising its responsibility to adapt the Act to "the changing patterns of industrial life," the Board reasonably concluded that this longstanding gap in the NLRA's protections should be addressed now. J.A. 159; 76 Fed. Reg. at 54,013 (citing *Weingarten*, 420 U.S. at 266). No one disputes that rates of unionization have decreased dramatically since their high point in the 1950s. As the Board noted, "Fewer employees today have direct, everyday access to an important source of information regarding NLRA rights and the Board's ability to enforce those rights." J.A. 159; 76 Fed. Reg. at 54,013. Consequently, mechanisms that may have made the lack of notice tolerable previously are no longer working in an employment environment where the traditions of collective bargaining are far less visible than in the past, and Section 7 rights are less well known. *Cf. Cent. Hardware Co. v. NLRB*, 407 U.S. 539, 543 (1972) (noting that to a significant degree, employees depend on others to learn about NLRA rights).

The Board also noted that the Section 7 right of employees (including non-union ones) to engage in "concerted activities" for the purpose of "mutual aid and protection" is "the most misunderstood" of the Section 7 rights, and "not subject to

an easy Internet search by employees who may have no idea of what terms to use, or even that such a right might be protected at all." J.A. 163; 76 Fed. Reg. at 54,017 n.83.

Taking account of the fact that required postings of employee rights in the workplace are commonplace, as well as the sharp decrease in employees' direct connection to sources of NLRA information, the Board was persuaded that the Rule was necessary to remove an impediment to the free exercise of Section 7 rights. Giving employees the same kind of notice of their NLRA rights that is the norm with respect to other employee protection regimes is a reasonable means by which to further the provisions of the Act.

In sum, Congress enacted Section 8 with the expectation that the Board would adapt its general provisions to new situations. Congress also empowered the Board to remove impediments to the free exercise of Section 7 rights by imposing additional affirmative duties when necessary. That is what the Board has done here. In so doing, the Board has neither "contravene[d] the expressed intent of Congress, nor unreasonably appl[ied] its mandate, in reaching the interpretation that this rule reflects." *Seafarers*, 394 F.3d at 207. The Rule "carr[ies] out" provisions of the NLRA, as required by Section 6, and alternatively, is a lawful interpretation of Section 8(a)(1) under *Weingarten*. *See* NLRB Br. 38, 40-42.

CONCLUSION

For the reasons explained in the Board's opening and reply briefs, the district court's decision should be reversed and remanded for the court to pass on the remaining challenges to the Rule.

/s/ Abby Propis Simms
ABBY PROPIS SIMMS
Deputy Assistant General Counsel

DAWN L. GOLDSTEIN
Supervisory Attorney

JOEL F. DILLARD
KEVIN P. FLANAGAN
MICAH P.S. JOST
MARK G. ESKENAZI
Attorneys

Special Litigation Branch
National Labor Relations Board
1099 14th Street, N.W.
Washington, D.C. 20570
Phone: (202) 273-2930
Fax: (202) 273-1799
E-mail: Abby.Simms@nlrb.gov

LAFE E. SOLOMON
Acting General Counsel

CELESTE J. MATTINA
Deputy General Counsel

JOHN H. FERGUSON
Associate General Counsel

MARGERY E. LIEBER
Deputy Associate General Counsel

ERIC G. MOSKOWITZ
Assistant General Counsel

National Labor Relations Board
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UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

No. 12-1757 **Caption:** Chamber of Commerce, et al. v. NLRB, et al.

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Phillip A. Miscimarra
Morgan, Lewis & Bockius, LLP
Fifth Floor
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San Diego, CA 92130

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