IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

NATIONAL ASSOCIATION OF MANUFACTURERS, et al.,	)	
Appellants	)	
v.	)	No. 12-5068
NATIONAL LABOR RELATIONS BOARD, et al.,	)	
Appellees.	)	

OPPOSITION TO EMERGENCY MOTION FOR INJUNCTION PENDING APPEAL AND/OR FOR EXPEDITED CONSIDERATION

Appellees National Labor Relations Board et al. ("NLRB" or "the Board") oppose appellants' emergency motion for injunctive relief pending appeal ("Mot.") in this challenge to the Board's recent rule, Notification of Employee Rights Under the National Labor Relations Act, 76 Fed. Reg. 54,006 (August 30, 2011) (to be codified at 29 C.F.R. pt. 104) ("the rule"). The rule's Subpart A imposes a duty on employers within the Board's jurisdiction to post an official government notice entitled, "Employee Rights Under the National Labor Relations Act." Subpart A 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. Here, the district court upheld Subpart A's posting requirement, but enjoined two enforcement mechanisms in Subpart B challenged by appellants.

Appellants have failed to make the showing necessary to justify enjoining Subpart A's notice-posting requirement. An injunction is an "extraordinary remedy." *Winter v. Natural Res. Def. Council, Inc.*, 555 U.S. 7, 24 (2008) (quotation omitted); *see also Munaf v. Geren*, 553 U.S 674, 689-90 (2008). The propriety of an injunction is judged by reference to four criteria: "(i) the likelihood that the moving party will prevail on the merits; (ii) the prospect of irreparable injury to the moving party if relief is withheld; (iii) the possibility of harm to other parties if relief is granted; and (iv) the public interest." D.C. Cir. R. 18(a)(1).[1]

[1] In resolving motions for relief pending appeal and for preliminary injunctions, courts consider similar factors. *See* Mot. Ex. 4 ("Ex. 4") at 2, n. 1 (citing *Nken v. Holder*, 129 S. Ct. 1749, 1761 (2009)). Before *Winter* and *Munaf*, many courts, including this one, balanced these four factors. *See Sanofi-Aventis U.S. LLC v. FDA*, 733 F. Supp. 2d 162, 167 (D.D.C. 2010) (citing cases). Since then, a circuit split has emerged regarding whether the factors should be balanced or treated as independent requirements. *Id.* (noting that the Fourth Circuit has held that the prior test, which permitted "flexible interplay among the elements may no longer be applied after *Winter*," while the Second, Seventh, and Ninth Circuits use a "modified, sliding-scale" approach). This Court has not had to decide the issue because parties seeking injunctive relief have not met either approach's requirements. *See Sherley v. Sebelius*, 644 F.3d 388, 392-93 (D.C. Cir. 2011);

1. Appellants Have Demonstrated Neither A Strong Likelihood Of Success On The Merits Nor Sufficiently "Serious Legal Questions" Justifying An Injunction Pending Appeal.

None of appellants' myriad claims show a strong likelihood of success on the merits—nor even present "serious legal question[s]" (the lower standard cited by appellants). *See* Mot. at 3 (citing *Wash. Metro. Area Transit Comm'n v. Holiday Tours, Inc.*, 559 F.2d 841 (D.C. Cir. 1977) ("*WMATC*")). Appellants' motion should be rejected on this ground alone.

a. Requiring Employers to Post a Notice of Employee Rights Is Within the Board's Statutory Authority.

The district court's scrutiny of Subpart A of the rule under the two-step analysis of *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984) is so evidently reasonable as to preclude appellants' likelihood of success on their most crucial point.

i. *Chevron* Step 1

Under *Chevron*'s first step, the court's task is to "employ[] traditional tools of statutory construction" to determine "whether Congress has directly spoken to the precise question at issue." 467 U.S. at 843. Here, the step one issue is the proper construction of the Act's grant of legislative rulemaking powers in

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Davis v. Pension Benefit Guar. Corp., 571 F.3d 1288, 1292 (D.C. Cir. 2009). Likewise, appellants here meet neither standard.

Section 6.[2] The district court properly rejected appellants' argument that Section 6 only permits the Board to establish rules for elections and the adjudication of unfair labor practice charges. Mot. Ex. 2 ("Ex. 2") at 12.

Consistent with the Supreme Court's recognition of the Board's broad rulemaking authority in *American Hospital Association v. NLRB*, 499 U.S. 606, 609-10 (1991) ("*AHA*"), the district court found that Section 6 "does not limit the Board to enacting rules for carrying out particular duties; rather, it expressly grants the Board the broad rulemaking authority to make rules necessary to carry out any of the provisions of the Act." *Id.; accord U.S. v. Picciotto*, 875 F.2d 345, 347-48 (D.C. Cir. 1989) (legislative rules may "creat[e] new duties"). The court found that Subpart A's requirement that employees be given notice of their NLRA rights carries out Section 7 of the NLRA, which grants employees the right to join and refrain from union and other concerted activity, 29 U.S.C. § 157, as well as the NLRA's Section 1 policy "to encourage and protect collective bargaining activity," 29 U.S.C. § 151; Ex. 2 at 12, 15.

[2] 29 U.S.C. § 156 ("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 subchapter.").

Appellants argue that *AHA* is distinguishable because the rule upheld there furthered the Board's duty to determine appropriate bargaining units and would only be triggered by a privately-initiated election petition authorized by 29 U.S.C. § 159. Mot. at 6 n.4. Given the breadth of Section 6's authorization to the Board to make rules carrying out *all* the provisions of the NLRA, however, the district court reasonably concluded that a notice-posting requirement designed to facilitate the free exercise of employee rights was no less valid than the rule upheld in *AHA*. Ex. 2 at 15-16. Appellants' contrary conclusion, the court found, overlooked that Congress knew how to limit the Board's powers to carrying out its duties under the NLRA's election and unfair labor practice provisions, 29 U.S.C. §§ 159-160, and did so expressly in tethering the Board's subpoena powers to its authority under those sections. Ex. 2 at 16-17 (discussing 29 U.S.C. § 161). What is significant is that, contrary to appellants' central *Chevron* step one claim, "Congress did not similarly limit the scope of the Board's rulemaking power under [Section 6]." Ex. 2 at 17.[3]

[3] The district court also found that the various cases appellants cited for the proposition that Congress limited the Board's authority to remedy unfair labor practices did not "purport to consider the scope of the Board's general rulemaking authority" and thus were inapposite. *Id.* at 17-18. And while appellants continue to urge that the rule's Subpart A impermissibly places legal obligations upon employers nationwide, regardless of whether any election petition or unfair labor practice charge is ever filed against them, the reality is that all employers within

Section 6's "broad, express grant of rulemaking authority" to the Board, *id*. at 19, also suffices to undermine appellant's claim that the silence of the NLRA with respect to a posting of rights requirement supports its *Chevron* step one attack on Subpart A. *Id*. at 16 n.8. As the district court recognized, there are many possible reasons that the NLRA does not include an express notice-posting provision like the ones enacted in other employment statutes; thus, *Chevron*'s own analysis of legislative silence together with this Court's guidance on that question, stand in the way of appellants' argument that the NLRA's silence precluded the Board from adopting the rule at issue. Ex. 2 at 13, 16 n.8 (citing *Chevron*, 467 U.S. at 865).[4]

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the Board's jurisdiction already are under a duty to follow the nationwide rules that the Board has developed through adjudication. *E.g*., *Republic Aviation Corp. v. NLRB*, 324 U.S. 793 (1945) (barring employer interference with employee solicitation for union membership on non-working time in non-work areas of the employer's property). No serious legal question is presented merely because Subpart A, a reasonable notice-posting rule developed through legislative rulemaking, has the same scope.

[4] *See, e.g., Serono Labs, Inc. v. Shalala*, 158 F.3d 1313, 1319 (D.C. Cir. 1998) (rejecting APA challenge, because while "nothing in the statute *permits* the use of animal assays, the important point is that nothing in the statute *prohibits* their use"); *Cheney R.R. Co. v. ICC*, 902 F.2d 66, 69 (D.C. Cir. 1990) ("the contrast between Congress's mandate in one context with its silence in another suggests not a prohibition but simply a decision *not to mandate* any solution in the second context, i.e., to leave the question to agency discretion."); *Pub. Serv. Comm'n of N.Y. v. FPC*, 327 F.2d 893, 897 (D.C. Cir. 1964) ("All authority of the Commission need not be found in explicit language. . . . While the action of the

Finally, the district court reasonably rejected appellants' alternative argument that the legislative history is not silent but rather establishes that Congress consciously denied the Board the authority to require employers to post government-provided notices of statutory rights. As the district court found, unenacted Section 304(b) discussed by appellants (Mot. at 7), *see* S. 2926, 73d Cong. (1934), reprinted in 1 NLRB, LEGISLATIVE HISTORY OF THE NATIONAL LABOR RELATIONS ACT, 1935, at 1 (1935); H.R. 8423, 1 Leg. Hist. 1140, was "completely different from the general notice provision in the Final Rule at issue here." Ex. 2 at 17 n.8. The notice required by Section 304(b) was an individualized notice prepared by the employer, not a uniform government-supplied notice; it was exclusively devoted to detailing the provisions of private agreements no longer in effect at particular facilities, not an official government statement of the key provisions of a public law that applied to employees nationwide.[5]

Commission must conform with the terms, policies and purposes of the Act, it may use means which are not in all respects spelled out in detail.").

[5] Equally unavailing is the appellants' reliance (Mot. at 5-8) on cases where the limitation on the agency's regulatory authority was based on specific statutory language and legislative history—precisely what is lacking in this case. *See Local 357, Teamsters v. NLRB*, 365 U.S. 667, 673-74 (1961); *Ry. Labor Executives Ass'n v. NMB*, 29 F.3d 655, 665-68 (D.C. Cir. 1994) (en banc). Nor, as the district court found, Ex. 2 at 13-14, is the Board's requirement that employers notify employees

Because, as shown, the district court's *Chevron* step one analysis of the rule's Subpart A is soundly based upon the broad language of Section 6 and relevant decisions of the Supreme Court and this Court, appellants have failed to meet their burden to establish a strong likelihood of success on the merits.

ii. *Chevron* Step 2

Under *Chevron's* second step, the court's task where "the statute is silent or ambiguous with respect to the specific issue" is to decide "whether the agency's answer is based on a permissible construction of the statute." 467 U.S. at 843. The reasonableness of the agency's statutory analysis is the touchstone. *Mayo Found. for Med. Educ. & Research v. United States*, 131 S. Ct. 704, 714 (2011); *see also Cont'l Air Lines, Inc. v. Dep't of Transp.*, 843 F.2d 1444, 1452 (D.C. Cir. 1988) ("'Reasonableness' in this context means . . . the compatibility of the agency's interpretation with the policy goals . . . or objectives of Congress.").

Here, as the district court found, appellants have "not even proffer[ed] an argument for why the Court should find [the rule] unreasonable should it reach

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of their statutory rights fairly analogized to the FTC's attempt to regulate the practice of law struck down in *American Bar Association v. FTC*, 430 F.3d 457 (D.C. Cir. 2005). As the court found, "The Board is not attempting to regulate entities or individuals other than those that Congress expressly authorized it to regulate, and it is not extending its reach to cover activities that do not fall within the ambit of the Act." Ex. 2 at 14.

Chevron's second stage." Ex. 2 at 20-21. Given the close nexus between employees' awareness of their NLRA rights and the realization of the Act's objectives through the exercise of its various provisions, the district court had no difficulty in concluding that the Board's rule satisfies *Chevron*'s "reasonableness" standard because such a gap-filling requirement is wholly "compatible . . . with the policy goals . . . or objectives" of the NLRA. *Id.* In view of the district court's wholly justified *Chevron* step two findings, appellants are in no position to claim that they have a strong likelihood of success on the merits. [6]

b. The Notice-Posting Requirement Does Not Impair First Amendment or Section 8(c) Rights.

Appellants' free speech arguments fare no better. Appellants claim that the First Amendment and Section 8(c) of the Act shield employers from the general obligation to post a government notice in the workplace that informs employees of

[6] Alternatively, Subpart A may be upheld under *Mourning v. Family Publications Service, Inc.*, 411 U.S. 356, 369 (1973), which holds that the validity of a regulation promulgated under a general grant of rulemaking authority will be sustained so long as it is "reasonably related to the purposes of the enabling legislation." Whether Mourning is analytically distinct or simply affords agencies a heightened level of deference under *Chevron* step two, *see* Ex. 2 at 20 n. 10 (citing *Colo. River Indian Tribes v. Nat'l Indian Gaming Comm'n*, 383 F. Supp. 2d 123, 144-45 (D.D.C. 2005)), *Mourning* only strengthens the Board's argument for denying the requested injunction.

their legal rights. Mot. at 9, 14-15.[7] According to appellants, such a requirement is inimical to the freedom to refrain from speaking. *See id.* at 15. But as the district court properly concluded,

> the Board's notice posting requirement does not compel employers to say anything. The poster that the regulation prescribes for the workplace is "government speech," which is "not subject to scrutiny under the Free Speech Clause." *See Pleasant Grove City v. Summum*, 555 U.S. 460, 464 (2009). . . .
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> The poster at issue here fits squarely into the requirements for government speech because its content is entirely a message from the government. The poster makes the source of its content clear . . . . Furthermore, the text of the poster is written by a government agency and may not be altered by any private individual.

Ex. 2 at 38.

Citing *Wooley v. Maynard*, 430 U.S. 705 (1977), appellants argue that the notice is unlawful government speech because employers must post it on their private property. Mot. at 9. But appellants misunderstand *Wooley*, in which the Supreme Court invalidated New Hampshire's requirement that citizens "publicly advertise" the state motto "Live Free or Die" on their license plates. 430 U.S. at 717 n.15. The critical feature of that challenged law was that it forced private

[7] Appellants argued below—and appear to argue here—that the Board's rule violates Section 8(c) of the Act because, in appellants' view, that provision incorporates a First Amendment right against compelled speech. *See* Mot. at 9. The district court correctly rejected this claim, which piggybacks on their unavailing First Amendment theory. *See* Ex. 2 at 42 n.25.

parties to disseminate an "ideological point of view," *id.* at 715. An accurate explanation of legal rights is, by contrast, non-ideological. Therefore, appellants' free speech claims are not advanced by their reliance on *Wooley*.

In addition, appellants' First Amendment and Section 8(c) arguments run headlong into established precedents, including a decision of this Court, that reject free speech challenges to workplace notice-posting obligations. In *UAW-Labor Employment & Training Corp. v. Chao*, 325 F.3d 360, 365 (D.C. Cir. 2003), this Court rejected the argument that the "right not to speak" exempted federal contractors from the requirement to post a notice informing employees of their right to refrain from supporting unions. *Id.* And in *Lake Butler Apparel Co. v. Secretary of Labor*, 519 F.2d 84, 89 (5th Cir. 1975), *cited in Chao*, 325 F.3d at 365, the Fifth Circuit rejected as "nonsensical" an employer's First Amendment challenge to the OSHA requirement to post a workplace notice. Appellants' failure to mention, let alone persuasively address, these precedents only underscores the weakness of their First Amendment arguments.

c. The Rule is Neutral and the Board Offered a Rational Explanation For Its Issuance.

Appellants complain that the Board's poster "omits important statements of employee rights that are not 'pro-union' in character." Mot. at 10. But Appellants do not specify what "important" rights have been omitted. In any event, as the

district court recognized (Ex. 2 at 5-6), the required notice is balanced. It includes both the employees' right to engage in union activity and their right to refrain from supporting unions. *Id.* It also lists, in parallel columns, examples of the conduct of employers and unions that the NLRA prohibits. *Id.* at 6. Although appellants may have preferred a different poster—or no poster at all—their criticism of the Board's poster as biased in favor of unions falls far short of establishing that they have a strong likelihood of success on the merits.

Equally without merit is appellants' argument that the need for the Rule was unsupported by the administrative record. Mot. at 10. As the district court found, the Board cited "studies, law review articles, and comments" to support its conclusions, and while the Board did not commission its own studies, it acted in accord with this Circuit's precedent in affording the public the opportunity to bring any contrary evidence to its attention. Ex. 2 at 22-23. As the district court found

> This is a textbook example of a circumstance where factual determinations are primarily of a judgmental or predictive nature, and thus, "complete factual support in the record for the [agency's] judgment or prediction is not possible or required[] . . . ."

Id. at 25 (first alteration in original) (quoting *FCC v. Nat'l Citizens Comm.*

for Broad., 436 U.S. 775, 814 (1978)).[8]

In sum, not only have appellants failed to demonstrate a likelihood of success on the merits of their challenge, but their claims do not even meet *WMATC*'s lower standard, which asks whether there are "questions going to the merits so serious, substantial, difficult and doubtful, as to make them a fair ground for litigation and thus for more deliberative investigation." 559 F.2d at 844. As the district court found, appellants "complain loudly" about the Board's exceeding its Section 6 authority, Ex. 2 at 15, but "[n]either the text of the statute nor any binding precedent support [appellants] narrow reading of a broad, express grant of rulemaking authority." *Id*. at 19. Similarly, as the district court recognized, *id.* at 37-42, appellants have failed to support their far-reaching view of the First Amendment, which would cast doubt upon many other current workplace posters notifying employees of their statutory rights. These are not close questions justifying the grant of extraordinary relief.[9]

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[8] This Court should also uphold the district court's findings regarding severability. The district court correctly found that the rule is severable, as shown by the Board's clear intent and the fact the rule could function sensibly without the challenged remedies. Ex. 2 at 42-45 (citing 76 Fed. Reg. at 54,031 and *MD/DC/DE Broadcasters Ass'n v. FCC,* 253 F.3d 732, 734 (D.C. Cir. 2001)).

[9] None of appellants' remaining arguments need be addressed. Their claims of alleged errors in the district court's discussion of the Section 8(a)(1) and equitable tolling mechanisms (Mot. at 11) are not cognizable under this motion, because the

2. Appellants Have Failed To Demonstrate That An Injunction Pending Appeal Is Required To Avoid Irreparable Injury.

To warrant injunctive relief from this Court, appellants must "demonstrate that irreparable injury is *likely* in the absence of an injunction." *Winter,* 555 U.S. at 22 (emphasis in original). Appellants have not and cannot meet their burden because they cannot show any irreparable harm, much less harm outweighing the significant public interest in the rule's implementation.

Appellants' irreparable harm claim is based primarily upon their assertion, appropriately rejected by the district court, that employers will suffer irremediable injury to their First Amendment rights if they are obligated to post the required notice. Mot. at 14. But, "the finding of irreparable injury cannot meaningfully be

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district court has already enjoined their use. Moreover, appellants waived their claim regarding the rule's animus mechanism (29 C.F.R. § 104.214(b)), by failing to raise it below. Ex. 2 at 45 and n.26 (finding animus claim waived). Similarly, appellants' belated attempt to challenge the rule on the ground that a government notice posting requirement improperly regulates in an area "'controlled by the free play of economic forces'" *(Machinists v. Wis. Employment Comm'n,* 427 U.S. 132, 140 (1976)), is likewise waived (Mot. at 8-9). If appellants wished to raise these arguments, "it was their responsibility to do so in a manner that gave the district court fair notice thereof so that the court could rule on it and the issue could be preserved for appeal." FC Inv. Group v. IFX Markets, Ltd., 529 F.3d 1087, 1095-96 (D.C. Cir. 2008). Lastly, the district court did not abuse its discretion in rejecting certain appellants' efforts to supplement their complaint with a new issue concerning the composition of a new and different Board than that which issued the rule, finding that such a challenge would be irrelevant, unripe, and a cause of undue delay in resolving the fully-briefed merits of the claims. Mot. Ex. 3 at 3.

rested on a mere contention of a litigant, but depends on an appraisal of the validity, or at least the probable validity, of the legal premise underlying the claim of right in jeopardy of impairment." *Wagner v. Taylor*, 836 F.2d 566, 576 n.76 (D.C. Cir. 1987) (internal quotation omitted). Here, there is no "validity" or "probable validity" to appellants' First Amendment claims. As discussed *supra* at 9-11, the Board's poster is government speech, not compelled employer speech, and appellants offer no reason why this notice-posting obligation is any different than the virtually indistinguishable requirements upheld in *Chao* and *Lake Butler*. Accordingly, appellants cannot establish irreparable injury on this basis.

Moreover, the Board reasonably found that the practical costs of compliance with the rule are de minimis (76 Fed. Reg. at 54,042 & n.190), because employers can obtain the notice for free and post a hard copy with a few inches of adhesive tape or a thumb tack, and with a few mouse clicks on an electronic bulletin board. *See* 76 Fed. Reg. at 54,046-47 (to be codified at 29 C.F.R. § 104.202(d)) and § 104.202(f)). As the district court noted, if the rule is struck down the notice can be removed. "Since the notice simply notifies employees of the rights that they are already guaranteed by law, any increased employee awareness that may result

cannot be deemed 'irreparable harm.'" Ex. 4 at 4.[10]

Two other harms alleged by appellants concern the unfair labor practice and animus enforcement mechanisms in the Board's Rule. Mot. at 15-16. As to the first, the district court has already enjoined implementation of the unfair labor practice provision of the Board's rule.[11] This Court can do no more.[12]

Nor is appellants' irreparable harm argument improved because the district court allowed that, on a case by case basis, the Board might still find that a failure to post the notice supports a finding of an unfair labor practice. The district court

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[10] As the Board noted in the Final Rule, 76 Fed. Reg. at 54,010, the Department of Labor issued a similar rule over sixty years ago requiring employers to post a workplace notice pursuant to the Fair Labor Standards Act (FLSA). *See* 14 Fed. Reg. 7,516, 7,516 (Dec. 16, 1949) (finding that "effective enforcement of the [FLSA] depends to a great extent upon knowledge on the part of covered employees of the provisions of the act and the applicability of such provisions to them, ..."). The Board is unaware of any challenge to the Labor Department's authority to promulgate or enforce this requirement since its enactment. In light of that rule's age, as well as the prevailing practice of posting employment rights in the workplace, it is difficult to fathom how imposing the obligation to post NLRA rights constitutes irreparable injury.

[11] The Board may, in due course, choose to file a cross-appeal regarding the injunction entered against the Board.

[12] Similarly, there is no cognizable irreparable harm to any appellant who might be faced in some future administrative case with the application of the rule's animus provision. Even aside from the fact that appellants failed to argue to the district court that this provision is unlawful (see n. 9 above), any such employer will have ample administrative and judicial review of any defenses to an animus finding before a Board remedial order can be imposed. *See* 29 U.S.C. § 160.

made clear that any such future finding by the Board would need to be "based on the facts and circumstances of the individual case before it that the failure to post interfered with the employee's exercise of his or her rights." Ex. 2 at 31. Appellants cannot show irreparable harm based upon an inchoate possibility that the Board might reach such a conclusion in an as-yet-unfiled case. Even if the Board might consider such a theory in a particular case, there could be no irreparable harm because the charged party would have an adequate opportunity to secure judicial review of that decision before being required to comply with any Board order. 29 U.S.C. § 160(e)-(f); *see Myers v. Bethlehem Shipbuilding Corp.*, 303 U.S. 41 (1938) (the final court review procedure is both adequate and exclusive, and courts are generally not permitted to enjoin ongoing Board proceedings); *see also, e.g., United Aircraft Corp. v. McCulloch*, 365 F.2d 960, 961 (D.C. Cir. 1966). Costs of potential litigation alone do not constitute irreparable harm. *See, e.g., FTC v. Standard Oil Co.*, 449 U.S. 232, 244 (1980).

In sum, if the rule's Subpart A is permitted to go into effect on April 30, 2012, appellants will suffer no cognizable harm supporting an injunction pending appeal.

3. The Possibility of Harm to Other Parties and the Public Interest Weigh Strongly Against Granting Relief Pending Appeal.

In *Nken v. Holder*, 129 S. Ct. 1749, 1761 (2009), the Supreme Court

explained that when the government is the opposing party, the remaining factors of assessing harm to other parties interested in the proceeding and weighing the public interest, merge. 129 S. Ct. at 1761-62. Moreover, the Supreme Court has stressed that "courts of equity should pay particular regard for the public consequences in employing the extraordinary remedy of injunction." *Winter*, 555 U.S. at 24 (quotation omitted). Here, "the balance of equities and consideration of the overall public interest in this case tip strongly in favor of" the Board. *See id*. at 26.

Appellants minimize the injury to the Board if the rule is enjoined, contending that the Board's only injury will be delay. Mot. at 16. But the true measure of the harm caused by delayed implementation is not its impact on the Board as an institution, but on the Board as the agency charged with protecting the public interest in the exercise of the rights guaranteed by the NLRA. *See Phelps Dodge Corp. v. NLRB*, 313 U.S. 177, 192-95 (1941). Congress has decided that the exercise of those rights serves the public interest. *See* 76 Fed. Reg. at 54,006 (citing 29 U.S.C. § 151). And the Board has concluded that there exists a widespread deficit in awareness of NLRA rights. *Id.* The rule thus serves the public interest because "[i]nforming employees of their statutory rights is central to advancing the NLRA's promise of 'full freedom of association, self-organization,

and designation of representatives of their own choosing.'" *Id.* at 54,007 (quoting 29 U.S.C. § 151); *accord* Ex. 4 at 5 ("Increasing awareness of the law is undoubtedly in the public's interest.").

While it is undeniably true that the Act has existed for 75 years without such a rule, here the Board exercised its responsibility to adapt the Act to "the changing patterns of industrial life," by means of a thorough notice and comment process, and reasonably concluded that this longstanding gap in the NLRA's protections should be addressed. 76 Fed. Reg. at 54,013 (quoting *NLRB v. J. Weingarten*, 420 U.S. 251, 266 (1975)). Now that the Board has determined the significance of that problem, any further delay in implementation only exacerbates it.[13]

In the face of that compelling public interest, appellants can only muster their determination to preserve the status quo for the "millions of employers" subject to the rule. Mot. at 17.[14] But appellants give short shrift to the employees

[13] As the court below noted, "The Board has already delayed implementation of the rule twice while the Court took the time to consider the matter closely, and the Court sees no reason why it should be delayed further." Ex. 4 at 5.

[14] Appellants argue that the public interest will be harmed if the injunction is not granted because of the "tremendous uncertainty and confusion in the business community as to the obligations of employers under the challenged Rule," and because "employers will be unable to determine their compliance obligations." Mot. at 16 n.9, 17. But compliance could hardly be simpler as noted above, especially since most employers are already subject to similar requirements under other workplace laws.

of those employers who are unaware of their rights under the NLRA and who for too long have been uniquely disadvantaged by the absence of any requirement that these rights be brought to their attention through the reasonable, customary means of a workplace poster.[15]

CONCLUSION

For the reasons stated above, appellants' motion should be denied.[16]

RESPECTFULLY SUBMITTED,

ERIC G. MOSKOWITZ
Assistant General Counsel
for Special Litigation
National Labor Relations Board
1099 14th Street, N.W.
Washington, D.C. 20570
Phone: (202) 273-2930
Fax: (202) 273-1799
E-mail: Eric.Moskowitz@nlrb.gov

/s/ Abby Propis Simms
ABBY PROPIS SIMMS
Deputy Assistant General Counsel
DAWN L. GOLDSTEIN
KEVIN P. FLANAGAN
JOEL F. DILLARD
MARK G. ESKENAZI
Attorneys
Special Litigation Branch
E-mail: Abby.Simms@nlrb.gov

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[15] After all, even "if only 10 percent of workers were unaware of [their NLRA] rights, that would still mean that more than 10 million workers lacked knowledge of one of their most basic workplace rights." 76 Fed. Reg. at 54,018 n.96.

[16] Absent an injunction, the Board sees no reason why this case should be handled more expeditiously than the many other cases pending before this Court.