ORAL ARGUMENT SCHEDULED FOR SEPTEMBER 11, 2012
NO. 12-5068
[Consolidated with No. 12-5138]

UNITED STATES COURT OF APPEALS
DISTRICT OF COLUMBIA CIRCUIT

NATIONAL ASSOCIATION OF MANUFACTURERS, *et al*,
Appellants/Cross-Appellees,
vs.
NATIONAL LABOR RELATIONS BOARD, *et al*,
Appellees/Cross-Appellants.

ON CROSS APPEALS FROM AN ORDER OF
THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA
C.A. No. 11-cv-01629-ABJ

REPLY AND RESPONSE BRIEF OF APPELLANTS/CROSS-APPELLEES

/s/ Glenn M. Taubman
Glenn M. Taubman
William L. Messenger
John N. Raudabaugh
c/o National Right to Work Legal
Defense and Education Foundation, Inc.
8001 Braddock Road, Suite 600
Springfield, VA 22160
Tel: (703) 321-8510
gmt@nrtw.org, wlm@nrtw.org, jnr@nrtw.org
Attorneys for National Right to Work
Legal Defense and Education
Foundation, Inc.

/s/ H. Christopher Bartolomucci
H. Christopher Bartolomucci
Bancroft PLLC
1919 M Street, N.W.
Suite 470
Washington, D.C. 20036
Phone: (202) 234-0090
Fax: (202) 234-2806
cbartolomucci@bancroftpllc.com
Attorney for National Federation of Independent Business, Southeast Sealing, Inc., and Racquetball Centers, Inc. d/b/a Lehigh Valley Racquet & 24-7 Fitness Clubs

/s/ Peter N. Kirsanow
Peter N. Kirsanow
Bryan Schwartz
Maynard Buck
Patrick O. Peters
Benesch Friedlander Coplan & Aronoff LLP
200 Public Square, Suite 2300
Cleveland, Ohio 44114-2378
Tel.: 216-363-4500
Fax: 216-363-4588
pkirsanow@beneschlaw.com;
bschwartz@beneschlaw.com
Attorney for National Association of Manufacturers

/s/ Maurice Baskin
Maurice Baskin
Venable LLP
575 7th St., N.W.
Washington, D.C. 20004
Tel: 202-344-4823
Fax: 202-344-8300
mbaskin@venable.com

Attorney for the Coalition
for a Democratic Workplace

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Authorities on which we chiefly rely are marked with asterisks.

Statutes

Regulations

Other

GLOSSARY

NLRB – National Labor Relations Board or "the Board"

NLRA – National Labor Relations Act or "the Act"

STATUTES AND REGULATIONS

All applicable statutes and regulations are contained in the previously filed briefs of the Plaintiff Employers and the Board.

SUMMARY OF ARGUMENT

The briefs of the Board and its *Amici* mischaracterize the language, structure, and history of the NLRA, and ultimately ignore the radically transforming effect that acceptance of their arguments would have on the previously limited functions of the Board. Unless the district court decision is reversed, the Board would acquire exactly the kind of "virtually limitless hegemony" that this Court has warned against in its previous administrative law decisions. *American Bar Ass'n v. FTC*, 430 F. 3d 457 (D.C. Cir. 2005); *Railway Labor Exec. Ass'n v. Nat'l Mediation Bd.*, 29 F. 3d 655 (D.C. Cir. 1994).

The Board's Brief relies on inapposite case law upholding general grants of agency rulemaking authority (*Mourning v. Family Publications Serv., Inc.*, 411 U.S. 356, 369 (1973)), ignoring this Court's requirement of proof that "the specific rule the agency promulgates is a valid exercise of that authority." *See Colorado River Indian Tribes v. National Indian Gaming Commission*, 466 F. 3d 134, 139 (D.C. Cir. 2006). Contrary to the Board's Brief and that of its *Amici*, the general grant of rulemaking authority in Section 6 of the Act does not in any manner justify promulgation of the challenged Rule, which is plainly not necessary to "carry out any provision of the Act." *Chamber of Commerce v. NLRB*, 2012 U.S. Dist. LEXIS 52419 (D.S.C. Apr. 13, 2012). The challenged Rule dramatically

exceeds the previously settled limits of the Board's authority by imposing unprecedented affirmative obligations on millions of employers who are not properly the subject of any Board action.

The Board and its *Amici* fail to identify any evidence of Congressional intent to authorize such a result. They also fail to address or distinguish the holding of this Court which compels the finding that Congress's express delegation of notice posting powers to other agencies, while excluding the Board, is "strong evidence that it did not intend to grant the power" to the NLRB. *Alcoa Steamship Co., v. Fed. Maritime Comm'n*, 348 F. 2d 756 (D.C. Cir. 1965). In sum, nothing in the opposing briefs justifies the district court's action in upholding the challenged Rule under *Chevron* Step 1, and that decision must be reversed.

Equally misguided are the Board's arguments under the First Amendment and Section 8(c) of the Act, which mischaracterize the Plaintiff Employers' contentions and fail to support the district court's decision. The Supreme Court's holdings in *Wooley v. Maynard*, 430 U.S. 705 (1977) and *Chamber of Commerce v. Brown*, 554 U.S. 60 (2008) establish that the challenged Rule constitutes compelled speech that *independently* violates both the Constitution and Section 8(c) of the Act.

Though it is unnecessary to reach the Board's cross-appeal against the district court's decision to enjoin two sub-parts of the challenged Rule, due to the invalidity of the entire Rule, the Board's Brief in support of the cross-appeal nevertheless fails to justify reversal of this portion of the district court's ruling. The district court properly found that the unfair labor practice and equitable tolling provisions of the challenged Rule conflict with the plain language of the Act. These findings further justify striking down the entire Rule on the alternative ground that the offensive provisions of the Rule should not have been severed from the remainder. The Board's brief fails to justify this additional defect in the district court's decision.

For each of these reasons, as further detailed below, the district court's decision should be reversed and the Board's challenged Rule should be set aside in its entirety.

ARGUMENT

I. THE BOARD HAS FAILED TO ESTABLISH ANY STATUTORY AUTHORITY FOR THE CHALLENGED RULE

A. The Board's Brief Fails To Refute The Act's Express and Implied Withholding Of Statutory Authority for the Challenged Rule.

As explained in the Plaintiff Employers' Opening Brief and in Judge Norton's opinion in *Chamber of Commerce v. NLRB*, 2012 U.S. Dist. LEXIS 52419 at *31 (D. S.C. April 13, 2012), Congress has for the past 76 years deliberately limited the functions of the NLRB. [1] Therefore, regardless of whether the Board acts by adjudication or by rulemaking, the plain language, structure and history of the Act preclude it from imposing affirmative duties on millions of private parties who have done nothing to subject themselves to the Board's authority. (Pl. Emp. Br. at 25-35).

The Board's Brief seeks to ignore or rewrite these settled legal principles in order to claim the statutory authority to impose the challenged Rule. In doing so,

[1] The Board does not contest or even address the statements in the Plaintiff Employers' Opening Brief and in Judge Norton's opinion regarding the limited nature of the Board's functions, which are evidenced by the government's own repeated published statements to this effect over many decades. *See, e.g.*, Presidential Statement on Signing the NLRA, Leg. Hist. at 3269 (1935); NLRB, Basic Guide to the National Labor Relations Act 33 (1997), http://www.nlrb.gov; NLRB, 2011 FY Performance and Accountability Report 12. *See also Chamber of Commerce v. NLRB*, 2012 U.S. Dist. LEXIS 52419. This point must therefore be deemed to be conceded by the Board.

the Board argues for a breathtaking expansion of its power over employers by asserting the right to impose affirmative new employer obligations in the absence of any ongoing unfair labor practice or election proceedings.[2] Contrary to the Board's Brief, such an outcome would plainly violate the holdings of numerous Supreme Court decisions and would, as this Court has previously warned, vest "virtually limitless hegemony" in the Board. *See American Bar Ass'n*, 430 F. 3d at 469 (D.C. Cir. 2005); *Railway Labor Exec. Ass'n*, 29 F. 3d at 671 (D.C. Cir. 1994). *See also* the Supreme Court cases limiting the Board's authority which are cited in the Plaintiff Employers' Opening Brief at 27-33 and discussed further below. The Board has failed to justify such an expansion of its statutory authority, and the district court's ruling must be reversed.

[2] The Board and its *Amici* take semantic issue with the Plaintiff Employers' use of the term "jurisdiction" to describe the Board's attempt to exercise authority over employers pursuant to the challenged Rule. (Board Br. at 25; Board *Amici* Br. at 10). Though the choice of language is unimportant to the outcome of this appeal, it is in fact proper to describe the challenged Rule as seeking to expand the Board's jurisdiction, because the Rule constitutes an attempt to exercise authority over parties who have not previously been considered to be within the Board's power to regulate, in the absence of unfair labor practice complaints or representation proceedings.

B. The Cases Relied On By The Board As Providing General Authority For Agency Action In Other Contexts Do Not Apply To The Challenged Rule.

At the outset, the Board's Brief relies heavily on the inapposite case of *Mourning v. Family Publ'ns Serv., Inc*., 411 U.S. 356, 369 (1973), for the principle that agency rules promulgated under general grants of rulemaking authority should be upheld so long as they are "reasonably related to the purposes of the enabling legislation." (NLRB Br. at 8). This Court previously rejected such a broad interpretation of *Mourning* in the case of *Colorado River Indian Tribes v. National Indian Gaming Commission*, 466 F. 3d 134, 139 (D.C. Cir. 2006) (Randolph, J.) ("An agency's general rulemaking authority does not mean that the specific rule the agency promulgates is a valid exercise of that authority."), *citing Goldstein v. SEC*, 451 F. 3d 873, 878 (D.C. Cir. 2006), and *Ragsdale v. Wolverine World Wide, Inc*., 535 U.S. 81, 92 (2002) ("Our previous decisions, *Mourning* included, do not authorize agencies to contravene Congress' will in this manner.").[3]

[3] Even the district court here acknowledged that *Mourning* and earlier similar holdings cited in the Board's Brief "do not stand for the proposition that the agency's interpretation controls for the purpose of *Chevron* step one." (Mem. Op. at 20 n.10). It should also be noted that in the *Mourning* case, the Supreme Court found that Congress provided a clear statutory predicate for the Federal Reserve Board to promulgate a rule compelling sellers to comply with certain disclaimer requirements of the Act. In the Truth in Lending Act, Congress had expressly granted to the Federal Reserve Board the power to prevent concealment of frivolous transaction charges. 411 U.S. at 356.

Other rulings of this Court that have relied on *Mourning*, such as those cited in the Board's Brief, at 8-11, have upheld the authority of agencies to engage in rulemaking only insofar as such rules did not run afoul of the substantive provisions of each agency's governing statute. *See Checkosky v. SEC*, 23 F. 3d 452, 469 (D.C. Cir. 1994) (Randolph, J.) ("There are limits, derived from the substantive provisions of the statute."). None of the cases cited in the Board's brief involved a statute like the NLRA that so clearly limits the authority of the agency to impose affirmative duties on employers. For the same reasons, this Court should find that the *Mourning* decision does not address the question before it and certainly does not answer that question in favor of the Board.[4]

[4] The Board *Amici*'s Brief incorrectly argues that the Court should simply skip *Chevron* Step One entirely and proceed directly to Step Two, based solely on the supposed "silence" of the NLRA on the subject of notice posting. (Board *Amici* Br. at 4-5). The *Amici*'s Brief fails to acknowledge or discuss at all this Court's holdings in *American Bar Ass'n*, 430 F. 3d 457; *Railway Labor Exec. Ass'n*, 29 F. 3d 655; and *Colorado River Indian Tribes*, 466 F. 3d at 139, among others, which squarely prohibit such an approach. In any event, as the Plaintiff Employers have pointed out, the NLRA is not "silent" on the limited nature of the Board's authority, but instead makes clear that the Board does not have authority to impose affirmative obligations on employers beyond those expressly designated by the Act.

C. Contrary To The Board's Brief, Section 6 Of The Act Does Not Authorize The Board To Impose Unprecedented Duties On Private Parties Who Have Done Nothing To Subject Themselves To The Board's Authority.

Perhaps recognizing that the *Mourning* line of cases do not carry the weight attached to them in the Board's Brief, the Board further attempts to transform Section 6 of the Act from a general grant of rulemaking authority in aid of the Board's settled, limited functions into a Congressional mandate to *expand* the Board's statutory authority beyond the limits imposed by decades of Supreme Court precedent. The Board unabashedly asserts that Section 6 allows it to use rulemaking to impose unprecedented affirmative obligations on employers and to ignore all previously recognized constraints on the Board's remedial and electoral powers. (Board Br. at 18-26).

However, the Board's Brief fails in its effort to support the district court's holding that the challenged Rule is justified under Section 6 as an action "necessary to carry out provisions of the Act." (Board Br. at 12-21). The Board does not contest Judge Norton's observation in *Chamber of Commerce* that the challenged Rule cannot be necessary to impose an affirmative obligation on employers to post notices of employee rights because that is a "nonexistent provision" in the Act. 2012 U.S. Dist. LEXIS 52419, at 18. The *Chamber of Commerce* court also properly dismissed the Board's theory, advanced again here,

that the challenged Rule is in any way necessary to carry out the "aspirational goals" of Section 1 or Section 7. *Id*.[5]

This Court similarly held in *Colorado River Indian Tribes v. National Indian Gaming Commission, supra*, 466 F. 3d at 139-40, that something more specific than a statute's general declaration of policy was required to serve as authority to promulgate regulations implementing an act's provisions. After further noting that it was necessary to examine not only the declared policy of the statute but also "how Congress expected to accomplish [the] policy," the Court observed: "This leads us back to the opening question – what is the statutory basis empowering the [agency regulation]?" Finding none, the Court struck down the rule.

Notwithstanding the Board's arguments to the contrary, Sections 8, 9 and 10 of the Act are the sole provisions by which the Board is authorized to "carry out" the Act's policies. Therefore, rulemaking under Section 6 can only be statutorily

[5] Contrary to the claims of the Board and its *Amici* (Board Br. at 15; Board *Amici* Br. at 20-23) , the anecdotal evidence in the record of a "knowledge gap" among some undetermined number of employees is insufficient to demonstrate that the challenged Rule is necessary to carry out even the aspirational policies of the Act. The Board has failed to adequately explain why its own resources are insufficient in the Internet Information Age to inform workers of their rights, without coercing employers into communicating the Board's message against their will. In fact, the Board has recently created a new web page to explain to employees their rights, which shows that the challenged Rule is unnecessary. *See* www.nlrb.gov/news/nlrb-launches-webpage-describing-protected-concerted-activity.

authorized if it is necessary to carry out those provisions. This is what distinguishes Section 6's language from the more specific language of Section 11. Contrary to the Board's Brief, at 23, it was not "superfluous" for Congress to limit the subpoena power of Section 11 specifically to those "hearings and investigations … necessary and proper for the exercise of the powers vested in [the Board] by sections [9] and [10]." 29 U.S.C. § 161. In as much as the Board is free to conduct hearings and investigations for other purposes, the reference to sections 9 and 10 was a useful way for Congress to identify those hearings and investigations that would or would not be subject to the subpoena power. Section 6 on the other hand is not concerned with hearings and investigations, but is focused on those provisions by which the Board is expected to carry out the purposes of the Act. There being no provisions other than Sections 8, 9, and 10 by which the purposes of the Act can be carried out, there was no need for Congress to be any more specific than it was in limiting the scope of Section 6.

In support of the Board's expansive view of its rulemaking authority, the Board repeatedly cites this Court's decision in *Batterton v. Marshall*, 648 F. 2d 694, 701-03 (D.C. Cir. 1980). (Board Br. at 18). But *Batterton* did not deal at all with the present question of Congressional delegation of authority to an agency (or lack thereof). Instead, that case dealt exclusively with the notice and comment requirements of the Administrative Procedure Act. *Id*. at 694 ("This case poses the

difficult but familiar problem of whether a particular agency action requires notice by publication and opportunity for comment by interested parties."). The selective quotes in the Board's Brief shed no light whatsoever on the issues in the present case.

The Board's Brief further relies (again) on the Supreme Court's holding in *American Health Association v. NLRB*, 499 U.S. 606 (1991) (Board Br. at 22), which has already been addressed and distinguished in Plaintiff Employers' Opening Brief. (Pl. Emp. Br. at 30-31). Little more need be said about *AHA* here, except that the Board's Brief fails to acknowledge that the rule at issue in *AHA* was undeniably in aid of the Board's existing statutory authority to decide bargaining unit issues under Section 9. The Supreme Court therefore had no occasion to address whether Section 6 in any way authorized the Board to impose affirmative new obligations on employers that are *not* otherwise authorized by the Act.[6]

To the same effect is another case cited at length in the Board's Brief, *Trans-Pacific Freight Conference of Japan/Korea v. Federal Maritime Commission*, 650

[6] The Board's quotation of Judge Posner's opinion in the *AHA* appeal (Board Br. at 28 n.12) reveals how the Board has missed the point of the current appeal. Whereas Judge Posner commented only that the Board's rulemaking power is not "less" than its adjudicatory power when it proceeds under Section 6, the question presented in the current case is whether the Board's rulemaking power under Section 6 is "*more*" than has been previously recognized in the adjudicatory context over the past 76 years.

F. 2d 1235 (D.C. Cir. 1980). There as in *AHA*, this Court was not called upon to opine as to whether the agency could use its rulemaking power to engage in actions that had been *prohibited* by the courts in the adjudicatory context, which is what the Board seeks to do in the presently challenged Rule.

D. The Board Has Failed To Refute The Clearly Manifested Legislative Intent Not To Authorize It To Impose Non-Remedial Notice Posting Requirements.

The Board's Brief unsuccessfully attempts to discount or minimize the numerous indications that Congress did not intend for it to be authorized to issue anything like the challenged Rule. (Board Br. at 29-38). The Board has uncovered no evidence of any Congressional intent affirmatively to delegate the authority to it necessary to promulgate the challenged Rule, *i.e.*, the authority to require employers who are not the subject of unfair labor practice or representation proceedings to take affirmative actions relating to their employees.

The Board's discussion of Congress's legislative intent fails to address or distinguish this Court's holding in *Alcoa Steamship Co. v. Fed. Maritime Comm'n.*, 348 F. 2d 756, 758 (D.C. Cir. 1965), which was prominently cited and discussed in the Plaintiff Employers' Brief, at 34-35. The *Alcoa* case held that "where Congress has consistently made express its delegation [to other agencies]

of a particular power, its silence is strong evidence that it did not intend to grant the power." *Id*. at 758.

The Board concedes, as it must, that Congress has consistently made express its delegation to many other labor agencies of the power to require employers to post notices of employee rights, beginning with the Railway Labor Act and continuing through virtually every other employment statute, other than the NLRA. (Board Br. at 34-38). The Board's Brief quibbles over the degree to which the Railway Labor Act's notice provision was publicized prior to enactment of the NLRA, or the extent to which Congress was "preoccupied" with other concerns as it included express notice provisions in statute after statute while failing to amend the NLRA to include such authority. (Board Br. at 36-37). But none of these digressions diminish the strength of the evidence that Congress expressly authorized nearly every labor agency other than the NLRB to impose a notice posting requirement on employers while failing to amend the Act to delegate the same authority to the Board.[7]

[7] The Board's Brief, at 38, calls attention to the alleged lack of statutory authority for notice posting in the Fair Labor Standards Act (FLSA). Because the Labor Department rule requiring such notices has never been tested in the courts, however, it is unknown whether that agency's rulemaking was statutorily authorized. It must also be noted that the FLSA, unlike the NLRA, contains employer recordkeeping and reporting requirements which were cited by the Labor

Also contrary to the Board's Brief and the district court, the fact that Congress considered and rejected a specific notice requirement in enacting the NLRA, as argued most cogently in the House *Amici* Brief, helps to confirm Congress's intent to withhold authority from the Board to impose the challenged Notice Rule on its own. The Plaintiff Employers stand by their previous arguments on this issue and the detailed discussion by the House *Amici* as to that aspect of the legislative history.[8]

E. Contrary To The Board's Brief, Cases Cited By The Plaintiff Employers Compel Invalidation Of The Challenged Rule.

It is worth reiterating here that the Board's Brief does not point to *any* legislative history indicating that Congress intended for the Board to impose notice posting requirements on millions of employers who have otherwise engaged in no behavior covered by Sections 8, 9 or 10. Therefore, the Board, like the district court, has at best improperly presumed from Congressional *silence* that the

---

Department as authority for the agency to require notice posting as well. *See* 29 U.S.C. § 211, cited in 29 C.F.R. § 516.

[8] The Board's *Amici* advance a new legislative history argument, not adopted by either the district court or the Board itself, claiming that an abortive attempt to narrow the rulemaking authority of Section 6 prior to passage of the Taft-Hartley amendments of 1947 somehow evidences Congressional intent to authorize the type of rulemaking at issue here. (Board *Amici* Br. at 13). Far from supporting the Board's argument here, Congress's rejection of the proposed amendment to Section 6 in 1947 evidences the majority view in Congress that no further limits on the Board's rulemaking authority were necessary, because such authority was sufficiently limited by the terms of the statute already.

required statutory authority has been delegated. As the Plaintiff Employers have previously argued, such a presumption plainly violates this Court's holdings in *Railway Labor Executives*, 29 F. 3d 665, 671 (D.C. Cir. 1994), and *American Bar Ass'n*, 430 F. 3d at 469 (D.C. Cir. 2005).

In response, the Board's Brief contends that the National Mediation Board lacked any general rulemaking authority, though that fact did not form any part of the basis for the Court's ruling in *Railway Labor Executives*. Moreover, in the subsequent *ABA* case in which this Court again adhered to the *Railway Labor Executives* holding, the Court found that the FTC was not entitled to any presumption of statutory authority for the particular rule at issue, in spite of the fact that the statute there *did* contain a general grant of rulemaking authority. The Board's Brief attempts to distinguish *ABA* on the basis that that case concerned "extraordinarily aggressive expansions of administrative authority." (Board Br. at 37 n.16). But the FTC's efforts to expand its authority were no more aggressive than the efforts of the Board in the challenged Rule, which threatens to impose unprecedented new obligations on six million employers.

Equally unavailing are the Board's efforts to evade the clear import of the Supreme Court's holding in *Teamsters Local 357 v. NLRB*, 365 U.S. 667 (1961). As the Plaintiff Employers have previously noted (Pl. Emp. Br. at 28), the

Teamsters case is particularly relevant to the current appeal because the Supreme Court there rejected previous Board efforts to establish a "broader, more pervasive regulatory scheme" than Congress authorized, specifically with regard to a notice provision. The Board's Brief, at 40-41, seeks to limit the case to its facts, but both Judge Norton in the *Chamber of Commerce* case and dissenting Board Member Brian Hayes properly found that the case argues strongly for setting aside the challenged Rule. *See Chamber of Commerce*, 2012 U.S. Dist. LEXIS 52419, at 19; *see also* 76 Fed. Reg. at 54038 (Hayes dissenting).

Finally, the Board's Brief attempts to sweep aside decades of Supreme Court precedent that have strictly limited the Board's authority to impose affirmative action requirements on employers, on the baseless ground that all such limits have been imposed in the context of adjudications. (Board Br. at 21-25). The Board's Brief does not specifically address any of the seminal cases cited by the Plaintiff Employers in their Opening Brief, other than *Teamsters Local 357*. But it is important to recall them here: *Sure-Tan, Inc. v. NLRB*, 467 U.S. 883 (1984) (expressly limiting the Board's authority to impose employer obligations beyond "make whole" remedies); *Republic Steel Corp. v. NLRB*, 311 U.S. 7 (1940) (holding that the Board may not justify an order solely on grounds that it will "deter future violations"); *NLRB v. Fant Milling Co.*, 360 U.S. 301 (1959) (holding that the Board lacks independent authority to charge private parties with unfair

labor practices). *See also NLRB v. Fin. Inst. Employees*, 475 U.S. 192 (1986); *Am. Ship Bldg. Co. v. NLRB*, 380 U.S. 300 (1965); *Consolidated Edison Co. of N.Y. v. NLRB*, 305 U.S. 197 (1938). *See also Chamber of Commerce v. Brown*, 554 U.S. 60, 65 (2008) (declaring that Congress intended employers' communications with their employees to be "unregulated" by the Board). Contrary to the Board's Brief, and contrary to the district court's decision, nothing in these cases suggests that the limits on the Board's statutory authority are confined to the adjudicatory process.[9]

By ignoring and/or rejecting all of the Supreme Court precedent limiting the Board's authority, on the specious ground that such limits pertain only to adjudications, the Board has made clear that it is seeking to remove all previous constraints on its authority by unilaterally declaring such limitations to be

[9] The Board and its *Amici* advance a number of cases in which they claim that the Board has previously imposed affirmative obligations on employers. (Board Br. at 46-49; Board Amici Br. at 10-12). In *every* case they cite, however, the affirmative duty was imposed only to remedy some specific, unlawful action engaged in by employers or unions or in aid of the Board's representation case procedures. *See, e.g., Truitt Mfg. Co.*, 351 U.S. 149 (1956) (remedying violation of statutory duty to bargain); *Standard Oil Co. of Cal. W. Operations, Inc. v. NLRB*, 399 F. 2d 639, 642 (9th Cir. 1968) (same); *NLRB v. J. Weingarten, Inc.*, 420 U.S. 251, 266 (1975) (remedying unlawful discharge of employees); *Republic Aviation Corp v. NLRB*, 324 U.S. 793 (1945) (remedying unlawful enforcement of solicitation rules); *Jeannette Corp. v. NLRB*, 532 F. 2d 916 (3d Cir. 1976) (remedying unlawful prohibition of employee discussion of wage rates); *NLRB v. Washington Aluminum Co.*, 370 U.S. 9 (1962) (remedying unlawful discharge of employees for concerted work stoppage). The challenged Rule is substantively different, for the first time imposing a duty on employers who have done nothing at all to interfere with employee rights under the NLRA.

inapplicable to rulemaking proceedings. This assumption of new and unlimited power by the agency will have pernicious effects that Congress clearly did not intend.

Specifically, if none of the limits imposed by the courts during the past 76 years of adjudications are deemed any longer applicable to rulemakings, then the Court must ask what is to stop the Board in a future rulemaking from imposing back pay penalties in excess of "make whole" relief (prohibited by such cases as *Sure-Tan* and *Republic Steel*); or commanding other forms of affirmative action by employers or unions (currently prohibited by *Consolidated Edison* and *Teamsters Local 357)*; or imposing burdensome new reporting requirements to measure compliance with the Act (never previously attempted); to name only a few of many examples. Such a radical expansion of the Board's settled role is not justified and should not be allowed to happen without the express direction of Congress. This Court should therefore apply settled law and reverse the district court.

II. CONTRARY TO THE BOARD'S BRIEF, THE CHALLENGED RULE INDEPENDENTLY VIOLATES BOTH THE FIRST AMENDMENT AND SECTION 8(c) OF THE ACT

The Board mischaracterizes the Plaintiff Employers' position by asserting that "Plaintiff Employers argued that the Rule was invalid under Section 8(c) because, in their view, that provision incorporates a First Amendment right against

compelled speech." (Board Br. at 68). That is the *Board's* position, not the Plaintiff Employers' contention. *See* 76 Fed. Reg. at 54,013. The Plaintiff Employers have consistently argued the opposite: that "[t]he district court mistakenly treated Section 8(c) as merely implementing the First Amendment, as opposed to creating independent employer rights of free speech." (App. Br. 37 n.13); *see also* (NRTW SJ. Br., 27-30) (Dkt. No. 30).

Specifically, Section 8(c) prohibits the Board from regulating "expression [that] contains no threat of reprisal or force or promise of benefit." 29 U.S.C. § 158(c). This limitation on the agency's authority is not identical to that imposed by the First Amendment, but more expansive. This is by design, as Section 8(c) was enacted by Congress as a prophylactic measure to *avoid* the need for case-by-case constitutional inquiries, and not to require them, as the Board would have it. *See U.S. Chamber of Commerce v. Brown*, 554 U.S. 60, 67-68 (2008).[10]

[10] The Board's Brief erroneously contends that the Plaintiff Employers' Opening Brief makes a "brand new" argument in reliance on *U.S. Chamber of Commerce v. Brown*. (Board Br. at 69). In reality, the Plaintiff Employers made exactly the same argument in their summary judgment briefs to the district court, explaining *both* that the challenged Rule is preempted by the *Machinists* doctrine (District Court Docket #33) and that it independently violates the Supreme Court's most recent interpretation of Section 8(c) (District Court Docket #20). The district court erred in overlooking each of these arguments and in failing to address them.

Here, an employer's refusal to communicate the message stated in the Board's mandatory notice implicates Section 8(c)'s protections. "For corporations as for individuals, the choice to speak includes within it the choice of what not to say." *Pacific Gas & Elec. Co. v. Pub. Utils. Comm'n*, 475 U.S. 1, 16 (1986); *see also Riley v. Nat'l Fed'n of the Blind*, 487 U.S. 781, 797 (1988). Indeed, a refusal to post the notice expresses a "view" or "opinion" in opposition to its slanted message just as much as actively speaking against it. 29 U.S.C. § 158(c).[11] The Board itself recognizes the expressive nature of not posting its notice, asserting that this constitutes an expression of anti-union animus by the employer. *See* 76 Fed. Reg. at 54,036-54,037.

The Board lacks the statutory authority to sanction an employer for refusing to disseminate its notice because this action does not communicate any "threat of reprisal or force or promise of benefit" under Section 8(c). Accordingly, the portions of the Rule providing that failure to post a notice evidences anti-union animus, 76 Fed. Reg. 54,036-54,037, and interferes with employees' rights in violation of NLRA Section 8(a)(1), 76 Fed. Reg. 54,031-54,033, are invalid under

[11] The Board's contention that its notice merely recites legal rights is both inaccurate and irrelevant under Section 8(c) because the provision protects expression that regards NLRA rights. *See Exxel/Atmos, Inc. v. NLRB*, 147 F.3d 972, 974-76 (D.C. Cir. 1998) (employer informing employees how to exercise their statutory right to decertification under the NLRA protected by Section 8(c)); *cf. Riley*, 487 U.S. at 797-98 ("compelled statements of 'fact,'" and not just "compelled statements of opinion," substantially burden protected speech).

Section 8(c). This is true irrespective of whether these provisions are also unconstitutional (which they are).

UAW-Labor Employment & Training Corp. v. Chao, 325 F.3d 360, 365 (D.C. Cir. 2003), decided prior to *Chamber of Commerce v. Brown*, held only that Section 8(c) did not prohibit a certain notice posting requirement because it was enforced by a federal agency *other than* the Board. 325 F.3d at 364-65. "[T]he activities described in Section 8(c) . . . are not 'protected by' the NLRA, *except from the NLRA itself*." *Id*. at 365 (emphasis added). Here, a notice posting requirement is being imposed under the NLRA. This is impermissible under *Chao*, as "Section 8(c) works to *negate* an unfair labor practice claim against an employer posting a notice." *Id*. (emphasis in original).

With regard to the Plaintiff Employers' First Amendment arguments, the Board improperly minimizes the ideological slant of the Notice that is mandated by the challenged Rule. (Board Br. at 66).[12] The Board's Brief does not dispute the Plaintiff Employers' assertion that the statement of rights that employers are required to post under the Rule omits important statements of *additional* rights, conceding that these choices constituted "editorial judgments" by the Board. (*Id*.

[12] According to the Board's Brief, this is the "critical feature" distinguishing the Supreme Court's holding in *Wooley v. Maynard*, 430 U.S. 704 (1977), on which the Plaintiff Employers rely.

at 68; *see also* Pl. Emp. Br. at 15, 38). Having made this concession, the Board cannot claim that the challenged Notice does not force employers to communicate an unwanted editorial judgment to their employees, in exactly the manner found unconstitutional by the Supreme Court in *Wooley*.

Contrary to the Board's Brief, at 67, this Court's decision in *UAW-Labor Employment & Training Corp. v. Chao* is not "directly applicable" to the Plaintiff Employers' First Amendment challenge -- and in fact is not applicable at all -- because the plaintiff in *Chao* "raise[d] no free-standing First Amendment claim" for this Court to consider. *See* 325 F. 3d at 364. As to *Lake Butler Apparel Co. v. Secretary of Labor*, 519 F. 2d 84 (5th Cir. 1975), also relied on by the Board, that case was decided prior to the Supreme Court's *Wooley* decision, dealt only with a statutory requirement to post a workplace notice under OSHA, and did not address at all any claim that the notice was ideologically slanted.

III. CONTRARY TO THE BOARD'S CROSS-APPEAL, THE DISTRICT COURT CORRECTLY ENJOINED SECTIONS 104.210 AND 104.210(a)

A. The Board Has Failed To Justify The Challenged Rule's Creation Of A New And Unauthorized Unfair Labor Practice.

As previously noted, the district court properly enjoined two aspects of the challenged Rule. Citing the plain language of Section 8(a)(1) and 8(c), the court

found that the agency "lacked the authority to deem a failure to post to be an unfair labor practice under the Act." Mem. Op. at 27. The Plaintiff Employers agree with the reasoning of the district court in support of that finding, as well as her ruling that the Board is precluded by the statute from making a "blanket advance determination that a failure to post will always constitute an unfair labor practice." *Id*. at 30-31. Of course, it is unnecessary to reach this issue if the Court strikes down the rule in its entirety, as should be the result for the reasons discussed above.

Nevertheless, the Board's Brief in support of its Cross-Appeal mistakenly argues that Section 8(a)(1) somehow authorizes the Board to declare via rulemaking that a failure to post the required Notice interferes with the exercise of employee rights. Section 8(a)(1) has never before been so interpreted, and there is no basis for doing so now. None of the cases that the Board cites are at all similar to the Board's new Rule, which for the first time imposes a penalty on employers who have not engaged in any misconduct and have in fact taken no action whatsoever.

In particular, contrary to the Board's Brief, none of the Board's cited cases purports to punish *inactivity* under the NLRA, except to the extent that the statute itself imposes an affirmative obligation such as the duty to bargain. Instead, each time the Board has found a violation of Section 8(a)(1) over the past 76 years,

there has been some *affirmative action* by a party, which has created the obligation to explain or undo the action in order to avoid interference with employee rights. [13] In such cases as *Truitt Mfg. Co*., 110 NLRB 856 (1954), *enf'd*, 351 U.S. 149 (1956) (Board Br. at 46), it was the employer's action of refusing to bargain in good faith, expressly prohibited under Section 8(a)(5), that properly invoked the additional prohibition against Section 8(a)(1) interference. To the same effect is *Standard Oil Co. of Ca., Western Operation, Inc. v. NLRB*, 399 F. 2d 639, 642 (9th Cir. 1968), cited in the Board's Brief at 46.[14]

The Supreme Court's holding in *Teamsters Local 357 v. NLRB*, 365 U.S. 667, again compels invalidation of the Board's newly broadened, pervasive unfair labor practice scheme. *Id*. at 675. Both in that case and in this one, the Board has attempted to penalize the failure to engage in conduct, posting a notice, which Congress has chosen *not* to penalize. Just as the Supreme Court held that the Board could not require unions to post a notice without a finding that they had in

[13] The Board's Brief, at 43-46, dwells at length on the assertion that Section 8(a)(1) "encompasses all the other unfair labor practices of 8(a) within its terms." But this claim is irrelevant to the validity of the challenged Rule. Nowhere does the Board allege that the purpose of the challenged Rule is to enforce any of the other unfair labor practices that are contained in Section 8(a).

[14] Equally unavailing is the Board's citation to *Technology Service Solutions*, 324 NLRB 298, 301 (1997). There the Board found that the Employer affirmatively denied union access to employee names and addresses that the Board had found to be required under its statutory authority to regulate the organizing process under Section 9. This is entirely different than the challenged Rule, which attempts to declare employers guilty of violating Section 8(a)(1) for having done nothing at all.

fact "discriminated" against employees within the meaning of Section 8(a)(3), the Board cannot now be allowed to require six million employers to post a notice without a finding that such employers have in fact "interfered with, coerced, or restrained" employees within the meaning of Section 8(a)(1). Under the Supreme Court's holding in the *Local 357* case, the Board's attempt to create a new violation of Section 8(a)(1) plainly constitutes a prohibited effort by the agency to establish a broader, more pervasive scheme than is permitted by the Act.

B. The Board Has Failed To Justify The Challenged Rule's Unauthorized Violation Of Section 10(b) Of The Act.

The district court further held correctly that Section 104.214(a) should be enjoined because the Board lacks authority to alter the statute of limitations for filing an unfair labor practice charge. The Board's Brief to the contrary relies almost entirely on cases decided under different statutory schemes, specifically where such statutes mandate posting of employee rights. The Board ignores numerous court decisions holding that Title VII and other employment law statutes should *not* be relied on as precedent for NLRB decision making, particularly as to procedural remedies under the NLRA. *See Tipler v. E.I. DuPont deNemours & Co.*, 443 F.2d 125, 128 (6th Cir. 1971) ("Although these two acts are not totally dissimilar, their differences significantly overshadow their similarities") (citing *Pettway v. Am. Cast Iron Pipe Co.*, 411 F.2d 998 (5th Cir. 1969)).

Although the Supreme Court did analogize Title VII and the NLRA with regard to the general concept of equitable tolling in *Zipes v. Trans World Airlines, Inc.*, 455 U.S. 385 (1982), the Board Brief improperly extrapolates from that decision to justify the Board's unprecedented new policy of tolling Section 10(b)'s limitation for an employer's failure to post the newly required notice. Certainly, no such issue was presented to the Court in *Zipes*. Moreover, Section 10(b) has been long interpreted to allow equitable tolling only in the event of "affirmative misconduct" by the employer. *See, e.g., Washington v. Washington Metropolitan Area Transit Authority*, 160 F.3d 750 (D.C. Cir. 1998) (rejecting claim of equitable tolling under Section 10(b) in the absence of "affirmative misconduct" by the defendant employer to lull the employee into inaction); *accord, Dove v. Washington Metropolitan Area Transit Authority*, 402 F. Supp. 2d 91 (D.D.C. 2005); *see also Conley v. Int'l Brotherhood of Electrical Workers, Local* 639, 810 F.2d 913, 915-916 (9th Cir. 1987) (refusing to toll 10(b) limitations period).

Contrary to the Board's Brief, the district court properly held that the challenged Rule improperly reversed the burden of proof for equitable tolling to apply. *See Mercado v. Ritz-Carlton San Juan Hotel, Spa & Casino*, 410 F. 3d 41, 48-50 (1st Cir. 2005), where the court declared that an employer's failure to post a required notice of employee rights would not result in equitable tolling of Title VII's statute of limitations unless the plaintiffs proved that they did not have actual

or constructive knowledge of their statutory rights. Notwithstanding the Board's *post hoc* rationalizations (Board Br. at 54-55), the district court correctly found that the challenged Rule "turns the burden of proof on its head." (Mem. Op. at 37).

In any event, the new Board Rule contradicts longstanding interpretations of Section 10(b), specifically that the statute of limitations begins to run upon a charging party's notice of an act constituting an unfair labor practice, absent "fraudulent concealment." *Local Lodge No. 1424 v. NLRB*, 362 U.S. 411, 429 (1960). *See also Leach Corp*., 312 NLRB 990 (1993), *enf'd* 54 F.3d 802 (D.C. Cir. 1995). The Board's new Rule completely reverses decades of understanding as to the proof required to toll the running of the statute of limitations, and must be set aside on this ground.

IV. THE BOARD HAS FAILED TO JUSTIFY THE DISTRICT COURT'S ERRONEOUS FINDING OF SEVERABILITY

Little more need be said regarding the district court's erroneous finding that the unlawful provisions enjoined by the court can somehow be severed from the rest of the challenged Rule. As the Plaintiff Employers have previously explained, the district court's decision violates the standard for severability set forth by this Court in *MD/DC/DE Broadcasters Ass'n v. FCC*, 236 F. 3d 13, 22 (D.C. Cir.), *reh'g denied w/ opinion*, 253 F. 3d 732 (D.C. Cir. 2001); *Financial Planning v. SEC*, 482 F. 3d 481 (D.C. Cir. 2007); *Davis County Solid Waste Mgmt. v. U.S.*

EPA, 108 F. 3d 1454, 1459 (D.C. Cir. 1997). Nothing in the Board's Brief removes the "substantial doubt" that the Board would have promulgated the challenged Rule without its key enforcement provisions, particularly in light of the Board's express statements in the final rule that it would *not* proceed to implement a voluntary notice posting rule. 76 Fed. Reg. at 54, 031. [15] Again, it should be unnecessary to reach this issue at all, because the entire Rule is invalid and should be set aside for lack of statutory authority.

CONCLUSION

For each of the reasons set forth above and in the Plaintiff Employers' Opening Brief, the district court's decision should be reversed and the challenged Rule should set aside in its entirety.

[15] The Board's Brief, at 60, improperly relies on a statement made by the Board in its Notice of *Proposed* Rulemaking, which was clearly superceded by the Final Rule.

Respectfully submitted,

/s/ Glenn M. Taubman
Glenn M. Taubman
William L. Messenger
John N. Raudabaugh
c/o National Right to Work Legal
Defense and Education Foundation, Inc.
8001 Braddock Road, Suite 600
Springfield, VA 22160
Tel: (703) 321-8510
gmt@nrtw.org, wlm@nrtw.org, jnr@nrtw.org
Attorneys for National Right to Work
Legal Defense and Education
Foundation, Inc.

/s/ H. Christopher Bartolomucci
H. Christopher Bartolomucci
Bancroft PLLC
1919 M Street, N.W.
Suite 470
Washington, D.C. 20036
Phone: (202) 234-0090
Fax: (202) 234-2806
cbartolomucci@bancroftpllc.com
Attorney for National Federation of Independent Business, Southeast Sealing, Inc., and Racquetball Centers, Inc. d/b/a Lehigh Valley Racquet & 24-7 Fitness Clubs

/s/ Peter N. Kirsanow
Peter N. Kirsanow
Bryan Schwartz
Maynard Buck
Patrick O. Peters
Benesch Friedlander Coplan & Aronoff LLP
200 Public Square, Suite 2300
Cleveland, Ohio 44114-2378
Tel.: 216-363-4500
Fax: 216-363-4588
pkirsanow@beneschlaw.com;
bschwartz@beneschlaw.com
Attorney for National Association of Manufacturers

/s/ Maurice Baskin
Maurice Baskin
Venable LLP
575 7th St., N.W.
Washington, D.C. 20004
Tel: 202-344-4823
Fax: 202-344-8300
mbaskin@venable.com

Attorney for the Coalition
for a Democratic Workplace

CERTIFICATE OF COMPLIANCE WITH RULE 32(A)

Pursuant to FRAP 32(a)(7)(B), Appellants certify that the foregoing brief, excluding the parts exempted by FRAP 32(a)(7)(B)(iii) and Circuit Rule 32, contains 6987 words of proportionally-spaced, 14-point Times New Roman Font, and the word processing system used was Microsoft Word 2010.

/s/ Maurice Baskin

Maurice Baskin
Venable LLP
575 7th St., N.W.
Washington, D.C. 20004
202-344-4823
mbaskin@venable.com

CERTIFICATE OF SERVICE

I hereby certify that copies of the foregoing brief, filed this 11th day of July 2012, were served electronically on the following counsel for Appellees/Cross-Appellants, all of whom have consented to electronic service:

Linda Dreeben: appellatecourt@nlrb.gov
Abby Propis Simms: abby.simms@nlrb.gov
Dawn Goldstein: dawn.goldstein@nlrb.gov
Eric Gray Moscowitz: eric.moskowitz@nlrb.gov

/s/ Maurice Baskin

Maurice Baskin
Venable LLP
575 7th St., N.W.
Washington, D.C. 20004
202-344-4823
mbaskin@venable.com