IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

NATIONAL ASSOCIATION OF MANUFACTURERS,	)	
	)	**Civil Action No. 13-cv-01998**
and	)	**JUDGE KENTAJI BROWN JACKSON**
VIRGINIA MANUFACTURERS ASSOCIATION	)	
Plaintiffs,	)	
v.	)	
THOMAS PEREZ, *et al.*,	)	
Defendants.	)	

MEMORANDUM OF THE NATIONAL ASSOCIATION OF MANUFACTURERS AND VIRGINIA MANUFACTURERS ASSOCIATION IN SUPPORT OF THEIR MOTION FOR SUMMARY JUDGMENT

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Federal Cases

Statutes

Executive Orders

Rules

Regulations

INTRODUCTION

This case arises from a facial challenge based on the administrative record brought by Plaintiffs against Defendant's Final Rule, at 29 CFR Part 471, 75 Fed. Reg. at 28368 (the "Rule" or the "Final Rule," attached as Exhibit "A"), implementing Executive Order 13496 ("E.O. 13496" or the "Executive Order"), which forces all federal contractors to post a "Notification of Employee Rights Under Federal Labor Laws," prominently and conspicuously in places of employment.

Plaintiff National Association of Manufacturers (the "NAM") is the largest manufacturing association in the United States, representing small and large employers in every industrial sector and in all 50 states, employing nearly 12 million men and women and contributing more than $1.8 trillion to the U.S. economy annually. Plaintiff Virginia Manufacturers' Association (the "VMA") similarly represents thousands of manufacturers employing 220,000 men and women contributing $34 billion to Virginia's gross state product and accounting for 80% of Virginia's exports to the global economy. Many of NAM and VMA's member companies hold contracts with the federal government in excess of $50,000 and are thus subject to the Rule, and many other members are interested in securing such contracts in the future.

Defendants are the U.S. Department of Labor ("DOL"); Thomas Perez, as the Secretary of the Department of Labor; the Office of Federal Contract Compliance Programs (the "OFCCP"); Patricia A. Shiu, as director of the OFCCP; the Office of Labor-Management Standards (the "OLMS"); and Michael J. Hayes, as director of the OLMS. Plaintiffs brought suit against Defendants for their publication, enactment and enforcement of the Rule.

Plaintiffs challenge the Rule as constituting compelled speech in violation of the First Amendment of the United States Constitution. Plaintiffs further challenge the rule as

promulgated in excess of Defendants' statutory authority, for being arbitrary and capricious in violation of the Administrative Procedure Act, 5 U.S.C. §701, *et seq.* (the "APA"), and for being preempted by the National Labor Relations Act. Pursuant to this Court's order, the parties will brief the issues through cross motions for summary judgment and, subsequently, cross oppositions to same.

STATEMENT OF FACTS[1]

Acting pursuant to the Federal Property and Administrative Services Act (the "Procurement Act"), President Barack Obama signed Executive Order 13496 on January 20, 2009 (the "Executive Order"). The Executive Order requires nonexempt federal departments and their agencies to include in their government contracts specific provisions requiring government contractors and subcontractors to post notices on their premises containing a list of selected rights related to the National Labor Relations Act, 29 U.S.C. § 151 *et seq.* (the "NLRA"), to "promote economy and efficiency in Government procurement." Executive Order 13496; 75 Fed. Reg. at 28368, 28399 (Exhibit A). The Executive Order delegated responsibility to the Secretary of Labor to adopt rules and issue orders "as are necessary and appropriate" to carry it out. *Id.*

Acting on the Executive Order, Defendants issued a Notice of Proposed Rulemaking on August 3, 2009, allowing for a brief 30-day notice and comment period. A total of 86 Comment Letters were received during this period, and despite multiple arguments that Defendants lacked authority to promulgate such a rule, Defendants proceeded to enact the Rule in final form on May 20, 2010. The Rule requires federal subcontractors to post the Notice or face a host of

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[1] Review of this case is based upon the administrative record. An appendix shall be supplied pursuant to LCvR 7(n). Under LCvR 7(h) a statement of undisputed facts is not applicable.

sanctions, including debarment from federal contracts. 75 Fed. Reg. at 23890, 28399 (Exhibit A).

While it purports to inform employees of their respective labor rights under the NLRA, the actual text of the Notice presents a biased message skewed in favor of unionization, instead of a full and accurate summary of rights under the NLRA. For example, the Notice is notably devoid of, *inter alia*, any information regarding

- employee rights to object to payment of dues in excess of the amounts required for representational purposes;
- employee rights to decertify a union; and
- employee rights to refuse to pay dues to a union in a right-to-work state;

This imbalance was pointed out in approximately one third of the comment letters received before publication of the Rule. 75 Fed. Reg. at 28372 (Exhibit A). However, despite acknowledging these comments, the Notice mandated by the Final Rule contains none of the above employee rights. In this sense, the Rule and Notice do not further employee freedom of association, or even the provision of objective information, and instead advance unionization above any other interest. Despite disagreement with its message, Plaintiffs members are forced to comply with the Rule and post the Notice under pain of sanctions up to and including debarment. 29 CFR § 471.14.

As set out more fully below, the Rule must be vacated as it constitutes compelled speech in violation of the First Amendment of the United States Constitution, has been promulgated in excess of Defendants' statutory authority, is arbitrary and capricious, and is preempted by the NLRA.

LAW AND ARGUMENT

I. There is no Genuine Issue as to Any Material Fact and Plaintiffs are Entitled to Judgment as a Matter of Law.

Summary judgment is appropriate if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law. Fed. R. Civ. P. 56(a); *see also Celotex Corp. v. Catrett*, 47 U.S. 317, 323 (1986); *Haynes v. Williams*, 392 F.3d 478, 481 (D.C. Cir. 2004). Here, summary judgment in favor of Plaintiffs is appropriate on several grounds.

First, the Rule unequivocally constitutes compelled speech in violation of the First Amendment, and Defendants have failed to identify a compelling government interest to justify the Rule. Moreover, even if the government's interest were "compelling," Defendants have provided no evidence that the Rule can possibly achieve its purported goal, much less that it is the least restrictive means of doing so. Summary judgment in Plaintiffs' favor is therefore appropriate as the Rule is contrary to a Constitutional right and must be set aside pursuant to the Administrative Procedure Act, (the "APA"), 5 U.S.C. § 706 (B).

Next, Defendants are wholly without authority to promulgate the Rule. Nothing in the Procurement Act grants Defendants power to require all federal contractors and subcontractors to post a notice of rights. Any such action by Defendants is unlawful and *ultra vires*. Indeed, even the National Labor Relations Board (the "NLRB" or the "Board") lacks such statutory authority, despite the fact that the NLRB has general rulemaking authority on all matters related to the NLRA. The Rule and the Notice are virtually identical to the rule and notice advanced by the NLRB in *Nat'l Ass'n of Mfrs. v. NLRB*, 717 F.3d 947, 956 (D.C. Cir. 2013) (hereinafter, "*NAM v. NLRB*"). The rule and notice at issue in *NAM v. NLRB* (the "NLRB Rule" and the "NLRB Notice"), however, were invalidated by the D.C. Circuit Court of Appeals in 2013 for being in

excess of the NLRB's statutory authority, and for offending First Amendment principles organic to the NLRA. Simply put, if the NLRB lacks statutory authority to promulgate the Rule under the NLRA, Defendants cannot reasonably claim to have similar authority or any derivative power from a wholly separate and distinct piece of legislation not even remotely related to labor relations.

Additionally, since Defendants have failed to identify any evidence whatsoever that the Rule will have its desired outcome, the rule is arbitrary and capricious. Accordingly, judgment as a matter of law in Plaintiffs' favor is appropriate and the Rule must be set aside pursuant to 5 U.S.C. § 706(2)(A) and 5 U.S.C. § 706(2)(C).

Moreover, even assuming, *arguendo*, that the Rule does not constitute compelled speech and somehow was within Defendants' scope of statutory authority under the Procurement Act, the Rule must still be set aside as it is preempted under the doctrines of *Garmon* preemption and/or *Machinists* preemption. Accordingly, Plaintiffs ask this Court to enter judgment in their favor as a matter of law.

II. The Rule Constitutes Compelled Speech in Violation of the First Amendment.

A. The Rule Abridges Plaintiffs' and Plaintiffs' Members' Free Speech Rights

The Rule unconstitutionally compels speech contrary to the D.C. Circuit Court's decision in *NAM v. NLRB*. The standard for judging whether a rule or regulation compelling private actors to engage in noncommercial speech is strict scrutiny, *i.e.*, the subject rule or regulation must serve a compelling governmental interest *and* be narrowly tailored to serve that interest. The Rule at issue meets neither prong of strict scrutiny.

1. The Rule Must Be Struck Under *NAM v. NLRB*

The First Amendment to the United States Constitution provides, in part, that "Congress shall make no law … abridging the freedom of speech." U.S. Const. amend. I. In *NAM v. NLRB*

the D.C. Circuit Court of Appeals was guided by "firmly established principles of First Amendment free-speech law," 717 F.3d at 956. In striking down the NLRB's notice-posting requirement, the D.C. Circuit found that such posting requirements constituted compelled speech under First Amendment, and thus violated Section 8(c) of the NLRA. *Id.* at 959. The well-settled principles set forth in *NAM v. NLRB* guide the analysis here, as well.

A fundamental tenet of First Amendment law is that it not only protects the right to speak, but "the right to refrain from speaking" as well. *R.J. Reynolds Tobacco Co. v. FDA*, 696 F.3d 1205, 1211 (D.C. Cir. 2012); *see also Wooley v. Maynard*, 430 U.S. 705, 714 (1977); *NAM v. NLRB*, 717 F.3d at 957. This is because the "right to disseminate another's speech necessarily includes the right to decide not to disseminate it." *NAM v. NLRB*, 717 F.3d at 956. This is why, as the D.C. Circuit noted, "[in] *Barnette* the Court held that 'to sustain the compulsory flag salute' and pledge of allegiance in public schools would be to conclude 'that a Bill of Rights which guards the individual's right to speak his own mind, left it open to public authorities to compel him to utter what is not in his mind" *NAM v. NLRB*, 717 F.3d at 957 citing *West Virginia State Board of Education v. Barnette*, 319 U.S. 624 (1943). Likewise, New Hampshire could not coerce its citizens to display the State motto "Live Free or Die" on their license plates in *Wooley*. *NAM v. NLRB*, 717 F.3d at 957; citing *Wooley v. Maynard*, 430 U.S. 705 (1977).

Courts have long acknowledged that "government agencies are not normally empowered to impose and police requirements as to what private citizens may say or write. Commercial labeling aside, the Supreme Court has long treated compelled speech as abhorrent to the First Amendment, whether the compulsion is directed against individuals or corporations." *Clifton v. FEC*, 114 F.3d 1309 (1st Cir. 1997) citing *McIntyre v. Ohio Elections Comm'n*, 514 U.S. 334, 115 S. Ct. 1511, 1519-20, 131 L. Ed. 2d 426 (1995); *Hurley v. Irish-American Gay, Lesbian &*

Bisexual Group of Boston, 515 U.S. 557, 115 S. Ct. 2338, 2347, 132 L. Ed. 2d 487 (1995); *Riley v. Nat'l Fed'n of the Blind*, 487 U.S. 781, 795 (1988); *Pacific Gas & Elec. Co. v. Public Util. Comm'n of Cal.*, 475 U.S. 1, 16 (1986) (plurality opinion); *Wooley v. Maynard*, 430 U.S. 705 at 714 (1977); *Miami Herald Publ'g Co. v. Tornillo*, 418 U.S. 241, 256, (1974); *West Virginia State Bd. of Educ. v. Barnette*, 319 U.S. 624, 642 (1943).

Defendants' Rule plainly constitutes compelled speech in violation of the First Amendment. Here, Defendants have presented federal contractors with an offer they can't refuse: either post a list of rights slanted in favor of unionization or subject yourself to sanctions up to and including debarment from federal contracts. As debarment for some of Plaintiffs' members may be tantamount to going out of business, Plaintiffs' members have little choice but to comply. In light of the numerous cases which have examined the subject, there is scant doubt that this constitutes compelled speech in direct contravention of the First Amendment.

This conclusion becomes readily apparent in light of the fact that only last year, the D.C. Circuit Court of Appeals overturned a substantively identical rule in *NAM v. NLRB*. As discussed above, the NLRB Rule mandated that all employers post the NLRB Notice, which is nearly word-for-word identical to the Notice at issue. The striking similarity between the two notices is not mere coincidence: although the NLRB Notice was struck down before this Notice was challenged, the NLRB Notice actually postdates this Notice and ***was modeled after this Notice***. 76 Fed. Reg. at 54018 ("the [National Labor Relations Board] proposed to adopt the language of the Department of Labor's Final Rule requiring Federal Contractors to post notices of employees' NLRA rights. 29 CFR Part 471"). Additionally, the rule mandating the NLRB Notice cites this Notice as "support" for the NLRB rule. 76 Fed. Reg. at 54007 ("Further support

... is President Obama's recent Executive Order 13496, issued on January 30, 2009, which stressed the need for employees to be informed of their NLRA rights.")

The NLRB Notice, just as the Notice here, "fail[ed] to notify employees, *inter alia*, of their rights to decertify a union, to refuse to pay dues to a union in a right-to-work state, and to object to payment of dues in excess of the amounts required for representational purposes." *NAM v. NLRB*, 717 F.3d at 958. Accordingly, Plaintiffs in *NAM v. NLRB*, just as the Plaintiffs here, objected to the selective list of rights contained in the NLRB Notice, which promoted unionization instead of providing a full or even-handed summary of the rights available under the NLRA.

The only substantive difference between the NLRB Rule and the Rule at issue in the present case is the remedies: whereas the NLRB Rule subjected employers who failed to post the notice to, among other things, the possibility of an unfair labor practice charge, the Rule at issue subjects violators to contractor-specific sanctions arguably far more punitive and catastrophic, such as debarment from federal contracts. 75 Fed. Reg. at 23890. Plaintiffs' members are thus compelled to comply.

In considering whether the NLRB Rule violated section 8(c) of the National Labor Relations Act, the D.C. Circuit relied on the similarities between section 8(c) and the First Amendment, resting its analysis on First Amendment jurisprudence. *NLRB*, 717 F.3d at 957 ("Our doubt stems, in part, from a comparison of § 8(c) with the law established under the First Amendment.") Basing its analysis on much of the authority discussed above, the D.C. Circuit Court unanimously held that the NLRB Rule infringed on the First Amendment, and thus violated § 8(c) of the NLRA. *Id.* at 959. Here too, Plaintiffs respectfully submit this Court must

find that the Rule constitutes compelled speech and therefore infringes on the free speech rights of Plaintiffs' and their members.

B. The Rule Cannot Withstand Strict Scrutiny.

It is "well-established that a regulation compelling noncommercial speech is subject to strict scrutiny and must be narrowly tailored to serve a compelling governmental interest." *Greater Baltimore Ctr. for Pregnancy Concerns, Inc. v. Mayor & City Council Baltimore*, 683 F.3d 539, 552 (4th Cir. 2012); citing *United States v. Playboy Entm't Group*, 529 U.S. 803, 813 (2000); *Riley v. National Federation of Blind, Inc.*, 487 U.S. 781, 796, 108 S. Ct. 2667, 101 L. Ed. 2d 669 (1988). In order to establish that the Rule is narrowly tailored, Defendants must establish that "If a less restrictive alternative would serve the Government's purpose, the legislature must use that alternative." *Playboy*, 529 U.S. at 813 citing *Reno v. American Civil Liberties Union*, 521 U.S. 844, 874 (1997). Defendants fall far short of carrying their burden.

1. Forcing Federal Contractors to Post the Notice Does Not Further a Compelling Governmental Interest

Defendants cannot articulate a *compelling* governmental interest furthered by the Rule. In fact, the ostensible interests purportedly furthered are specious and unsupported by empirical evidence.

Defendants' Rule implements Executive Order 13496, which was designed "to promote the economy and efficiency in Government procurement." 75 Fed. Reg. at 28368; citing Executive Order 13496. Defendants purport to derive their authority under the Procurement Act, and support the Rule by flimsily stringing together a series of questionable premises. First, "[w]hen the Federal Government contracts for goods or services, it has a proprietary interest in ensuring that those contracts will be performed by contractors whose work will not be interrupted by labor unrest." *Id.* The Rule continues "[t]he attainment of industrial peace is most

easily achieved and workers' productivity is enhanced when workers are well informed of their rights under Federal labor laws, including the National Labor Relations Act (Act), 29 U.S.C. 151 *et seq*." Next, the Rule reasons that

> encouraging the practice and procedure of collective bargaining and * * * protecting the exercise by workers of full freedom of association, self-organization, and designation of representatives of their own choosing, ... will eliminate the causes of certain substantial obstructions to the free flow of commerce and mitigate and eliminate these obstructions where they have occurred.

Id; citing Executive Order 13496 and 29 U.S.C. 151 (internal punctuation omitted). Thus, as "the Executive Order concludes, 'relying on contractors whose employees are informed of such rights under Federal labor laws facilitates the efficient and economical completion of the Federal Government's contracts.'" *Id.*; citing Executive Order 13496.

Even assuming, *arguendo*, that the efficient completion of federal government contracts is a *compelling* governmental interest – on a par with, e.g., eradicating racial discrimination – the Rule and the Executive Order *contain no evidence whatsoever* that the Rule will in any way "promote economy and efficiency in Government Procurement." Indeed, throughout the text of the Rule, Defendants fail to cite a *single* study, article, or even anecdotal evidence that would show the slightest improvement in government procurement efficiency the Rule would bring about. In fact, in the text of the Rule, Defendants acknowledged that multiple commenters found it would indeed have an adverse impact on government procurement efficiency:

> Some commenters were doubtful that the Executive Order would fulfill its stated goals of promoting economy and efficiency in government procurement through notifying employees of their rights, and suggested instead that the Executive Order would have the ***opposite effect and actually increase costs to taxpayers and amplify labor–management conflict, among other negative effects cited.*** (Emphasis added).

75 Fed. Reg. at 28369. Rather than attempt to refute the commenters with evidence, Defendants responded by reiterating how the Executive Order would only be subject to a "lenient standard" and would survive even if the commenters were correct in their assertions:

> Executive orders issued under the authority of the Procurement Act need only meet a "lenient standard" that requires that the order have a "sufficiently close nexus" to the values of providing the government an economical and efficient system for procurement and supply. Various executive orders have passed this "lenient standard," even in cases in which the link between the order and efficient procurement may seem attenuated, where an argument can be made that the order will have the opposite effects of its stated goal, or when the order increases costs to the government in the short term.

Id. at 75 Fed. Reg. at 28370 (internal citation omitted).

2. The Rule is Not Narrowly Tailored

Having infringed upon the First Amendment rights of Plaintiffs, Defendants do not enjoy the claimed "lenient standard" they discuss above in the Rule.[2] In order to survive strict scrutiny, Defendants must first establish that efficiency in government procurement is a ***compelling*** government interest. The Defendants cannot make even this initial showing. But the Rule's infirmities do not stop there. To survive strict scrutiny, Defendants must not only show that improving efficiency in government contracting is a compelling governmental interest and that the Rule improves government efficiency, but that it is, in fact, narrowly tailored to the point of being the ***least restrictive means*** of achieving this goal. *Playboy*, 529 U.S. at 813. Defendants fall spectacularly short of this burden.

Giving even brief pause to consider the various ways of improving government procurement yields a myriad of options which do not infringe upon Plaintiffs' First Amendment Rights. Defendants could, for instance, take it upon themselves to provide employees the

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[2] As explained herein, having advanced no evidence in support of its claim, Defendants' Rule is arbitrary and capricious and thus must fail even if not subjected to strict scrutiny.

information in the Notice. They could institute efficiency criteria for federal contractors. Defendants could review the amounts paid contractors and seek opportunities for cost savings. Still yet, Defendants could review internal procedures for process improvement opportunities to increase procurement efficiency. In fact, means far less restrictive than the notice-posting requirement set forth in the Rule are strewn throughout the comments for both the Rule, the NLRB Rule, and even the opinion in *NAM v. NLRB*, 717 F. 3d at 967. Despite the many options available, Plaintiffs chose instead to trample the First Amendment rights of contractors to achieve a goal which Defendants have no evidence will provide even a modest improvement in efficiency.

In truth, Defendants cannot establish that forcing contractors to post a selective list of rights available under the NLRA actually improves procurement efficiency, much less that it is the *least restrictive means* of achieving this purported goal. Accordingly, the Rule fails the strict scrutiny test and, therefore, unlawfully infringes upon Plaintiffs' free speech rights. Accordingly, the Rule must be struck down pursuant to the APA, 5 U.S.C. § 706(2)(B) as being contrary to a Constitutional right.

III. The Rule Must be Set Aside Under the Administrative Procedure Act.

The Rule violates the APA under the standards set forth in *Chevron U.S.A., Inc. v. NRDC*, 467 U.S. 837 (1984). A *Chevron* analysis involves a two-step process. Under *Chevron* Step I, the Court asks "whether Congress has directly spoken to the precise question at issue." *Chevron*, 467 U.S. at 842; *see also Public Citizen, Inc. v. HHS*, 332 F.3d 654, 659 (D.C. Cir. 2003). If Congress has spoken, then that is the end of the analysis, and the Court "must give effect to the unambiguously expressed intent of Congress." *Chevron*, 467 U.S. at 843; *see also Northpoint Tech., Ltd. v. FCC*, 412 F.3d 145, 151 (D.C. Cir. 2005) (quoting *Chevron*). No

deference is shown to the Defendants under this step. *See Shays v. FEC*, 508 F. Supp. 2d 10, 30 (D.D.C. 2007).

Under *Chevron* Step II, the Court may defer to the Defendants' application of the statute, but only if it is a permissible and reasonable construction of the statute. *Chevron,* 467 U.S. at 844; *Public Citizen*, 332 F.3d at 659; *Southern Cal. Edison Co. v. FERC*, 116 F.3d 507, 511 (D.C. Cir. 1997) (deference is owed to an agency only if its construction is "reasonable" in light of the statutory text, history, and purpose). A Court must set aside a rule if it is "arbitrary, capricious, ...or otherwise not in accordance with the law." 5 U.S.C. § 706(2)(A). See also, *United States v. Mead Corp.*, 533 U.S. 218 (2001). An agency rule is arbitrary and capricious when "it is so implausible that it could not be ascribed to a difference in view or a product of agency expertise." *See Motor Vehicle Mfrs. Ass'n. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 42-43 (1983).

Plaintiffs submit that Defendants' promulgation of the Rule fails under both steps of the *Chevron* standard.

A. The Rule Has Been Promulgated in Excess of Defendants' Statutory Authority Under the Procurement Act and Defendants' Action Is Not Entitled to Deference.

1. Congress did not grant Defendants Authority to Promulgate a Rule Directing All Contractors to Post a Notice of Rights.

It is axiomatic that an agency's exercise of its jurisdiction is limited to that authorized by statute. As stated by the Supreme Court, "[a]n agency's power is no greater than that delegated to it by Congress." *Lyng v. Payne*, 476 U.S. 926, 937 (1986). In the present case, Defendants' promulgation of the Rule far exceeds the rulemaking authority granted them by congress. Indeed, even the NLRB, which is granted exclusive regulatory authority over the matters governed by the NLRA, fails to have such authority. *See NAM v. NLRB, supra.* In light of this,

there can be little doubt that Defendants' promulgation of the Rule far exceeds the rulemaking authority granted them by Congress and is *ultra vires*.

Defendants cite the Procurement Act, 40 U.S.C. 101 *et seq*. and Executive Order 13496 as authority for the Rule. Specifically, they state "The Procurement Act authorizes the President to 'prescribe policies and directives that [he] considers necessary to carry out' the statutory purposes of ensuring 'economical and efficient government procurement and supply'" 75 Fed. Reg. at 28369 citing 40 U.S.C. § 101; 40 U.S.C. § 121 (a). Congress itself never delegated any specific rulemaking ability to the OFCCP, the OLMS, or even the Department of Labor generally. The OFCCP and OLMS here purport to act under the authority given by President Obama via Executive Order 13496. However, this authority simply was not the President's to give.

As noted, the initial *Chevron* inquiry is "whether ***Congress*** has directly spoken to the precise question at issue." *Chevron*, 467 U.S. at 842 (Emphasis added). While Congress has "spoken" on this issue, it chose neither the Procurement Act nor Defendants as its vehicles for setting labor policy. Instead, Congress chose to speak about the implementation of the NLRA, unsurprisingly, in the NLRA itself. Section 6 of the NLRA authorizes the NLRB—not the DOL, not the OFCCP, and not the OLMS — to promulgate "such rules and regulations as may be necessary to carry out the provisions of this Act." 29 U.S.C. § 156. As a concurring majority found in *NAM v. NLRB*, however, "[s]uch 'general rulemaking authority,' although facially broad, 'does not mean that the specific rule the agency promulgates is a valid exercise of that authority,'" *NAM v. NLRB*, 717 F.3d at 966 citing *Colo. River Indian Tribes. v. Nat'l Indian Gaming Comm'n*, 466 F.3d 134, 139 (D.C. Cir. 2006).

The concurring majority in *NAM v. NLRB* held that the NLRB's posting rule, which was the same in all relevant respects to the present Rule, did not constitute "a valid exercise of the Board's section 6 authority because the rule is not, as section 6 requires, 'necessary' to carry out the express provisions of the Act." *NAM v. NLRB*, 717 F.3d at 966. The concurring majority further held that even if it was necessary that workers receive additional information regarding their workplace rights, "there is nothing in the text of the NLRA to suggest the burden of filling the 'knowledge gap' should fall on the employer's shoulders. Unions and the NLRB are at least as qualified to disseminate appropriate information—easily and cheaply in this information technology age—and in fact already do so." *Id.* at 967.

Thus, the concurring majority held, given that no notice posting requirement appears in the statutory text, there is nothing to suggest that "Congress intended to authorize a regulation so aggressively prophylactic as the posting rule." *Id.*; *accord Chamber of Commerce of U.S. v. NLRB*, 856 F. Supp. 2d, 778, 790-792 (D.S.C. 2012); *Amalgamated Transit Union v. Skinner*, 894 F. 2d 1362, 1364 (D.C. Cir. 1990) ("Where Congress prescribes the form in which an agency may exercise its authority, ... we cannot elevate the goals of an agency's action, however reasonable, over that prescribed form.")

Defendants' present claim for statutory authority under the Rule is far more attenuated than the Board's was in *NAM v. NLRB*. In *NAM v. NLRB*, the Board lacked statutory authority to promulgate a notice posting rule, ***even though the NLRB has general rule making ability to implement the NLRA***. If a substantively identical notice of rights under the NLRA isn't "necessary" to carry out the provisions of the NLRA itself, it simply cannot be the case that the Notice is somehow necessary to fulfill the Procurement Act. If the NLRB lacks statutory authority to require Notice posting, surely Defendants lack such authority as well.

Like the NLRA, the Procurement Act contains no affirmative requirement for employers to post such a notice. The absence of statutory authority to promulgate the Rule requiring the posting of the Notice stands in contrast to other major federal labor and employment laws that contain specific notice-posting requirements. The Railway Labor Act, 45 U.S.C. § 152, Title VII of the 1964 Civil Rights Act, 42 U.S.C. § 2000e-10, the Age Discrimination and Employment Act, 29 U.S.C. § 627, the Occupational Safety and Health Act, 29 U.S.C. § 657(c), the Americans With Disabilities Act, 42 U.S.C. § 12115, the Family and Medical Leave Act, 29 U.S.C. § 2619(a) and the Uniform Service Employment and Re-employment Rights Act, 38 U.S.C. 4334(a), all contain express and specific provisions providing for notice posting by employers subject to the jurisdiction of the relevant agency charged with enforcing the respective statutes.

The posting requirements of Title VII are representative: "Every employer, employment agency, and labor organization, as the case may be, *shall* post and keep posted in conspicuous places upon its premises where notices to employees, applicants for employment and members are customarily posted, *a notice to be prepared or approved by the commission* setting forth excerpts from, or summaries of, the pertinent provisions of this subchapter and information pertaining to the filing of a complaint." (Emphasis added). 42 U.S.C. § 2000e-10.

It is clear from the notice-posting provisions contained in the statutes noted above that when Congress intends to vest an enforcement agency with notice-posting rulemaking authority, such authority is set forth in the organic statute of the relevant agency. The fact that Congress chose not to grant Defendants authority to promulgate rules regarding the posting of a notice-of-rights clearly demonstrates that Defendants are without such authority.

Furthermore, had Congress wished to grant similar rulemaking authority to Defendants, Congress could have easily amended the Procurement Act at some point in the 65 years since the Procurement Act's passage to include a provision similar to that contained in the other statutes. Congress, in fact, did precisely that by amending the Railway Labor Act to include an express notice-posting requirement. Congress' pointed failure to amend the Procurement Act further emphasizes congressional intent not to grant notice-posting authority to the Board.

The absence of statutory authorization to promulgate the Rule makes plain the unambiguously expressed intent of Congress that Defendants, contrary to Step 1 of the *Chevron* standard, have no authority to issue the Rule. The Rule must therefore be held unlawful and set aside as in excess of the Board's authority pursuant to the APA, 5 U.S.C. § 706(2)(C).

2. The Board's Promulgation of the Rule is arbitrary and Capricious and is not a Reasonable Construction of the Procurement Act.

Even assuming, *arguendo*, that notice-posting rulemaking authority can somehow be gleaned from the patent absence of such provision in the Procurement Act, the Rule must nonetheless be enjoined as being arbitrary, capricious and not a reasonable construction of the statutory language. *Chevron, supra; Motor Vehicle Mfrs. Ass'n. v. State Farm Mut. Auto Ins., Co., supra.*

An agency rule is arbitrary and capricious when the agency's putative justification for the rule neglects or is contrary to the evidence before the agency during the rulemaking process. *See Burlington Truck Lines v. United States*, 371 U.S. 156 (1962); *cf. American Hospital Association v. NLRB*, 499 U.S. 606 (1991). An agency rule is arbitrary and capricious when it is supported by insufficient or selective evidence.

Here, scrutiny of Defendants' justification for the Rule, including both the Executive Order enabling the Rule as well as the Final Rule itself, reveals no evidence whatsoever to

support the conclusion that requiring all contractors post a notice in any way improves procurement efficiency. In fact, during the Rule's notice and comment period, multiple commenters provided arguments suggesting that the Rule would actually make government procurement ***less*** efficient. 75 Fed. Reg. at 28370. Defendants, in response, cited no studies, no analysis, no expert opinions, indeed, ***no evidence of any kind*** in support of the Rule, and actually concede that "an argument can be made that the order will have the ***opposite effect*** of its stated goal." (Emphasis added).

Instead of providing even a plausible argument to the contrary, Defendants counter these assertions by noting that previous "administrations have issued executive orders governing labor and employment practices of federal contractors" which have been sustained. *Id.* However, the fact that such regulation has occurred does not equate to Defendants having administrative carte blanche to enact whatever regulation they choose without any evidence whatsoever. Such behavior is the very definition of arbitrary and capricious, and Defendants' advancement of such an argument is simply tautological.

Finally, as set forth in the preceding section, the inescapable fact that nothing in the Procurement Act grants Defendants the authority to promulgate the Rule renders Defendants' issuance of same arbitrary and capricious—perhaps even whimsical or imperious—particularly where the NLRB itself has no such authority. Defendants' arrogating unto themselves a power unavailable to the agency specifically responsible for administering the NLRA is nothing if not capricious.

Defendants' promulgation of the Rule is unworthy of *Chevron* deference, and the Rule must therefore be held unlawful and set aside under the APA, 5 U.S.C. §706(2)(A) and (C) as arbitrary and capricious and enacted in excess of statutory right.

IV. The Rule is Preempted by the NLRA.

Apart from the Constitutional and APA infirmities of the Rule, its continued enforcement must be enjoined due to the preemptive effect of the NLRA. The Supreme Court has recognized two variations of NLRA preemption-preemption under *Lodge 76, Int'l Assn. of Machinists & Aerospace Workers v. Wisconsin Employment Relations Comm'n,* 427 U.S. 132, 144 (1976) ("*Machinists* Preemption") and preemption under *San Diego Building Trades Council v. Garmon* 359 U.S. 236 (1959) ("*Garmon* Preemption"). Here, the Rule actually falls within both *Machinists* and *Garmon* preemption doctrines and must be enjoined.

Garmon Preemption prohibits the regulation of any "activity that the NLRA protects, prohibits, or arguably protects or prohibits" by any agency other than the NLRB. While generally applied in the context of state regulation, both *Garmon* and *Machinist* Preemption apply with equal force to non-Board actors such as federal executive branch agencies. *UAW-Labor Employment and Training Corp. v. Chao*, 325 F.3d 360 (D.C. Cir. 2003).

In *Garmon* itself, the Supreme Court explained the basis for preemption as follows:

> Congress did not merely lay down a substantive rule of law to be enforced by any tribunal competent to apply law generally to the parties. It went on to confide primary interpretation and application of its rules to a specific and specially constituted tribunal and prescribed a particular procedure for investigation, complaint and notice, and hearing and decision, including judicial relief pending a final administrative order. Congress evidently considered that centralized administration of specially designed procedures was necessary to obtain uniform application of its substantive rules and to avoid these diversities and conflicts likely to result from a variety of local procedures and attitudes towards labor controversies. . . . A multiplicity of tribunals and a diversity of procedures are quite as apt to produce incompatible or conflicting adjudications as are different rules of substantive law . . . ." *Garner v. Teamsters Union*, 346 U.S. 485, 490-491.
>
> Administration is more than a means of regulation; administration is regulation. We have been concerned with conflict in its broadest sense; conflict with a complex and interrelated federal scheme of

> law, remedy, and administration. Thus, judicial concern has necessarily focused on the nature of the activities which the States have sought to regulate, rather than on the method of regulation adopted.

Garmon, 359 U.S. 242-243.

In enacting the NLRA, Congress structured the statute to balance the rights and interests of employees, employers and labor organizations within the context of collective bargaining. Section 7 of the NLRA delicately balances the rights of employees to engage in or refrain from self-organization, collective bargaining and other concerted activity. Section 8(c) preserves the right of employers to express "views, argument and opinion," which has universally been recognized to include the right to oppose unionization. 29 U.S.C. § 158(C) Sections 8(a) and 8(b) set forth the substantive and remedial rules governing violations of the NLRA. Finally, and for present purposes most important, Congress created and empowered the NLRB to act as the sole agency charged with administering and enforcing the NLRA. See *Chamber of Commerce v. Brown*, 554 U.S. 60, 65 (2008) citing *Wisconsin. Dep't. of Indus. Labor & Human Rels. v. Gould, Inc.*, 475 U.S. 282, 286 (1986).

Now come the Department of Labor, the OFCCP and OLMS and purport to have the authority to (1) dictate what employers communicate regarding employees' rights under the NLRA; (2) decide which specific NLRA rights will be communicated to employees; and (3) determine what sanctions will be levied against employers who fail to communicate the NLRA rights as Defendants dictate. In short, the Rule empowers Defendants to intricately regulate communications on matters Congress placed squarely within the NLRB's jurisdiction. This creates precisely the "multiplicity of tribunals and ... diversity of procedures ... quite apt to produce incompatible or conflicting adjudications ... (*Garmon* at 242-243) which *Garmon* prohibits.

The D.C. Circuit has determined that even the NLRB, the very entity charged with promulgating regulations necessary to carry out the NLRA—indeed, the entity created by the NLRA for the ***express purpose*** of such regulation—does not itself have the authority to require employers to post a notice virtually identical to the one in the Rule. In so holding, the Court found that Congress did not intend "to authorize a regulation so aggressively prophylactic as the posting rule." *NAM v. NLRB* at 967. If the virtually identical "aggressively prophylactic" posting rule is incompatible with the NLRA when promulgated by the NLRB, it is certainly no less incompatible with that statute when issued by Defendants. If anything, it is more incompatible because it injects another agency into the arena which Congress left exclusively to the NLRB. Such intrusion disrupts the statutory framework governing labor policy established by Congress and administered and enforced by the NLRB. Again, it is precisely this kind of incompatible regulation by agencies other than the NLRB which *Garmon* preemption precludes.

Further, the D.C. Circuit's decision in *NAM v. NLRB* makes clear that 8(c) of the NLRA protects the right of employers to remain silent regarding employee rights under the NLRA. It necessarily follows then that imposing a rule which mandates that employers speak to those rights in a defined manner "regulates activity that the NLRA protects..." *Wisconsin Dep't. of Indus. Labor & Human Rels. v. Gould, Inc.*, 475 U.S. 282, 286 (1986). It is likewise clear that no state or federal regulatory agency (other than the NLRB) may regulate conduct protected by the NLRA. This rule is at the core of *Garmon* Preemption. Accordingly, the Rule at issue cannot stand.

Even more clear than the application of *Garmon* Preemption is that of *Machinists* Preemption, which prohibits regulation of labor-management activities which Congress intended to be unregulated. *Machinists,* 427 U.S. at 144; *Chamber of Commerce of the U.S. v. Reich*, 74

F.3d 1322 (1996). In *NAM v. NLRB* the D.C. Circuit unequivocally held that a notice of §7 rights posting required by the NLRB was contrary to Congress' intent and, therefore, invalid. Thus, notice of rights under §7 of the NLRA is unquestionably activity which Congress intended to leave unregulated.

This is not to say that Congress did not provide for the regulation by the NLRB of how §7 rights are interpreted or what communications may be deemed to interfere with those rights. Certainly, the NLRB heavily regulates those matters. 29 U.S.C. § 156.

When it comes to the required posting of a particular notice of §7 rights, however, *NAM v. NLRB* recognizes that Congress intentionally left that particular matter unregulated, to the point that not even the NLRB has authority to act. Again, the reasoning of the D.C. Circuit in *NAM v. NLRB* has its roots in the rights under §8(c) of the Act. Section 8(c) prevents the imposition of unfair labor practice liability for exercising the right to remain silent on the issue of employer rights under §7. Thus, the NLRA explicitly leaves employer speech in this regard unregulated. Permitting DOL to now sanction an employer for maintaining the §8(c) right of silence would allow DOL to tread, indeed sprint, into an area Congress distinctly left unregulated. *Machinists* Preemption absolutely prohibits such action. Accordingly, the Rule is preempted under *Machinists* and *Reich*.

CONCLUSION

For all of the reasons set forth above, Plaintiffs respectfully submit that Defendants are wholly without authority to enact and enforce the Rule, and this Court should grant Plaintiffs' motion for summary judgment because there exists no genuine issue as to any material fact and Plaintiffs are entitled to judgment as a matter of law. Plaintiffs further submit that the Court declare the Rule null and void, and preliminarily and permanently enjoin enforcement of the Rule.

Respectfully submitted,

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