IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

NATIONAL ASSOCIATION OF MANUFACTURERS,	)	**Civil Action No. 1:11-cv-01629**
and	)	**JUDGE AMY BERMAN JACKSON**
COALITION FOR A DEMOCRATIC WORKPLACE	)	
Plaintiffs,	)	
v.	)	
NATIONAL LABOR RELATIONS BOARD, *et al.*,	)	
Defendants.	)	

PLAINTIFFS' MOTION FOR PRELIMINARY INJUNCTION
AND REQUEST FOR EXPEDITED HEARING

Pursuant to Fed. R. Civ. P. 65(a) and LCvR 7(f), 65.1(c) and 65.1(d), Plaintiffs National Association of Manufacturers and Coalition for a Democratic Workplace ("Plaintiffs"), through counsel, respectfully request that this Court (1) hold an expedited hearing on Plaintiffs' Motion for Preliminary Injunction and (2) enter a preliminary injunction enjoining Defendants, the National Labor Relations Board (the "Board"), Board Chairman Mark Pearce, Board Members Craig Becker and Brian Hayes, and Board General Counsel Lafe Solomon, from undertaking any and all agency action to implement and enforce the Final Rule entitled Notification of Employee Rights Under the National Labor Relations Act, that was published in the Federal Register on August 30, 2011 (76 Fed. Reg. 54006 (2011)) (the "Rule"), including, but not limited to, the requirement that "[a]ll employers subject to the National Labor Relations Act (the "NLRA") must post notices to employees, in conspicuous places, informing them of their NLRA rights,

together with Board contact information and information containing basic enforcement procedures, in the language set forth in the Appendix to Subpart A of this Part (the "Notice")."

In both the Notice of Proposed Rulemaking and the Rule, the Board cites Section 6 of the NLRA as authority to promulgate and issue the Rule. However, neither Section 6 nor any other sections of the NLRA contain any provisions granting the Board the authority to promulgate and issue a rule requiring employers to post a notification of employee rights under the NLRA. The Rule, therefore, has been promulgated in excess of the Board's statutory authority under the NLRA and Plaintiffs have a substantial likelihood of success on the merits. Should this unlawful regulation be permitted to be implemented, Plaintiffs, their members and all employers subject to the Board's jurisdiction will suffer irreparable injury. Defendants, on the other hand, will not be harmed by a delay in implementing an unlawful Rule and the public interest favors an injunction.

An expedited hearing is essential, pursuant to LCvR 65.1(d), because the effective date of the Rule is November 14, 2011, less than two months from now. For that reason, Plaintiffs respectfully request that the Court set a hearing date of no later than twenty-one (21) days from the date of this filing or on or about October 18, 2011.

In further support of this Motion and its request for an expedited hearing, Plaintiffs respectfully refer the Court to the attached Memorandum of Points and Authorities.

The undersigned certifies that consent to this Motion could not be obtained from opposing counsel Eric C. Moskowitz, Abby Propis Simms and Dawn L. Goldstein by telephone conferences on September 23 and 26, 2011, pursuant to LCvR 7(m), the motion being opposed.

WHEREFORE, Plaintiffs request that its Motion for Preliminary Injunction be granted. A Proposed Order is attached.

Dated: September 27, 2011.

Respectfully submitted,

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MEMORANDUM OF THE NATIONAL ASSOCIATION OF MANUFACTURERS AND COALITION FOR A DEMOCRATIC WORKPLACE IN SUPPORT OF ITS MOTION FOR PRELIMINARY INJUNCTION AND REQUEST FOR EXPEDITED HEARING

FACTUAL BACKGROUND

The Board published a Notice of Proposed Rulemaking in the Federal Register on December 22, 2010, 75 Fed. Reg. 80410, seeking public comment on a rule requiring employers subject to the jurisdiction of the NLRA to post notices informing their employees of certain rights under the NLRA. After considering public comments on the Proposed Rule, the Board published the Rule in the Federal Register on August 30, 2011, at 76 Fed. Reg. 54006 (2011). The effective date of the Rule is November 14, 2011. The Rule is entitled Notification of Employee Rights under the National Labor Relations Act. Plaintiff National Association of Manufacturers ("NAM") filed a complaint with this Court on September 8, 2011, to declare the Rule unlawful and to enjoin its operation. Plaintiffs NAM and Coalition for a Democratic Workplace ("CDW") filed an amended complaint on September 23, 2011, seeking the same remedy.

LAW AND ARGUMENT

I. Preliminary Statement

The Board is wholly without statutory authority to promulgate the Rule. Nothing in the Act grants the Board power to require all employers subject to the Board's jurisdiction to post a notice of rights. Nor does the Board have the authority to assert jurisdiction over all employers in the absence of a representation petition or an unfair labor practice charge. Further, the Board's creation of a new unfair labor practice related to the failure to post the Rule's Notice usurps the power of Congress. Moreover, the Board's alteration of the congressionally-established statute of limitations for filing an unfair labor practice charge exceeds the authority delegated by Congress and is contrary to Supreme Court and federal circuit court precedent. Finally, the Rule's posting requirement constitutes compelled speech in violation of the First Amendment to the United States Constitution and Section 8(c) of the Act, 29 U.S.C. § 158(c). Accordingly, the Rule is in violation of Sections 6, 8(c), and 10(b) of the Act, 29 U.S.C. §§ 156, 158(c) and 29 U.S.C. § 160(b), the Administrative Procedure Act (the "APA"), 5 U.S.C. §§ 706(2)(A) and 706(2)(C), and the First Amendment.

II. Standard of Review

When deciding whether to grant a preliminary injunction, the Court examines whether (1) there is a substantial likelihood the plaintiff will succeed on the merits; (2) plaintiff will be irreparably injured if an injunction is not granted; (3) an injunction will not substantially injure the defendants; and (4) the public interest will be furthered by the injunction. *Ellipso, Inc. v. Mann*, 480 F.3d 1153, 1157 (D.C. Cir. 2007) (upholding preliminary injunction issued by this Court). The court balances these factors, and "[i]f the arguments for one factor are particularly strong, an injunction may issue even if the arguments in other areas are rather weak." *Id.* (*quoting Serono Labs., Inc. v. Shalala*, 158 F.3d 1313, 1318 (D.C. Cir. 1998)).

As discussed below, Plaintiffs have a substantial likelihood of success on the merits of their claims; Plaintiffs, the employers represented by Plaintiffs and all employers subject to the Board's jurisdiction will suffer irreparable harm absent an injunction; the Defendants will not be harmed by an injunction; and an injunction is in the public interest.

A. Plaintiffs are Likely to Succeed on the Merits.

1. The Standard of Review Under *Chevron*.

The Rule is subject to review 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 the Board's promulgation of the Rule fails under both steps of the *Chevron* standard.

2. This Court has General Federal Question Jurisdiction to Determine Whether the Rule Exceeds the Board's Statutory Authority.

In addition to being reviewable under the APA, this Court has general federal question subject matter jurisdiction over this matter. The Supreme Court has explicitly held that the federal district courts have jurisdiction to determine whether a rule or other action by the Board is in excess of its delegated authority under the NLRA. In *Leedom v. Kyne*, 358 U.S. 184 (1958) the Supreme Court held that such jurisdiction exists when the Board acts "in excess of its delegated powers and contrary to a specific prohibition of the Act." *Id.* at 188. Particularly applicable to this case, the Supreme Court further noted that the federal courts must intervene when the Board has "attempted [the] exercise of power that had been specifically withheld." *Id.* at 189.

The review of agency action under *Leedom v. Kyne, supra,* involves no deference to the agency. Rather, it requires straightforward statutory interpretation to determine whether the agency action at issue is in excess of the power delegated by Congress. In *Railway Labor Executives' Ass'n v. National Mediation Board,* 29 F.3d 655 (D.C. Cir. 1994) (*en banc)* the D.C. Circuit addressed the parameters of such review, stating :

> Nor is this a case in which principles of deference to an agency's interpretation comes into play. Such deference is warranted only when Congress has left a gap for the agency to fill pursuant to an express or implied 'delegation of authority to the agency.' *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, U.S. 837, 843-44 (1984).

Id. at 2908.

While different in jurisdictional basis, the substance of the analysis under *Leedom v. Kyne* is essentially the same as the *Chevron* Step I analysis. If it is determined that the agency has exceeded the grant of congressional authority, the agency action is void and the inquiry ends. Because of this similarity, the focus of the discussion below is whether the Rule exceeds the Board's statutory authority. If so, the Rule must be stricken under either the *Leedom v. Kyne* analysis or the *Chevron* Step I analysis. And, as will be amply demonstrated, the Rule clearly exceeds the bounds of the Board's statutory authority.

3. The Rule Has Been Promulgated In Excess of the Board's Statutory Authority Under The NLRA and the Board's Action is Not Entitled to Deference.

a. Congress did not grant the Board authority to promulgate a rule directing all employers 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, the Board's promulgation of the Rule far exceeds the rulemaking authority granted it by Congress.

Section 6 of the NLRA authorizes the Board to promulgate "such rules and regulations as may be necessary to carry out the provisions of this Act." 29 U.S.C. § 156. Neither Section 6 nor any other sections of the NLRA contain any provisions granting the Board the authority to promulgate a rule requiring employers to post a notification of employee rights under the NLRA. Since Congress did not include a notice-of-rights posting provision in the NLRA, it is obvious that no "rules and regulations [are] necessary to carry out" such provision. Nonetheless, Section 104.20(a) of the Rule requires "[a]ll employers subject to the NLRA [to] post notices to employees, in conspicuous places, informing them of their NLRA rights, together with Board contact information and information containing basic enforcement procedures, in the language set forth in the Appendix to Subpart A of this Part."

The absence of statutory authority for the Board 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 the Board authority to promulgate rules regarding the posting of a notice-of-rights demonstrates that the Board is without such authority. See e.g., *Civil Service Employees Assn., Local 1000, AFSCME v. NLRB,* 569 F.3d 88 2d (2nd Cir. 2009) (Deference is not accorded the NLRB where the NLRB moves into a new area of regulation which Congress has not committed to the NLRB).

Further, with the exception of the Railway Labor Act, all of the statutes noted above were enacted subsequent to the NLRA. Had Congress wished to grant similar rulemaking authority to the Board, Congress could have easily amended the NLRA at some point in the last 75 years 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. Notably, this was done just one year before enactment of the NLRA. 45 U.S.C. § 152 Eighth; Pub. L. No. 73-442, 48 Stat. 1185, 1188 (1934). Congress' pointed failure to amend the NLRA while amending the closely-related Railway Labor Act further emphasizes congressional intent not to grant notice-posting authority to the Board.

Moreover, Congress made extensive amendments to the NLRA in 1947, 1959 and 1974. Yet at no time did Congress even consider amending the NLRA—as it had the Railway Labor Act—to include a notice-posting rule.

The Rule also provides for electronic posting of the Notice. Again, nothing in Section 6 nor any other provision of the NLRA authorizes the Board to require employers to electronically post a notice of employee rights under the NLRA. Even the statutes that require the posting of a notice-of-rights do not require electronic posting.

The Board's promulgation of the Rule exceeds the Board's statutory authority even more blatantly than the Board's rule in *NLRB v. Financial Institution Employees of America, Local 1182, et al.*, 121 LRRM 2741 (S. Ct. 1986). In *NLRB v. Financial Institution Employees*, the Board promulgated a new rule requiring that non-union employees be permitted to vote on a certified union's decision to affiliate with another union. The Court held, however, that since the Act establishes specific election procedures for determining whether employees desire a change in the union's representative status, the Board has no authority to require unions to follow other procedures. Therefore, the new rule exceeded the Board's statutory authority. In so

holding, the Court, quoting *American Ship Building Co. v. NLRB*, 380 U.S. 300, 318 (1965), stated that "[d]eference to the Board 'cannot be allowed to slip into an inertia which results in the unauthorized assumption . . . of major policy decisions properly made by Congress.'" (ellipsis in the original) *Id*. at 2746.

In the present case, the Board has no statutory authority to require notice-posting; no statutory authority to assert active jurisdiction over employers regardless of whether they are the subject of an unfair labor practice charge or a representation petition; no statutory authority to create an unfair labor practice; and no statutory authority to toll the statute of limitations set forth in Section 10(b), 29 U.S.C. § 160(b).

The absence of statutory authorization to promulgate the Rule makes plain the unambiguously expressed intent of Congress that the Board, contrary to Step 1 of the *Chevron* standard, has 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).

b. The Board's promulgation of the Rule is arbitrary and capricious and not a reasonable construction of the Act.

Even assuming, *arguendo*, that notice-posting rulemaking authority can somehow be gleaned from the patent absence of such provision in the Act, the Rule must nonetheless be enjoined as being arbitrary, capricious and not a reasonable construction of the Act. *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. Scrutiny of the Board's justification for the Rule (attached hereto in the announcement of the Rule as Exhibit A) reveals no substantial, credible

evidence supporting a need for the Rule. The alleged empirical evidence cited by the Board as the basis for generating the Rule consists solely of random anecdotes, a few selective studies cited in discrete articles, and partisan opinion. Substantive empirical evidence and analyses of rigorous scholarly merit are completely lacking. The Board, without a shred of credible evidence, contends that the Rule is necessary because employees are unaware of their NLRA rights. Rule at 21. The Board does not even attempt to explain why it is now imperative to address this problem 75 years after passage of the Act and in an environment of robust information and media proliferation. The Board's specious rationalizations for promulgating the Rule are the very definition of arbitrary and capricious, and are unworthy of *Chevron* deference.

c. The Board cannot mandate notice-posting absent the triggering of its authority to administer the provisions of the NLRA.

The Board does not have plenary authority to assert active jurisdiction over all employers. Rather, the Board's authority to administer the provisions of the NLRA is triggered only when a representation petition is filed pursuant to Section 9(c)(1), 29 U.S.C. § 159(c)(1) or an unfair labor practice charge is filed pursuant to Section 8, 29 U.S.C. § 158 and processed by the Board under Section 10, 29 U.S.C. § 160. Neither Section 6, nor any other section of the NLRA contains any provisions granting the Board the authority to assert active jurisdiction over an employer absent the filing of a petition or a charge. The Rule, nonetheless, requires *all* employers subject to the Board's jurisdiction to post a Notice, regardless of whether the employers are the subjects of charges or petitions.

Had Congress intended to permit the Board to assert jurisdiction over employers absent the filing of a charge or petition, Congress easily could have done so. Since Congress did not authorize the Board to assert active jurisdiction over all employers at all times, promulgation of the Rule violates the unambiguously expressed intent of Congress, contrary to Step 1 of the *Chevron* standard, and is an impermissible and unreasonable construction of the NLRA under

Step 2 of the *Chevron* standard. Therefore, the Rule is unlawful and should be set aside under the APA, 5 U.S.C. § 706(2)(C). Further, the Rule must be held unlawful and set aside as "arbitrary, capricious, . . . or otherwise not in accordance with the law" under 5 U.S.C. § 706(2)(A) of the APA.

i. Congress Did Not Authorize the Board To Peremptorily Assert Jurisdiction Over All Employers

As noted above, the Act provides for the Board's powers to be invoked only upon the occurrence of one of two events – the filing of an unfair labor practice charge or the filing of a representation petition. Nowhere does the Act contemplate that the Board can on its own initiative compel an employer, employee or labor organization to act in the absence of a charge or petition. The assertion of jurisdiction by an agency must be authorized by Congress. In the present case, the Board's actions in promulgating the Rule far exceed the power granted the Board by Congress.

Railway Labor Executives' Ass'n v. National Mediation Board, 29 F.3d 655 (D.C. Cir. 1994) (*en banc*) is directly on point. There, the National Mediation Board (the "NMB") promulgated a new procedural rule to address union representation issues in the context of railroad mergers and acquisitions. Specifically, the NMB provided that in the case of a consolidation of carriers, the NMB, a carrier or employees of a carrier could initiate representation proceedings. Previously, only employee groups could initiate such proceedings.

The D.C. Circuit held that because the Railway Labor Act explicitly provided that the NMB's representation process is to be initiated "upon the request of either party to the dispute [*i.e.*, employee groups]," the NMB had exceeded its statutory power by allowing the process to be initiated by itself or a carrier. The court stated:

> The Board does not deny that the Merger Procedures seek to allow both the Board and carriers to initiate representation proceedings under Section 2, Ninth. Nor does the Board deny that in this respect the Merger Procedures are directly at odds

> with more than fifty years of unbroken practice under Section 2, Ninth. We need look no further than the language of Section 2, Ninth, the structure of the Act, and its legislative history to determine that these proposed procedures are not only unprecedented, but legally insupportable as well.

Id. at 2903.

The court began its analysis with a review of the plain language of the statute, noting:

> [T]he entire structure of Section 2, Ninth makes it plain that representation investigations and elections are conducted only at the behest and for the specific protection of "employees." The "duty of the Mediation Board" to "investigate" does not arise except "upon request of either party," "i.e. employees." The Mediation Board is only "authorized" to conduct an election in connection with "such an investigation" as is prescribed by Section 2, Ninth.

Id. at 2903-04.

The court then turned to legislative history, finding that Congress' rejection of a provision that would have made carriers a party to representation proceedings revealed its intent to limit those able to invoke those proceedings to employees. *Id.* at 2905. Importantly, the court further noted that "Congress thought the Board's powers *were not self-initiating*, but were triggered by a proper invocation thereof by one of the employee parties to the dispute." *Id.* at 2907. (Emphasis added).

The court found it "telling" that in the more than fifty years prior to the NMB's promulgation of its new merger procedures it had never claimed that the statute authorized it or a carrier to initiate representation proceedings. *Id.* at 2907. Thus, while not dispositive, the agency's history of interpretation is a factor to the considered.

In the present case, the Board is similarly attempting to initiate the exercise of its jurisdiction in a fashion clearly not contemplated by Congress. Just as in *Railway Labor Executives' Ass'n, supra,* the structure of the statute at issue (the NLRA), the legislative history and the Board's own consistent treatment of the issue reveal that the Board's action goes far beyond the scope of the jurisdiction contemplated and granted by Congress.

Again, the Act specifically limits the parameters of the Board's power to (1) the investigation and processing of representation petitions and (2) the investigation and adjudication of unfair labor practice charges. 29 U.S.C. §§ 159, 160. In granting these powers, Congress defined precisely when and how the Board's power can be invoked. The language of the Act is unambiguous; with respect to representation petitions, § 9 (c) of the Act states:

> (1) *Whenever a petition shall have been filed*, in accordance with such regulations as may be prescribed by the Board –
>
> (A) by an employee or group of employees or any individual or labor organization …; or
>
> (B) by an employer…
>
> the Board shall investigate such petition and if it has reasonable cause to believe a question of representation exists shall provide for an appropriate hearing upon due notice…. If the Board finds upon the record of such hearing that such a question of representation exists, it shall direct an election by secret ballot and shall certify the results thereof.

29 U.S.C. § 159(c) (Emphasis added).

Clearly, Congress has authorized the Board to act in the representation arena *only* upon the filing of a petition. There is no authority granted to the Board to take any action in connection with representation issues in the absence of a petition being filed by employees, a union or an employer.[1]

The same is true with respect to unfair labor practice charges; Congress carefully defined the parameters of the Board's power. Section 10 of the Act provides:

> (a) Powers of Board generally
>
> The Board is empowered, *as hereinafter provided*, to prevent any person from engaging in any unfair labor practice. (listed in section 158 of this title) affecting commerce …

[1] Similarly, § 9(e) of the Act permits the Board to entertain deauthorization petitions to revoke a union security provision in a collective bargaining agreement, but *only* "upon the filing" of a petition by employers to do so. 29 U.S.C. § 159(c).

> (b) *Whenever it is charged* that any person has engaged in or is engaging in any such unfair labor practice, the Board, or any agent or agency designated by the Board for such purposes, *shall have the power* to issue and cause to be served upon such person a complaint stating the charges in that respect, and containing a notice of hearing before the Board or a member thereof, or before a designated agent or agency …

29 U.S.C. § 160 (Emphasis added).

Section 10(c) even identifies when the Board's jurisdiction ceases. That Section provides that if the Board determines that no unfair labor practice has been committed, "then the Board shall state its findings of fact *and shall issue an order dismissing the said complaint*…" *Id.*

Given this very precise language, it is plain that Congress granted a limited scope of authority to the Board with respect to unfair labor practices. Only upon the filing of a charge is the Board's power invoked to determine the existence of an unfair labor practice. Thus, Congress empowered the Board to regulate the conduct of only those employers before it in representation or unfair labor practice proceedings.

If the limited grant of power were not clear enough from the provisions of the Act discussed above, yet additional statutory provisions confirm this conclusion. For example, Section 10(j), which permits the Board to seek preliminary injunctive relief in unfair labor practice cases, specifically states that "[t]he Board shall have the power, upon issuance of a complaint as provided in subsection (b)…to petition any United States district court [for preliminary injunctive relief.]" 29 U.S.C. § 160(j). The Board's power in this context only begins only upon the issuance of a complaint, which can be issued only *after a charge is filed*. In the area of jurisdictional disputes, § 10(k) provides that the Board is "empowered" to resolve such disputes only *after an unfair labor practice charge is filed*. 29 U.S.C. § 160(k). The same is true with respect to secondary boycotts. Section 10(c) obligates the Board to seek preliminary injunctive relief in the case of secondary boycotts but only *after the filing of a charge*. 29 U.S.C. § 160(l).

Section 11 of the Act further illustrates the very defined limits of the Board's statutory authority:

> For purposes of *all* hearings and investigations, which, in the opinion of the Board, are necessary and proper for *the exercise of the powers vested in it by sections 159 and 160 of this title –*

29 U.S.C. § 161. (Emphasis added). This preamble to the Board's authority to receive documentary evidence, issue subpoenas and serve process, again reinforces that the Board's powers are only those enumerated in Sections 9 and 10 of the Act. In this regard, it must be noted that Congress saw fit to explicitly limit the Board's subpoena power in § 11 by providing that "the Board *shall* revoke" any subpoena seeking evidence which "does not relate to any matter under investigation…" *Id.* (Emphasis added).

Finally, since the adoption of the Wagner Act in 1935, the Board has never purported to have the ability to exercise jurisdiction over any person or entity other than in connection with an unfair labor practice charge or representation petition. Indeed, the Board itself has long recognized that it is statutorily precluded from fashioning broad prophylactic remedies, even in the context of unfair labor practice charges. *See, Local 357, Teamsters v. NLRB*, 365 U.S. 667 (1961). This consistent interpretation wholly supports the plain language and legislative history of the Act itself.

In sum, Congress has delineated the scope of the Board's authority in great detail. The Board is empowered to exercise jurisdiction over an employer *only* upon the filing of an unfair labor practice charge or a representation petition. Sections 9 and 10 explicitly describe the contours of the Board's power and make unquestionably clear that in the absence of such a charge or petition, the Board has no jurisdiction to regulate employer conduct. As stated by the Court in *Railway Labor Executives' Ass'n, supra*, where a statute "does not contemplate action-

initiating roles [for the agency]" that agency is prohibited from seizing such a role itself. *Id.* at 665.

Here, the Board purports to assert jurisdiction over 6,000,000 employers nationwide and requires them to post a notice under threat of administrative prosecution, all in the absence of an unfair labor practice charge or representation petition. Nothing in the Act grants the Board such power. Accordingly, the Board has manifestly exceeded its statutory authority. This patent self-expansion of power by the Board compels the conclusion that Plaintiffs have an exceedingly high likelihood of success on the merits.

d. By creating a new unfair labor practice under the Rule the Board has exceeded the authority granted to it by Congress.

Section 104.210 of the Rule states in pertinent part that: "[f]ailure by [employers] to post the employee notice may be found to interfere with, restrain, or coerce employees in the exercise of their rights guaranteed by NLRA Section 7, 29 U.S.C. § 157, in violation of NLRA Section 8(a)(1), 29 U.S.C. § 158(a)(1)." Section 104.210 of the Rule further provides that: "the Board will determine whether an employer is in compliance [with the Rule] when a person files an unfair labor practice charge alleging that the employer has failed to post the notice required [under Subpart B of the Rule]."

Section 104.210 of the Rule purports to create a new unfair labor practice where an employer covered under the NLRA fails to post a Notice. The Board's action plainly usurps congressional authority. Congress detailed the five unfair labor practices that may be committed by an employer in Section 8(a) of the NLRA, 29 U.S.C. § 158(a). The failure to post a notice of employee rights under the Act is not among them. Moreover, Section 10(a), 29 U.S.C. § 160(a), specifically empowers the Board to address *only* those unfair labor practices "listed in Section 158 of this title." Although the new unfair labor practice ostensibly derives from Section 8(a)(1), 29 U.S.C. § 158(a)(1), that Section makes it unlawful for employers "to interfere with, restrain,

or coerce employees in the exercise of the rights guaranteed in Section 157 of this title." Section 157 relates to employee rights. It has absolutely nothing to do with notice-posting.

The Board is not authorized to alter, augment or add to the enumerated unfair labor practices established by Congress. The Supreme Court's opinion in *Local 357, Teamsters v. NLRB, supra* is controlling in this regard. There, the Board added two requirements to hiring hall arrangements (to prevent unlawful encouragement of union membership) not specifically provided by Congress. The Court held that the Board is confined to the hiring hall regime established by Congress and is without authority to establish a broader regulatory scheme. *See*, *NLRB v. Drivers, etc., Local Union,* 362 U.S. 274 (1960).

The Board cannot arrogate unto itself the legislative power to establish unfair labor practices that could subject employers to sanctions. Neither does the Board have the authority to amend the Act. Such power and authority is the province of Congress alone. Yet, in the present case, the Board presumes to create a new notice-posting requirement *and* a new unfair labor practice for failure to post such Notice. The statutes cited in Section 2a hereof that penalize failure to post mandated notices contain specific statutory authorization for such sanctions. *See*, Railway Labor Act, 45 U.S.C. § 152; Title VII of the 1964 Civil Rights Act, 42 U.S.C. § 2000e-10; the Family and Medical Leave Act, 29 U.S. § 2619(a); and the Occupational Safety and Health Act, 29 U.S.C. § 657(c). On the other hand, the Americans With Disabilities Act, 42 U.S.C. § 12115; the Uniform Service Employment and Re-employment Rights Act, 38 U.S.C. 4334(a); and the Age Discrimination in Employment Act, 29 U.S.C. § 627 do not contain specific statutory authorization for the relevant enforcement agencies to impose sanctions. Accordingly, they do not. The Board stands alone in promulgating a notice-posting rule without statutory authority *and* in creating an unfair labor practice for failure to post the notice, again without statutory authority. Therefore, promulgation of the Rule violates the unambiguously

expressed intent of Congress, contrary to Step 1 of the *Chevron* standard and is an impermissible and unreasonable construction of the NLRA under Step 2 of the *Chevron* standard. The Rule, therefore, is unlawful and should be set aside under the APA, 5 U.S.C. § 706(2)(C). Further, the Rule must be held unlawful and set aside as "arbitrary, capricious, . . . or otherwise not in accordance with the law" under 5 U.S.C. § 706(2)(A) of the APA.

e. By promulgating the Rule purporting to toll the statute of limitation for unfair labor practice charges, the Board has exceeded the authority granted to it by Congress.

The Supreme Court and various circuit courts have made it abundantly clear that the Board has no authority to alter the statute of limitations for filing an unfair labor practice charge. As the Court stated in *Local Lodge No. 1424, etc., et al. v. National Labor Relations Board,* 362 U.S. 411 (1960):

> "As expositor of the national interest, Congress, in the judgment that a six month limitation period did not seem unreasonable, H.R. Rep. No. 245 80th Cong., 1st Sess., p. 40, barred the Board from dealing with past conduct after that period had run, even at the expense of the vindication of statutory rights.
>
> It is not necessary for us to justify the policy of Congress. It is enough that we find it in the statute. That policy cannot be defeated by the Board's policy." (citing *Colgate-Palmolive Peet Co. v. National Labor Relations Board,* 338 U.S. 355, 363 (insert date).

Courts have repeatedly stressed that a statute of limitations established by Congress cannot be defeated by policy of the Board. *See Local Lodge 1424, supra*; *see also, Don Lee Distributor, Inc. v. National Labor Relations Board,* 145 F.3d 834 (6th Cir. 1998). Nonetheless, Section 102.214(a) of the Rule provides for the tolling of the statute of limitations for unfair labor practice charges. Section 102.214(a) provides in pertinent part that: "[w]hen an employee files an unfair labor practice charge, the Board may find it appropriate to *excuse the employee from the requirement that charges be filed within six (6) months after* the occurrence of the

allegedly unlawful conduct if the employer has failed to post the required employee notice unless the employee has received actual or constructive notice that the conduct complained of is unlawful." (Emphasis added). Thus, the Board purports to toll the statute of limitation for filing an unfair labor practice charge where an employer has failed to post a notice.

Section 10(b) of the NLRA, 29 U.S.C. § 160(b), however, provides in pertinent part that: "*[n]o complaint shall issue* based upon any unfair labor practice charge occurring *more than six (6) months prior to the filing of a charge* with the Board and service of a copy thereof upon a person against whom such charge is made unless the person aggrieved thereby was prevented from filing such charge by reason of service in the armed forces, in which event, the six (6) month period shall be computed from the day of his discharge." (Emphasis added). It is clear that the only exception to the six (6) month statute of limitations for filing an unfair labor practice charge contemplated by Congress pertains to persons prevented from filing because of service in the military. Nothing in Section 10(b) evinces congressional intent to toll the statute of limitations where an employer has failed to post a notice not authorized by Congress.

Not only is the Rule's tolling of the Section 10(b) statute of limitations not authorized by Congress, its application to the unauthorized Notice is arbitrary and capricious. Statutes of limitation may not be altered at the whim of an agency:

> The statute of limitations is short . . . in most employment cases because the delay in bringing of suit runs up the employer's potential liability; every day is one more day of backpay entitlements. We should not trivialize the statute of limitations by promiscuous applications of tolling doctrines.

Cada v. Baxter Healthcare Corp., 920 F.2d 446, 453 (7th Cir. 1990). *See also, Kanakais Co., Inc.*, 293 NLRB 435 (1989).

As stated in *Local Lodge 1424, supra*, permitting the Board to alter the statute of limitations would "vitiate policies which underlie that provision of the Act (i.e., 10(b)) and

which are to bar litigation over past events after records have been destroyed, witnesses have gone elsewhere and recollections of events in question have become dim and confused, and to stabilize existing bargaining relationships." *Id.* at 419.

Section 102.214(a) therefore exceeds the unambiguously expressed intent of Congress contrary to Step 1 of the *Chevron* standard. Moreover, the tolling of the statute of limitations is "arbitrary, capricious, . . . or otherwise not in accordance with the law" and must be set aside under Step 2 of the *Chevron* standard.

f. The Rule violates Section 8(c) of the Act and the First Amendment by compelling employers to engage in speech they would not otherwise issue.

The First Amendment's protection of freedom of speech "prohibits the government from telling people what they must say." *Rumsfeld v. Forum for Academic and Institutional Rights, Inc.*, 547 U.S. 47, 62 (2006). The Supreme Court has stated that where a statute "[m]andat[es] speech that a speaker would not otherwise make," the statute "necessarily alters the content of the speech." *Riley v. National Federation of the Blind of N.C., Inc.*, 487 U.S. 781, 795 (1988). Corporate employers do not lose free speech protection because of the corporate status of the speaker. *See Pacific Gas and Elec. Co. v. Pub. Util. Comm'n*, 475 U.S. 1 (1986).

Although the First Amendment's protection against compelled speech is not absolute, the exceptions typically arise in the commercial sphere. The state (*i.e.* governmental agency) may require speakers to express certain factual and uncontroversial messages without their consent. The most common examples are warning and nutritional labels, provided the speech requirements are reasonably related to the state's interest in preventing deception of consumers. *See Nat'l Elec. Mfrs. Ass'n. v. Sorrell*, 272 F.3d 104 (2nd Cir. 2001); *See also Zauderer v. Office of Disciplinary Council for Sup. Ct. of Ohio*, 471 U.S. 626 (1985). Where the speech compelled is subjective and controversial, a strict scrutiny analysis applies. The speech requirement must

then serve a compelling state interest and be narrowly tailored to serve that interest. *FCC v. Pacifica*, 438 U.S. 726 (1978).

The Rule in the present case compels Plaintiffs, their members and all employers subject to the Act to post a Notice containing selective information regarding employee rights under the Act. The speech so compelled relates almost exclusively to rights favoring or promoting unionization. The Notice does not include significant employee rights related to, for example, the right to decertify a union or not pay dues in support of a union's political agenda. The biased nature of the Notice compels employers to engage in speech they would not otherwise make. Essential factual information regarding employee rights is omitted.

Section 8(c) of the Act, 29 U.S.C. § 158(c) permits employers to express their views, arguments and opinions as they deem fit on subjects covered by the Act. This section also grants employers the right to select the medium through which they will communicate their message. By compelling employers to communicate through specified media a selective and incomplete message, the Rule necessarily compels employers to communicate a subjective and controversial message — one that both violates employers' Section 8(c) rights and fails to meet the strict scrutiny standard. The dissemination of selective information regarding employer rights does not constitute a compelling governmental interest. Moreover, even if the Notice-posting constituted a compelling state interest, the Rule's requirement that *all* employers post the Notice is not narrowly tailored to meet that interest. As noted by the Court in *Riley*, *supra*, "the State [could] itself publish" the information it requires employers to post. *Id.* at 800. The Board, by using all employers as a proxy for disseminating certain information regarding employee rights, has exceeded the narrow tailoring prong as well as the compelling state interest prong of the strict scrutiny standard. This is especially true given that employer speech is compelled by a newly-created sanction the Board has no authority to impose.

The Rule must therefore be held unlawful and set aside under the First Amendment, Section 8(c), 29 U.S.C. § 158(c) and the APA 5 U.S.C. § 706(2)(C).

B. Plaintiffs Will Suffer Irreparable Harm Absent An Injunction.

The injuries suffered by Plaintiffs and their members will be irreparable because they cannot be effectively redressed by this Court. If the Rule is not enjoined, but is later found to be unlawful, Plaintiffs' members would be denied a meaningful or effective remedy because once the required Notice is posted, the proverbial bell cannot be unrung.

Irreparable harm is intrinsic to a federal agency's promulgation of a rule absent statutory authority. In fact, the Board has designated the Rule a "major rule" as defined by Section 804(2) of the Small Business Regulatory Enforcement Fairness Act of 1996, 5 U.S.C. 804(2)(A) because the Rule will have an effect on the economy of more than $100 Million in just the first year it takes effect. Rule at 86.

In the present case, Plaintiffs and their members will be compelled to incur the costs associated with the unlawful directive to post the Notice; their speech will be compelled in a manner inconsistent with Section 8(c), 29 U.S.C. § 158(c) and the First Amendment; they will be subject to prosecution under a newly-minted unfair labor practice charge, thereby incurring the costs, legal fees, and sanctions associated therewith; they will be subject to a protracted statute of limitation that, for the reasons set forth in *Local Lodge 1424* and *Cada v. Baxter Healthcare Corp., supra,* substantially prejudices employers and implicates their due process rights. These harms are significant, irremediable, and inflicted by an agency fiat untethered to congressional authorization.

C. Defendants Will Not Be Harmed By a Preliminary Injunction.

There is no harm that will inure to Defendants if the Rule is enjoined. A temporary delay to give the Court sufficient time to review the merits of the case will not harm the Defendants.

Seventy-five years have passed without the Board requiring a notice of the type imposed by the Rule. A delay of a few weeks or months certainly cannot be described as significant or material.

Case law supports issuing an injunction where the only injury to the defendant agency is delay. *See International Long Term Care v. Shalala*, 947 F. Supp. 15 (D.D.C. 1996) (a delay in administrative process was an inadequate basis for denying a preliminary injunction to stop the Secretary of Health and Human Services from terminating a nursing home's participation in the Medicare program); *DSE, Inc. v. United States*, 3 F. Supp. 2d 1464, 1472 (D.D.C. 1998) (issuing an injunction despite resulting delay in performing a government contract); *Nat'l Treasury Employees Union v. U.S. Dep't of Treasury*, 838 F. Supp. 631, 640 (D.D.C. 1993).

An order for injunctive relief in the present case will do nothing more than preserve the state of affairs that has been governing employees, employers, labor organizations and the Board for the last 75 years.

D. The Public Interest Favors a Preliminary Injunction.

A preliminary injunction will protect the public interest.

It is in the manifest interest of the public that a federal governmental agency be enjoined from acting unlawfully. *See, e.g., Clarke v. Office of Fed. House. Enter. Oversight*, 355 F. Supp. 2d 56, 66 (D.D.C. 2004) (noting a "substantial public interest" in ensuring that a federal agency "acts within the limits of its authority"); *Mova Pharm. Corp. v. Shalala*, 140 F.3d 1060, 1066 (D.C. Cir.1998) (affirming a preliminary injunction based in part on the public interest in the faithful execution of the laws); *Nobby Lobby, Inc. v. City of Dallas*, 970 F.2d 82, 93 (5th Cir. 1992) (approving the district court's conclusion that the "public interest is always served when public officials act within the bounds of the law and respect the rights of the citizens they serve.").

CONCLUSION

Plaintiffs respectfully submit that this Court should grant Plaintiffs' motion for preliminary injunction because Plaintiffs have demonstrated that they will have a substantial likelihood of success on the merits; their members will suffer irreparable harm if an injunction does not issue; Defendants cannot show that they would suffer any harm; and the public interest favors entering the injunction.

Respectfully submitted,

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CERTIFICATE OF SERVICE

This is to certify that the foregoing Motion for Preliminary Injunction and accompanying Memorandum in Support were filed electronically on the 27th day of September, 2011 in accordance with the Court's Electronic Filing Guidelines. Notice of this filing will be sent to all parties by operation of the Court's Electronic Filing System. Parties may access this filing through the Court's Filing System.

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