UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF SOUTH CAROLINA
CHARLESTON DIVISION

CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA and SOUTH CAROLINA CHAMBER OF COMMERCE, Plaintiffs, v. NATIONAL LABOR RELATIONS BOARD, et al., Defendants.	No. 2:11-cv-02516-DCN

BRIEF OF AMICI CURIAE THE HONORABLE JOHN KLINE, CHAIRMAN, COMMITTEE ON EDUCATION AND THE WORKFORCE, UNITED STATES HOUSE OF REPRESENTATIVES, AND REPRESENTATIVES DAN BURTON, LEE TERRY, DARRELL ISSA, TODD RUSSELL PLATTS, J. RANDY FORBES, JOE WILSON, RODNEY ALEXANDER, JOHN CARTER, STEVAN PEARCE, STEVE SCALISE, STEVE AUSTRIA, GREG HARPER, LYNN JENKINS, TOM MCCLINTOCK, DAVID P. ROE, GLENN THOMPSON, TIM WALBERG, SANDY ADAMS, LOU BARLETTA, LARRY BUCSHON, FRANCISCO CANSECO, SCOTT DESJARLAIS, TREY GOWDY, JOE HECK, BILL HUIZENGA, MIKE KELLY, JAMES LANKFORD, KRISTI NOEM, ALAN NUNNELEE, MIKE POMPEO, BEN QUAYLE, REID RIBBLE, TODD ROKITA, DENNIS ROSS, AND DANIEL WEBSTER IN SUPPORT OF PLAINTIFFS

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INTRODUCTION

The National Labor Relations Board ("NLRB" or "Board") is subject to the National Labor Relations Act, 29 U.S.C. §§ 151 *et seq.* ("NLRA," "Wagner Act" or "Act"). The Act and its legislative history demonstrate that the NLRB exceeded its authority, and acted contrary to the NLRA, by imposing a notice obligation on employers who are not parties to a pending unfair labor practice charge or a pending representation petition. This is especially evident from three points discussed more fully in the remainder of this brief:

(a) The NLRA's legislative history shows that *original versions of the Wagner Act contained a specific employer unfair labor practice relating to notice, which declared unlawful any employer's failure to provide notice to employees as required under the Act*. Led by Senator Wagner and a "unanimous" Senate Labor Committee, Congress intentionally *eliminated* these notice provisions from the Act.

(b) After the Wagner Act legislation was introduced, Congress intentionally removed all NLRB discretionary authority over employers, and the Board's jurisdiction was limited to *actual* parties, in *pending* cases, and *adjudicated* facts based on *evidentiary hearings*. This limitation was more than a legislative preference, it was regarded as central to the Act's constitutionality.

(c) The Board's recent creation of an employer notice obligation, without Congressional authorization, undermines important rights afforded by *other* statutes in which Congress has included express statutory notice requirements.

INTEREST OF THE AMICI CURIAE

The Amici Curiae are thirty-six Members of the United States House of Representatives ("Members"), including The Honorable John Kline, Chairman of the House Committee on Education and the Workforce (the "Committee") and Representatives Dan Burton, Lee Terry, Darrell Issa, Todd Russell Platts, J. Randy Forbes, Joe Wilson, Rodney Alexander, John Carter, Stevan Pearce, Steve Scalise, Steve Austria, Greg Harper, Lynn Jenkins, Tom McClintock, David P. Roe, Glenn Thompson, Tim Walberg, Sandy Adams, Lou Barletta, Larry Bucshon, Francisco Canseco, Scott Desjarlais, Trey Gowdy, Joe Heck, Bill Huizenga, Mike Kelly, James Lankford, Kristi Noem, Alan Nunnelee, Mike Pompeo, Ben Quayle, Reid Ribble, Todd Rokita,

Dennis Ross, and Daniel Webster. The Amici House Members have an interest in this litigation for several reasons. First, the Amici wish to make available to this Court relevant legislative history that has not been brought to the Court's attention by the NLRB or the other parties. Second, Chairman Kline and Representatives Platts, Wilson, Roe, Thompson, Walberg, DesJarlais, Rokita, Bucshon, Gowdy, Barletta, Noem, Heck, Ross and Kelly are current members of the Committee[1] to which the NLRA was originally referred in the House, and which played a leading role when Congress adopted the NLRA. Third, the House Members have an interest in preserving legislative decisions that are usurped when an agency exceeds its authority and creates obligations contrary to federal law. Finally, the Members have an interest in protecting rights afforded by other employment statutes containing express notice obligations, which are undermined by the creation of additional notice requirements without statutory authorization.

ARGUMENT

A. The NLRB's Creation of an Employer Notice Obligation Usurps the Decision by Congress *Not* to Require Notice Under the Act

Decision-making concerning the scope of our federal labor laws is the province of Congress. U.S. Const. art. I, § 1 ("All legislative powers herein granted shall be vested in a Congress of the United States"). The NLRA, originally known as the Wagner Act, was adopted in 1935 after 18 months of work by the House and Senate.[2] Important NLRA amendments were adopted in 1947, 1959 and 1974.[3]

[1] At the time of the NLRA's enactment, the Committee was known as the Committee on Labor. *See* H.R. Rep. No. 74-969, pt. 1, 74th Cong., 1st Sess. (1935), *reprinted in* 2 Legislative History of the National Labor Relations Act of 1935, at 2910 (1935).

[2] Wagner Act 49 Stat. 449 (1935), 29 U.S.C. §§ 151 *et seq.*

[3] *See* Labor Management Relations Act ("LMRA" or "Taft-Hartley Act"), 61 Stat. 136 (1947), 29 U.S.C. §§ 141 *et seq.*; Labor Management Reporting and Disclosure Act ("LMRDA" or "Landrum-Griffin Act"), 73 Stat. 541 (1959), 29 U.S.C. §§ 401 *et seq.;* and Health Care Amendments to the NLRA, 88 Stat. 395 (1974).

The Act reflects fundamental choices by Congress. The NLRB is *not* vested with a "general authority to define national labor policy by balancing the competing interests of labor and management." *American Ship Bldg. Co. v. NLRB*, 380 U.S. 300, 316 (1965). As the Supreme Court stated in *NLRB v. Insurance Agents Int'l Union*, 361 U.S. 477 (1960):

> It is suggested here that the time has come for a reevaluation of the basic content of collective bargaining as contemplated by the federal legislation. *But that is for Congress*. Congress has demonstrated its capacity to adjust the Nation's labor legislation to what, in its legislative judgment, constitutes the statutory pattern appropriate to the developing state of labor relations in the country. . . . *[W]e do not see how the Board can do so on its own*.

Id. at 500 (emphasis added; footnote omitted). *See also Lyng v. Payne*, 476 U.S. 926, 937 (1986) ("an agency's power is no greater than that delegated to it by Congress").

Court review is the only way to preserve legislative decisions that are usurped or ignored by the Board. This was recognized in *NLRB v. Brown*, where the Supreme Court stated:

> Reviewing courts are not obliged to stand aside and rubber-stamp their affirmance of administrative decisions that they deem *inconsistent with a statutory mandate or that frustrate the congressional policy underlying a statute*. Such review is always properly within the judicial province, and courts would abdicate their responsibility if they did not fully review such administrative decisions.[4]

The Amici support the Plaintiffs' motions for summary judgment because, as noted more fully below, the NLRA and its legislative history demonstrate that the Board exceeded its authority, and acted contrary to the NLRA, by creating a notice obligation imposed on employers that are not parties to pending unfair labor practice or representation proceedings. *Chevron USA, Inc. v. Natural Res. Def. Council*, 467 U.S. 837 (1984).

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[4] 380 U.S. 278, 291-92 (1965) (emphasis added). *See also NLRB v. Fin. Inst. Employees*, 475 U.S. 192, 202 (1986), *quoting American Ship Bldg, 380 U.S. at 318* ("Deference to the Board 'cannot be allowed to slip into a judicial inertia which results in the unauthorized assumption by an agency of major policy decisions properly made by Congress'"); *Republic Steel Corp. v. NLRB*, 311 U.S. 7, 11-12 (1940) ("We do not think that Congress intended to vest in the Board a virtually unlimited discretion to devise punitive measures, and thus to prescribe penalties or fines which the Board may think would effectuate the policies of the Act").

1. The NLRA, on Its Face, Reveals That Congress Intended *Not* to Impose a Notice Obligation on Employers Under the Act

The starting point for evaluating the scope of any statute is its plain language. *Griffin v. Oceanic Contractors, Inc.*, 458 U.S. 564, 571 (1982) ("There is, of course, no more persuasive evidence of the purpose of a statute than the words by which the legislature undertook to give expression to its wishes") (citations omitted). The NLRA is replete with references to "notice" in many contexts,[5] but no provision creates an employer notice obligation.[6] This warrants an inference that Congress intended *not* to impose an NLRA notice obligation on employers.[7]

The same conclusion is supported by comparing the NLRA to other statutes. As the court stated in *Alcoa Steamship Co. v. Fed. Maritime Comm'n.*, 348 F.2d 756, 758 (D.C. Cir. 1965),

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[5] There is no shortage of references in the NLRA to required "notice," although nothing requires employer notice to employees. *See, e.g.*, NLRA § 3(a), 29 U.S.C. § 153(a) (regarding removal of Board members "upon notice and hearing"); § 8(d)(1), 29 U.S.C. § 158(d)(1) (referencing "written notice to the other party" before contract terminations or modifications); § 8(d)(2), 29 U.S.C. § 158(d)(2) (referencing "notice of the existence of a dispute" to the Federal Mediation and Conciliation Services and state mediation agencies); § 8(d)(A), (B), (C), 29 U.S.C. §§ 158(d)(A), (B), (C) (referencing modified "notice" applicable to health care institutions); § 8(g), 29 U.S.C. § 158(g) (specifying content requirements applicable to health care institution "notice"); § 9(c)(1), 29 U.S.C. § 159(c)(1) (requiring "due notice" before representation hearings); § 10(b), 29 U.S.C. § 160(b) (requiring "notice of hearing" after service of unfair labor practice complaint); § 10(c), 29 U.S.C. § 160(c) (requiring "notice" before Board takes further testimony or argument in unfair labor practice proceedings); § 10(d), 29 U.S.C. § 160(d) (requiring "reasonable notice" before Board modifies or sets aside any finding or order); § 10(e), 29 U.S.C. § 160(e) (requiring court to "cause notice . . . to be served" upon filing of Board petition for enforcement of unfair labor practice orders); § 10(j), 29 U.S.C. § 160(j) (requiring court to "cause notice . . . to be served" upon filing of Board petition for interim injunctive relief); § 10(k), 29 U.S.C. § 160(k) (requiring Board resolution of unfair labor practice charges involving jurisdiction disputes absent satisfactory evidence of dispute adjustment within ten days "after notice that such charge has been filed"); § 10(l), 29 U.S.C. § 160(l) (requiring "notice" before secondary boycott temporary restraining orders and after filing of petitions for secondary boycott injunctive relief).

[6] In this brief, the phrase "notice obligation" refers to a requirement that employers provide notice *to employees* regarding various aspects of a statute. The NLRA refers to many other types of "notice," some applicable to employers, but none require employers to provide notice to employees regarding the law. *See* note 5, *supra*.

[7] *INS v. Cardoza-Fonseca*, 480 U.S. 421, 432 (1987) ("Where Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion") (citation omitted); *Marshall v. Gibson's Products, Inc. of Plano*, 584 F.2d 668, 676 (5th Cir. 1978) ("expression of certain powers implies the exclusion of others"); *U.S. v. Capobianco*, 836 F.2d 808, 811 (3d Cir. 1988) (omissions from statute are presumed to be intentional); 2B J. Norman J. Singer & J.D. Shamble Singer, SUTHERLAND STATUTORY CONSTRUCTION § 47.25 (7th ed. 2011) [hereinafter *Statutory Construction*] (same).

"Where Congress has consistently made express its delegation of a particular power, its silence is strong evidence that it did not intend to grant the power."[8]

The Railway Labor Act ("RLA") was enacted in 1926 without any general statutory notice requirement.[9] Yet, in 1934 – at the same time Senator Wagner and others discussed *eliminating* the Wagner Act legislation's notice obligation[10] – RLA amendments were introduced which *added* an employer notice obligation to the RLA.[11] Thus, the amended RLA stated:

> Every carrier *shall notify its employees by printed notices in such form and posted at such times and places as shall be specified by the Mediation Board* that all disputes between the carrier and its employees will be handled in accordance with the requirements of this Act, and *in such notices there shall be printed verbatim, in large type, the third, fourth, and fifth paragraphs of this section*. . . .

RLA § 2, Eighth, 45 U.S.C. § 152, Eighth (emphasis added).[12]

There are many additional federal laws in which Congress (i) expressly required general notices informing employees of statutory rights, or (ii) expressly required specific notices triggered by certain events, agreements or benefits, or (iii) elected *not* to impose any notice obligation (and no such obligation has ever been deemed to exist).[13] The mere recitation of these categories demonstrates that legislative choices have dictated whether or not (and what type of) notice obligations exist under particular laws. The absence of a notice obligation in the NLRA warrants a conclusion that no employer notice obligation exists under the statute.

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[8] *See also Statutory Construction* § 53:3 ("By analogy, the interpretation of a . . . statute may be influenced by language of other statutes which are not specifically related, but which apply to similar persons, things or relationship").

[9] 44 Stat. 577-587 (1926), 45 U.S.C. §§ 151 *et seq*.

[10] *See* text accompanying notes 20-28, *infra*.

[11] S. 3266, 73d Cong. (1934) (introduced April 2, 1934, calendar day; March 28, 1934, legislative day). For ease of reference, when the legislative and calendar days differ, the remainder of this brief refers to the calendar day.

[12] In addition to the RLA's general notice obligation, the RLA amendments also required notice to employees indicating that the RLA invalidates any prior contracts requiring or preventing union membership. RLA § 2, Fifth, 45 U.S.C. § 152, Fifth.

[13] Federal statutes that fall within the different categories set forth in the text (which in most cases are augmented by additional *state* notice requirements) are set forth on pages 25-27 below.

2. Legislative History Shows That Congress Intended *Not* to Impose an NLRA Notice Obligation on Employers

The NLRA's legislative history dispels any doubt that Congress intentionally decided there should be no employer notice obligation under the Act. As noted previously, *original versions of the proposed Wagner Act contained an employer unfair labor practice relating to notice, which declared unlawful any employer's failure to provide notice to employees as required under the Act*. The notice provisions were discussed in hearings conducted by the Senate and House labor committees. Ultimately, the notice provisions were disfavored by the legislation's supporters *and* opponents, which prompted Congress – led by Senator Wagner – to remove the notice provisions from the Act. At virtually the same time notice provisions were being *removed* from the NLRA, Congress introduced legislation *adding* notice obligations to the RLA.

This legislative history is clearly relevant. As the Board itself stated, arguments against the notice requirement "might have some persuasive force if there were evidence that Congress had considered and rejected inserting such a requirement into the Act." 76 Fed. Reg. 54,006, 54,013 (2011); *Railway Labor Executives' Ass'n v. NMB*, 29 F.3d 655, 667 (D.C. Cir. 1994) (*en banc*), *cert. denied*, 514 U.S. 1032 (1995) ("Congress' refusal to enact language which would have established unequivocally [a claimed right] is strong evidence that Congress did not intend the Board to have the power to confer that right on its own"); *Statutory Construction* § 48.2 (7th ed. 2011) (same).

(a) *Initial Versions of the Wagner Act Imposed Notice Obligations.* Efforts to enact comprehensive labor relations legislation in Congress date back to March 1, 1934,[14] when

[14] Earlier statutes adopted by Congress dealt with certain labor issues but not in a comprehensive manner. Examples include the Sherman Act, 26 Stat. 209 (1890), 15 U.S.C. §§ 1 *et seq.*; the Clayton Act, 38 Stat. 730 (1914), 15 U.S.C. §§ 12 *et seq.*; the Norris LaGuardia Act, 47 Stat. 70 (1932), 29 U.S.C. §§ 101 *et seq.*; and the

Senator Robert F. Wagner introduced S. 2926 during the 73d Congress. *See* S. 2926, 73d Cong. (1934), *reprinted in* 1 NLRB, LEGISLATIVE HISTORY OF THE NATIONAL LABOR RELATIONS ACT, *1935*, at 1 (1935).[15] Companion legislation was introduced as H.R. 8434 in the House by Representative William Connery, Chairman of the House Committee on Labor. *See* H.R. 8423, 73d Cong. (1934), 1 Leg. Hist. 1128 (introduced March 1, 1934).

The structure of S. 2926 and H.R. 8434 resembled the current NLRA: they articulated a policy of equalizing bargaining power to facilitate the free flow of commerce (S. 2926 § 2, 1 Leg. Hist. 1; H.R. 8434 § 2, 1 Leg. Hist. 1128-29); protected the right to organize and join labor organizations (S. 2926 § 4, 1 Leg. Hist. 3; H.R. 8434 § 4, 1 Leg. Hist. 1130); created a "National Labor Board" (S. 2926 §§ 3(8), 201, 1 Leg. Hist. 3, 4; H.R. 8434 § 3(8), 201, 1 Leg. Hist. 1130, 1131-32); and enumerated employer unfair labor practices (S. 2926 § 5, 1 Leg. Hist. 3-4; H.R. 8434 § 5, 1 Leg. Hist. 1130-31).

S. 2926 and H.R. 8434 contained two provisions imposing a notice obligation on employers. Section 5(5) created an employer "unfair labor practice" specifically based on violations of the proposed statutory notice obligation:

> SEC. 5. It shall be an unfair labor practice for an employer, or anyone acting in his interest, directly or indirectly –
>
> * * *
>
> (5) *To fail to notify employees* in accordance with the provisions of *section 304(b).*

S. 2926 § 5(5), 1 Leg. Hist. 3 and H.R. 8434 § 5(5), 1 Leg. Hist. 1130 (emphasis added).

In turn, Section 304(b) required every employer to "notify his employees" (a phrase similar to the wording of the RLA's general notice provision)[16] as follows:

National Industrial Recovery Act ("NIRA"), 48 Stat. 195 (1933), 15 U.S.C. §§ 703 *et seq*. The NIRA was declared unconstitutional in *A.L.A. Schechter Poultry Corp. v. United States*, 295 U.S. 495 (1935).

[15] Hereinafter, the two-volume compiled NLRA legislative history is referred to as "__ Leg. Hist. __."

[16] The RLA's general notice provision requires an employer to "notify its employees" regarding certain RLA provisions. RLA § 2, Eighth, 45 U.S.C. § 152, Eighth.

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

S. 2926 § 304(b), 1 Leg. Hist. 14 and H.R. 8434 § 304(b), 1 Leg. Hist. 1140 (emphasis added).

Two aspects of the notice provisions in S. 2926 and H.R. 8434 are especially significant. First, in contrast to the broad notice obligation added to the RLA, Senator Wagner included a more narrow obligation in Section 304(b), which only required notice that the law invalidated "[a]ny term of a contract or agreement . . . which conflict[ed] with the provisions of this Act." *Id*.

Second, Section 304(b) still contemplated broad-based notification to employees. In large part, the Wagner Act legislation focused on eradicating management-dominated labor organizations, commonly known as "company unions."[17] Company-sponsored unions were widespread in the early 1930s,[18] which gave rise to large numbers of constitutions, contracts, policies and agreements that Senator Wagner and others viewed as illegitimate.[19] As introduced,

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[17] Two separate unfair labor practices in S. 2926 and H.R. 8423 dealt with management-dominated labor organizations. Section 5(3) made it an unfair labor practice for employers "[t]o initiate, participate in, supervise, or influence the formation, constitution, bylaws, other governing rules, operations, policies, or elections of any labor organization. S. 2926 § 5(3), 1 Leg. Hist. 3; H.R. 8434 § 5(3), 1 Leg. Hist. 1130. Section 5(4) made it an unfair labor practice for employers "[t]o contribute financial or other material support to any labor organization, by compensating anyone for services performed in behalf of any labor organization, or by any other means whatsoever." S. 2926 § 5(4), 1 Leg. Hist. 3; H.R. 8434 § 5(4), 1 Leg. Hist. 1130. Both of these prohibitions were ultimately incorporated (in modified form) in NLRA Section 8(a)(2), 29 U.S.C. § 158(a)(2). *See generally NLRB v. Cabot Carbon Co*., 360 U.S. 203 (1959).

[18] When the Wagner Act was under consideration, company-sponsored unions reportedly represented roughly five times the number of conventional union members (45.7 percent versus 9.3 percent, according to one study), 1 Leg. Hist. 107 (testimony of William Green), and the number of company union members was reportedly 3 million employees, equal to the total membership of the American Federation of Labor, 2 Leg. Hist. 2429 (statement of Rep. Maverick). From July 9, 1934 to January 9, 1935, company unions caused about 30 percent of national labor disputes. H.R. 74-969, 2 Leg. Hist. 2925 (1935); H.R. Rep. 74-972, 2 Leg. Hist. 2971 (1935); H.R. Rep. 74-1147, 2 Leg. Hist. 3066 (1935). Senator Wagner and others reported that company unions "multiplied with amazing rapidity since the enactment of the recovery law." 1 Leg. Hist. 15 (statement of Sen. Wagner). *See also* 1 Leg. Hist. 470 (reporting 180 percent increase in company unions in manufacturing and mining after NIRA's enactment); 1 Leg. Hist. 1485 ("Company unions flourish especially in the great industries, such as steel, automobiles, rubber, and chemicals") (testimony of William Green); 1 Leg. Hist. 108 (referring to company unions in "public utilities and on the railways, and also in trade" in addition to "manufacturing and mining") (testimony of William Green). *See generally* Bureau of Labor Statistics (BLS), U.S. Department of Labor, Characteristics Of Company Unions – 1935, at 3, 286 (1937) (evaluating company unions in existence as of 1935); E. Burton, Employee Representation (1926); L. Fairley, The Company Union in Plan and Practice (1936).

[19] The legislative hearings and reports included recurring references to agreements imposing improper restrictions on employees or resulting from self-dealing between employers and company unions dominated by the employer. *See*, *e.g.*, 1 Leg. Hist. 1125 ("in many instances the employer dictated the text of the constitution and the

S. 2926 and H.R. 8423 dealt with this problem by (i) making any failure to provide the required notice an employer unfair labor practice; and (ii) requiring notification to employees regarding all contract and agreement provisions conflicting "with the provisions of [the] Act." S. 2926 §§ 5(5), 304(b), 1 Leg. Hist. 3, 141; H.R. 8423 §§ 5(5), 304(b), 1 Leg. Hist. 1130, 1140.

(b) ***Witnesses Testified Regarding the Act's Notice Provisions and Notice Issues***. Senator Wagner's initial bill – S. 2926 – was the subject of extensive hearing testimony. Harvard Professor Sumner Slichter proposed the following more explicit notice-posting language with a "modest retroactive feature" regarding invalidated agreements:

> If *within 3 months . . . prior to an election* . . . the employer shall have negotiated an agreement with persons whom the National Labor Board finds are not authorized to represent the employees, the Board may, *upon petition of the certified representatives*, order an abrogation of the agreement, and the agreement shall no longer be binding upon the employees. *Notice of such abrogation shall be posted by the employer within the plant*.[20]

United Mine Workers President John L. Lewis advocated changing Section 304(b) to exclude dispute resolution procedures established by "collective-bargain[ing] agreements valid under the provisions of this Act" or by NIRA "codes of fair competition." 1 Leg. Hist. 187 (testimony of John L. Lewis). Another witness, L.L. Balleisen, proposed that Section 304(b) be limited to notice regarding conflicting contracts or agreements "entered into after the passage of this act. . . ." 1 Leg. Hist. 694 (testimony of L.L. Balleisen).[21]

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by-laws to these organizations") (statement of Sen. Walsh); 1 Leg. Hist. 1234 ("The foreman walks over to me and says, 'here is your constitution,' he goes along throughout the entire shop and says to each worker, 'here is your constitution'") (statement of Sen. Wagner); 2 Leg. Hist. 2375 ("In nearly all cases, their constitutions were drafted by the employer, and certain provisions [prevent] modification without the consent of the employer") (statement of Sen. Wagner); S. Rep. No. 1184, 73d Cong. 5, 1 Leg. Hist. 1104 (1934) ("There was presented to the committee much testimony . . . to the effect that a few employers had dominated labor organizations of their own employees by dictating the terms of their constitutions and bylaws"); H.R. Rep. No. 969, 74th Cong. 1516, 2 Leg. Hist. 2925 ("An extremely common form of interference is the provision in the constitution or bylaws of company unions that changes may not be made except with the consent of the employer"); H.R. Rep. No. 972, 74th Cong. 15-16, 2 Leg. Hist. 2971-72 (same); H.R. Rep. No. 1147, 74th Cong. 18, 2 Leg. Hist. 3066-68 (same).

[20] 1 Leg. Hist. 94 (testimony of Dr. Sumner Slichter) (emphasis added).

[21] Numerous other witnesses throughout the legislative hearings commented on Section 304(b) and other notice issues. *See*, *e.g.*, 1 Leg. Hist. 104-105 (American Federation of Labor President praises legislation as a

On March 26, 1934, James A. Emery (General Counsel of the National Association of Manufacturers) testified at length regarding S. 2926.[22] Mr. Emery placed into the record the enumerated unfair labor practices, including Section 5(5) relating to notice.[23] Mr. Emery then expressed his opposition to Section 304(b), which resulted in the following exchange:

> Mr. EMERY. . . . There are many forms of employment relationship developed since the beginning of the factory operating today not only without complaint, but to the demonstrated satisfaction of employer and employee, but no matter how old they may be, or agreeable to the parties they are, if the employer initiated or participated in setting them up, they are not only abrogated by this bill, *but the employer must immediately so notify his employees*, and they are destroyed.
>
> The CHAIRMAN. Any doubt about that?
>
> Senator BORAH. State that again, please.
>
> Mr. EMERY. I say that no matter how old a form of employee relationship now existing in any particular plant between the employer and employee or in any industry may be, no matter how old it may be, no matter how agreeable to the parties, if the employer initiated

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positive extension of existing railway practices, and describes a document from Joseph Eastman, Coordinator of Railroads, providing that employees "be advised by appropriate notice posted on bulletin boards and distributed generally that . . . they are free to join or not to join any labor organization") (testimony of William Green); 1 Leg. Hist. 1055 (proposal to expand the scope of Section 304(b) to require notice regarding "any contract or agreement . . . , or any extension of such contract or agreement, in the negotiations preceding which or in the consummation of which unfair labor practices were employed") (testimony of Isadore Polier); 1 Leg. Hist. 978 (witness responded to questioning about Section 304(b) and expressed a view that it was sufficiently clear, but stated "any lawyer can twist it around to make it mean something else") (testimony of Cornelia Pinchot); 1 Leg. Hist. 138 (complaint that employer engaged in "deception" and "posted on its bulletin boards a garbled quotation of [NIRA] section 7(a)" which "omitted that portion . . . which states that the employees choice of representatives shall be free from the interference, restraint, or coercion of the employers") (testimony of William Green); 1 Leg. Hist. 278 (Local union president describes employer who "posted a notice to the effect that this company had this plan in effect and we must accept it and they would not bargain with any other group") (testimony of William J. Long); 1 Leg. Hist. 174 (description of company union election where "notices of the election were posted" and employees were told "the forman desired to have a 100 percent record in his shop . . . in the company-held election") (testimony of UMW President John L. Lewis); 1 Leg. Hist. 520, 522 (references to misleading employer "posters throughout the mill" regarding employee rights, and to company union election ballot where employees, by voting, agreed to the election rules "as stated in the posted notice issued by the employees' committee . . . under the plan of employees' representation at [the] plant") (testimony of George H. Powers); 1 Leg. Hist. 572 (management witness describes having "posted" labor clause from NIRA industry code "on many of our posting boards") (testimony of George A. Seyler); 1 Leg. Hist. 705-706 (describing posting of election bulletins and nominees for union office on Company bulletin boards) (testimony of Edgar Woolford); 1 Leg. Hist. 724-25 ("set of shop rules was posted" to prevent any "misunderstanding" after company refused to sign union contract) (testimony of S.G. Brooks); 1 Leg. Hist. 805 (indicating that company union representatives "posted the rules for the election" one week in advance and gave a copy "to the Labor Board").

[22] Mr. Emery appeared on behalf of the National Association of Manufacturers ("NAM") and 38 state associations of manufacturers. *See* 1 Leg. Hist. 371-73 (opening statement of Chairman Walsh; introduction of James A. Emery). Senator Walsh's opening comments reveal that Mr. Emery "for years [had] represented the employers' side of industrial questions affecting the public interest, before committees of the Congress." *Id.*

[23] 1 Leg. Hist. 387-88 (testimony of James A. Emery).

> that plan, or participated in setting it up, *the plan is not only abrogated, but the employer must immediately so notify his employees, and the plan is destroyed. Not to do so is an unlawful act. That is provided by section 304 of the bill, section (b):*
>
> > Any term of a contract or agreement of any kind which conflicts with the provisions of this act, is hereby abrogated, *and every employer who is a party to such contract or agreement shall immediately so notify his employees by appropriate act*.
>
> Now, under section 5, paragraph 3, to initiate or participate in any labor organization or in its formation is an unfair labor practice, so that any old plans, any systems of employment relationship, which are in existence in which the employer participated or which he influenced are all outlawed by that provision right now.
>
> Senator WAGNER. *I think there is raised there a more serious question of constitutional law.*
>
> Mr. EMERY. Yes; certainly. . . .
>
> The CHAIRMAN. *It has been suggested by some witnesses, witnesses who are friendly to the bill, who have appeared before the committee that that section be eliminated from the bill*.
>
> Senator WAGNER. *Including the author*.
>
> The CHAIRMAN. *I am referring to section 304(b)*. I did not know you had agreed to the elimination, Senator, but I think others have.
>
> Senator DAVIS. *I think the committee is unanimous*.

1 Leg. Hist. 394-95 (emphasis added).

(c) *Congress, Led by Senator Wagner, Intentionally Eliminated the Act's Notice Provisions*. Following the March 26, 1934 exchange between James A. Emery, Senator Wagner, Committee Chairman Walsh, and Senators Borah and Davis,[24] a substitute version of S. 2926 was reported by the Senate Committee on Education and Labor. *See* S. 2926, 73d Cong. (1934), 1 Leg. Hist. 1070 (reported May 26, 1934). This substitute version *deleted* both notice provisions – *i.e.*, Sections 5(5) and 304(b). *Id*. at 1072-73, 1084-85. The notice provisions were similarly deleted and omitted from all subsequent versions of the Wagner Act legislation, including the version signed into law.[25]

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[24] Participants in the above exchange – in addition to Mr. Emery, Senator Wagner and Labor Committee Chairman Walsh – included Senators William E. Borah and James J. Davis, both of whom were Members of the Senate Committee on Education and Labor. 1 Leg. Hist. 371 (opening statement of Chairman Walsh).

[25] *See* S. 1958, 74th Cong. (1935), 1 Leg. Hist. 1295 (introduced Feb. 21, 1935); H.R. 6187, 74th Cong. (1935), 2 Leg. Hist. 2445 (introduced by Representative Kennedy, Feb. 26, 1935); H.R. 6288, 74th Cong. (1935), 2

(d) ***Congress Added the RLA Notice Provisions Precisely When Congress Deleted the Wagner Act Notice Provisions***. As noted previously,[26] amendments *adding* employer notice obligations to the RLA were introduced at virtually the same time Senator Wagner, Chairman Walsh and others decided to *remove* the NLRA's notice provisions. This is evident from the sequence of events summarized below:

Wagner Act legislation[27]	**RLA amendments**[28]
March 1: House and Senate bills introduced with notice obligation provisions (S. 2926 and H.R. 8434)	–
March 14-16, 20-22: Senate Labor Committee hearings (notice provisions still in bills)	–
March 26: Senators Wagner, Walsh, and Davis mention "unanimous" support for **removing** notice provisions	–
March 27-30, April 3-7 and 9: More Senate Labor Committee hearings	**April 2:** Senate RLA bill introduced **adding** notice provisions (S. 3266)
–	**May 21:** RLA amendments (**adding** notice provisions) reported favorably to Senate (S. 3266)
May 26: Substitute bill referred to Senate, **removing** employer notice (S. 2926)	–
–	**June 6:** RLA amendments (**adding** notice provisions) introduced in House (H.R. 9861) and debated in Senate (S. 3266) **June 21:** RLA amendments (**adding** notice requirements) **signed into law** by President (H.R. 9861)
Feb 21, 1935 - July 5, 1935: Further consideration to Wagner Act (requiring **no** employer notice), which the President ultimately **signed into law** (S. 1958)	–

Leg. Hist. 2459 (introduced by Representative Connery, Feb. 28, 1935); H.R. 7978, 74th Cong. (1935), 2 Legis Hist 2857 (introduced by Representative Connery, May 9, 1935); S. 1958, 74th Cong. (1935), 2 Leg. Hist. 2944 (reported by House Committee on Labor, with amendments, May 21, 1935); S. 1958, 74th Cong. (1935), 2 Leg. Hist. 3032 (reported by House Committee on Labor, with amendments, June 10, 1935); S. 1958, 74th Cong. (1935), 2 Leg. Hist. 2416 (passed by Senate, May 16, 1935); S. 1958, 74th Cong (1935), 2 Leg. Hist. 3238 (passed by House, with amendments, June 19, 1935); H.R. Rep. 74-1371 (1935), 2 Leg. Hist. 3252 (Conference Report, June 26, 1935); S. 1958, 74th Cong. (1935), 2 Leg. Hist. 3270 (as passed by House and Senate, June 27, 1935, and signed by President, July 5, 1935).

[26] See text accompanying notes 9-12, *supra*.

[27] *See* 1 Leg. Hist. 27-1066 (hearings held by Senate Labor Committee in 1934 on dates specified in the table). *See also* notes 14-25, *supra*, and accompanying text;

[28] *See* S. 3266, 73d Cong. (1934) (introduced April 2, 1934); S. 3266, 73d Cong. (1934) (reported favorably to Senate, April 2, 1934); H.R. 9861, 73d Cong. (1934) (introduced June 6, 1934); 78 Cong. Rec. 10,576 (Senate debates, June 6, 1934); 48 Stat. 1185-1997 (1934) (signed June 21, 1934).

(e) ***The NLRB's Description of Legislative History Is Erroneous.*** The NLRB notice rule makes fundamental misstatements regarding the Act's legislative history.

For example, the notice rule states that "nothing" in the Act's legislative history "provides evidence that Congress had considered and rejected inserting [a notice] requirement into the Act,"[29] and "there is not the slightest hint that the omission of a notice-posting requirement was the product of legislative compromise and therefore implies congressional rejection of the idea."[30] These assertions are plainly contradicted by (i) early versions of the Wagner Act legislation which contained an employer unfair labor practice specifically relating to a failure to provide required notice; (ii) extensive witness testimony pertaining to the proposed notice provisions and other notice issues; (iii) the indication that Senator Wagner (and a "unanimous" Senate Labor Committee) favored removal of the notice provisions; and (iv) the elimination of the notice provisions from the substitute S. 2926 reported out of Committee, and from all subsequent versions of the legislation.[31]

The notice rule also asserts that the newly created notice obligation "fills a *Chevron*-type gap in the NLRA's statutory scheme."[32] Yet, according to *Chevron*, a "gap" can validate an agency regulation only if "Congress did not actually have an intent" and there was no "specific comment" regarding the matter in question.[33] Applying this standard, the NLRA's legislative history leaves no room for arguments that a "gap" existed regarding a potential notice obligation for employers. Here, as in *Railway Labor Executives'*, 29 F.3d at 671, "'Congress has directly

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[29] 76 Fed. Reg. 54,006, 54,013 (Aug. 30, 2011) (supplemental information).

[30] *Id*. Similar misstatements are made in the NLRB's brief filed with this Court. *See* Defendants' Memorandum in Support of Cross-Motion for Summary Judgment, filed 11/9/11, Docket # 21-1 ("NLRB's Brief"), at 11-12.

[31] *See* text accompanying notes 14-28, *supra*. It may be correct that the notice provision's elimination was not the "product of legislative compromise" (76 Fed. Reg. at 54,013), but this was only because the legislation's supporters *and* opponents favored removal. *Id.*

[32] *Id*. at 54,011.

[33] *Chevron*, 467 U.S. at 845, 851.

spoken to the precise question at issue' in this case . . . *so there is no gap for the agency to fill*." *Id*., *quoting Chevron*, 467 U.S. at 842 (emphasis added).

We anticipate that the Board may attempt to discount the Act's legislative history by arguing that Section 304(b) in the original Wagner Act bills failed to impose an *unlimited* notice obligation, as would be accomplished by the Board's new notice rule. (Section 304(b) as proposed would have required employer notification to employees regarding every abrogated "contract or agreement of any kind which conflict[ed] with the provisions of [the] Act.")[34] For several reasons, such a distinction, if anything, reveals more clearly that the Board's notice rule contradicts what Congress intended when the NLRA was adopted.

First, it is beyond dispute that the original Wagner Act bills contained Section 5(5),[35] which was a separately enumerated unfair labor practice that dealt *exclusively* with notice – *i.e.*, an employer's failure to satisfy whatever notice obligations were imposed under the Act. In this regard, the notice rule accomplishes *precisely* what Congress considered and rejected when adopting the NLRA: treating a failure to provide notice – to whatever extent it was required – as non-compliance with the Act.

Second, because the Wagner Act's proposed notice requirement was more narrow than what the Board is now imposing on all employers, this *hurts* – not helps – efforts to justify the notice rule. If an agency cannot impose a new requirement that Congress specifically considered and rejected when adopting a statute like the NLRA, it is even more improper for the agency to create and impose a *broader* requirement. As stated in *Railway Labor Executives'*, 29 F.3d at 669, "the bald assertion of power by [an] agency cannot legitimize it."

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[34] S. 2926, 73d Cong. § 304(b), 1 Leg. Hist. 14 and H.R. 8434 § 304(b), 73d Cong. 1 Leg. Hist. 1140 (1934).

[35] As proposed, Section 5(5) made it an unfair labor practice for any employer "[t]o fail to notify employees in accordance with the provisions of section 304(b)." S. 2926 § 5(5), 1 Leg. Hist. 3 and H.R. 8434 § 5(5), 1 Leg. Hist. 1130 (1934).

Third, Congress adopted the RLA notice requirements at the same time the Wagner Act was being considered,[36] and the RLA contains *both* types of notice requirements: a *generalized* notice obligation (requiring notice-posting regarding RLA rights)[37] *and* an employer obligation to notify employees regarding invalidated contracts (similar to the proposed Wagner Act notice obligation).[38] The existence of both types of notice provisions in the RLA amendments demonstrates that (i) Congress, even when *formulating* the original Wagner Act legislation, intentionally rejected a generalized notice obligation (which was contained in the RLA amendments as introduced and enacted), and (ii) Congress, when *adopting* the Wagner Act, intentionally rejected even the more narrow "invalidated contracts" notice obligation (also contained in the RLA amendments as introduced and enacted). Witness testimony regarding notice-posting and notice issues similarly shows that the topic of notice received prominent attention during the Wagner Act's consideration by Congress. *See* notes 20-21, *supra*.

Finally, as noted previously, the original Wagner Act legislation plainly contemplated broad-based notification by employers which, in the circumstances then existing, would have functioned like a generalized notice requirement. Proposed Section 304(b) stated every employer-party to any abrogated contract or agreement that "conflict[ed] with *the provisions of [the] Act*" was required to "*so notify* his employees."[39] At the time, conflicting contracts and agreements – triggering the proposed employer notice obligation – were near-ubiquitous based on the enormous number of "company unions" (employer-dominated labor organizations) invalidated by the Act. *See* notes 17-19, *supra*, and accompanying text. When the Wagner Act

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[36] *See* text accompanying notes 26-28, *supra*.

[37] RLA § 2, Eighth, 45 U.S.C. § 152, Eighth, quoted in the text accompanying note 12, *supra*.

[38] RLA § 2, Fifth, 29 U.S.C. § 152, Fifth (prohibiting contracts requiring or prohibiting union membership, and requiring that employers "shall notify the employees by an appropriate order that such contract has been discarded and is no longer binding on them in any way").

[39] S. 2926, 73d Cong. § 304(b), 1 Leg. Hist. 14 and H.R. 8434 § 304(b), 73d Cong. 1 Leg. Hist. 1140 (1934) (emphasis added).

was being considered, for example, company unions reportedly represented roughly *five times* the number of conventional union members, which was equal to the *total* membership of the American Federation of Labor. *Id.*

(f) *Summary.* The inescapable conclusion from the Act's legislative history is that Congress intended that employers would *not* have any NLRA obligation to provide notice to employees. The Supreme Court has already held, in a different context, that the Board cannot impose a notice-posting requirement that is not authorized by the Act. Thus, in *Local 357, Teamsters Local v. NLRB*, 365 U.S. 667, 671-72, 676 (1961), the Court held that, absent a finding of illegality, the Board could not require general notice-posting regarding hiring hall agreements.[40] The Court stated:

> It may be that hiring halls need more regulation than the Act presently affords. . . . Perhaps the conditions which the Board attaches to hiring-hall arrangements will in time appeal to the Congress. Yet, *where Congress has adopted a selective system for dealing with evils, the Board is confined to that system*. . . . Where, as here, Congress has aimed its sanctions only at specific discriminatory practices, *the Board cannot go farther and establish a broader, more pervasive regulatory scheme*.

Id. at 676 (emphasis added; citation omitted).

It is also significant that (i) Congress amended the NLRA in 1947, 1959 and 1974 without adding a notice obligation; and (ii) the NLRB throughout a 75-year period never required employers to provide general notice under the NLRA. These considerations demonstrate the intent of Congress has remained consistent: there is no employer notice obligation under the NLRA.[41]

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[40] The Board requirement of notice posting regarding hiring halls originated in *Mountain Pacific Chapter*, 119 NLRB 883 (1958), *overruled by Local 357*, 365 U.S. 667. .

[41] *See Railway Labor Executives'*, 29 F.3d at 669 (court rejects NMB's claimed authority to initiate representation disputes because, among other things, such a right was invoked "only in the last five years of its sixty-year history"); *NLRB v. Bell Aerospace Co. Div. of Textron, Inc.*, 416 U.S. 267, 274-75 (1974) ("a court may accord great weight to the longstanding interpretation placed on a statute by an agency charged with its administration"). *See also Bob Jones University v. U.S.*, 461 U.S. 574, 600-601 (1983); *Planned Parenthood Federation of America, Inc. v. Heckler*, 712 F.2d 650, 660 (1983); *Haig v. Agee*, 453 U.S. 280, 302 (1981); *NLRB v. Brooks*, 204 F.2d 899 (1953).

Because Congress decided not to require an employer notice under the Act, the Board cannot impose such an obligation on its own. As the Supreme Court stated in *Colgate-Palmolive-Peet Co. v. NLRB*, 338 U.S. 355, 362-63 (1949), "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." *See also Florida Power & Light Co. v. IBEW Local 641*, 417 U.S. 790, 811-812 (1974); *Local 1424, IAM v. NLRB*, 362 U.S. 411, 429 (1960).

B. Congress Intentionally Created the NLRB *Without* "Roving Commission" Authority, Which Leaves the Board Without Power to Create a General Notice Obligation

Even if one disregards the decision by Congress not to impose a notice obligation on employers under the NLRA, the Act's legislative history reveals that Congress consciously limited the NLRB's jurisdiction over employers to *actual* parties, in *pending* cases, and *adjudicated* facts based on *evidentiary hearings*. And this arrangement was much more than a legislative preference, it was regarded as being central to the Act's constitutionality.

1. The NLRA Imposes Express Limits on the NLRB's Jurisdiction

The NLRA's language and structure reflect limitations placed on the Board's authority. Sections 3 through 6 address the creation and functioning of the NLRB, and do not vest the Board with any affirmative authority or subject matter jurisdiction.[42] Consequently, the Board's jurisdiction over employers is limited to those specified in the Act's other provisions, which is reinforced by the statement in Section 6 restricting the Board to develop rules and regulations "as may be *necessary to carry out the provisions of this Act*."[43]

[42] 29 U.S.C. §§ 153-156. The current statutory provisions reflect certain modifications as the result of amendments in 1947 and 1959 (as part of the LMRA and LMRDA) which did not materially change the Board's authority as contemplated in the 1935 Act. *Compare id. with* Wagner Act §§ 3-6, 49 Stat. 449 (1935).

[43] 29 U.S.C. § 156 (emphasis added). The language of Section 6, authorizing rulemaking "necessary to carry out the provisions of this Act" (29 U.S.C. § 156), explains why the notice obligation challenged in the instant litigation differs from "remedial" notices that the Board has authority to require after an employer or union is found to have engaged in a ULP prohibited under the Act. The Supreme Court has upheld the Board's authority to require the posting of remedial notices, after ULP adjudications, but such notices are "adopted to the need of the individual case." *NLRB v. Penn. Greyhound Lines*, 303 U.S. 261, 268 (1938) (emphasis added). The Board itself has deemed

2. Legislative History Shows Congress Intentionally Restricted the NLRB's Jurisdiction Over Employers to Actual Cases

The original Wagner Act legislation – S. 2926 and H.R. 8434 – would have given the Board broad affirmative powers to address matters at the Board's own initiative. Thus, S. 2926 and H.R. 8434 initially stated:

> Whenever *any member of the Board*, or the executive secretary, or any person designated for such purpose by the Board, *shall have reason to believe, from information acquired from any source whatsoever*, that any person has engaged in or is engaging in any such unfair labor practice, *he shall in his discretion issue and cause to be served upon such person a complaint* stating the general nature of the charges in that respect, and containing a notice of hearing before either an examiner or the Board at a place therein fixed, not less than twenty-four hours after the service of said complaint, but the examiner or the Board shall have discretion to continue or adjourn such hearing from time to time. Any such complaint may be amended by any member of the Board or by any person designated for that purpose by the Board *at any time* prior to the issuance of an order based thereon; and *the original complaint shall not be regarded as limiting the scope of the inquiry*.

S. 2926, 73d Cong. § 205(b), 1 Leg. Hist. 6; H.R. 8434, 73d Cong. § 205(b), 1 Leg. Hist. 1133 (emphasis added).

As enacted, however, the Wagner Act *eliminated* the Board's power to initiate action against employers. This was accomplished in Section 10(b), which (i) conditioned all Board action on the filing of a charge, (ii) deleted the phrase, "in his discretion," from the sentence dealing with a complaint's issuance, and (iii) added, as a result of the Taft-Hartley amendments passed in 1947, a six-month charge-filing statute of limitations.[44] In representation cases, the

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inappropriate the posting of any remedial notice for a period longer than 60 days except in cases involving "extreme" or "egregious" conduct. *Rose-Terminix Exterminator Co.*, 315 NLRB 1283, 1289 (1995); *Hickmott Foods, Inc*., 242 NLRB 1357, 1357 (1979); *United States Serv. Indus., Inc*., 319 NLRB 231, 232 (1995). Similarly, the Board's notice rule is not governed by the Supreme Court decision in *American Hospital Ass'n v. NLRB*, 499 U.S. 606 (1991) because, in that case, the Supreme Court upheld healthcare bargaining unit regulations which, rather than creating new obligations, were directly pertained to representation proceedings, one of the two areas in which the Board has been vested with authority by Congress.

[44] 29 U.S.C. § 160(b). Section 10(b) currently states: "*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 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, at a place therein fixed, not less than five days after the serving of said complaint: *Provided, That no complaint shall issue based upon any unfair labor practice occurring more than six months prior to the filing of the*

statute imposed similar constraints on Board action, requiring "an appropriate hearing upon due notice" and existence of a "question affecting commerce concerning the representation of employees."[45]

3. The Board's Limited Jurisdiction Over Employers, Confined to Actual Cases, Was Fundamental to the Act's Constitutionality

The decision to eliminate discretionary NLRB jurisdiction over employers was no accident. Throughout 1934 and 1935 while Congress considered the Wagner Act legislation, concerns existed about the NIRA's constitutionality; and on May 27, 1935, the Supreme Court declared the NIRA unconstitutional in *A.L.A. Schechter Poultry Corp. v. United States*, 295 U.S. 495 (1935). The NIRA had authorized the President to approve and impose industry-specific "codes of fair competition" on employers – for example, fixing "the number of hours for work-days," establishing wage rates, and requiring that employees have "the right of 'collective bargaining.'" *Id*. at 521-24. The Supreme Court held that the formulation of such obligations involved "essential legislative functions with which [Congress] is vested," and that giving such "code-making authority" to the President (or the Executive branch) violated Article I of the U.S. Constitution as "an unconstitutional delegation of legislative power." *Id*. at 529, 537-542. In the words of Justice Cardozo, "Here in effect *is a roving commission* to inquire into evils and upon discovery correct them." *Id*. at 551 (emphasis added) (Cardozo, J., concurring).

The Supreme Court in *Schechter* contrasted NIRA's unconstitutional delegation of authority with the Federal Trade Commission ("FTC"), which the Court believed had been

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charge with the Board and the service of a copy thereof upon the 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 month period shall be computed from the day of his discharge." *Id.* (emphasis added; underlining identifies Taft-Hartley language added in 1947; LMRA § 101, 61 Stat. 136 (1947).

[45] Wagner Act § 9(c), 49 Stat. 449 (1935), 2 Leg. Hist. 3270, 3274. The Act's current language in representation cases similarly permits an NLRB investigation, hearing, and election only "*[w]henever a petition shall have been filed*, in accordance with such regulations as may be prescribed by the Board." NLRA § 9(c)(1), 29 U.S.C. § 159(c)(1 (emphasis added).

properly authorized to resolve disputes about "unfair methods of competition." *Id*. at 532. The delegation of authority to the FTC was permissible, according to the Court, because the FTC could only make determinations "in *particular instances*, upon *evidence*. . . ." *Id*. at 533 (emphasis added). The Court explained:

> To make this possible, Congress set up a special procedure. A Commission, *a quasi-judicial body*, was created. Provision was made for *formal complaint, for notice and hearing, for appropriate findings of fact supported by adequate evidence*, and for judicial review *to give assurance that the action of the Commission is taken within its statutory authority*.

Id. (emphasis added; citations omitted).

Based on concerns about the Wagner Act's constitutionality, the legislation's supporters embraced the "quasi-judicial body" model for the NLRB, which entailed eliminating all of the NLRB's discretionary authority, except for the Board's handling of actual ULP and representation cases.[46] This was explained by Representative William Connery, the legislation's sponsor in the House:

> The Board set up under the Wagner-Connery bill is just such a tribunal as the court describes. It is a quasi-judicial body, *which acts upon formal complaint*, after *due notice and hearing*. Provision is made for appropriate findings of fact, *supported by adequate evidence* and for judicial review to give assurance that the action of the Board is taken within its statutory authority.

2 Leg. Hist. 3007-3008 (statement of Rep. Connery; emphasis added).

Pervasive in the Act's legislative history are similar references to the Board's lack of "roving commission" authority – *i.e.*, its inability to take action beyond *actual* parties, in *pending* cases, based on *adjudicated* facts after an *evidentiary hearing.* This was highlighted in the Senate report on the substitute version of S. 2926 passed by the Senate Labor Committee:

[46] Even the term, "unfair labor practices," was modeled after the "unfair trade practices" addressed by the FTC, which was intended to give the Wagner Act a "sound constitutional basis . . . in accordance with decisions of the Supreme Court." *See* S. Rep. 73-1184, at 4, 1 Leg. Hist. 1103 (1934). Likewise, proposed changes to the policy statements in S. 1958 were intended to "bring it more clearly outside of the ruling in the *Schechter* case." *See* H.R. Rep. 74-1147, 2 Leg, Hist. 3056 (1935).

> *The quasi-judicial power of the Board is restricted to four unfair labor practices and to cases in which the choice of representatives is doubtful*. And even then the Board's compulsory action is limited to *cases that have led or threaten to lead to labor disputes* that might affect commerce or obstruct the free flow of commerce.
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> * * *
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> Another important aspect of the bill, as amended, is the emphasis it places on the *strictly judicial aspect of the work of the Board*. . . . This makes two things plain: (1) The Board is to *enforce the law as written by Congress*; and (2) *the Board acts only when enforcement is necessary*.
>
> * * *
>
> Section 3 lists what the bill calls unfair labor practices. . . . There are four separate unfair labor practices listed; and *only those practices which are listed are, for the purposes of this bill, to be regarded as unfair*. That is made explicit by the preceding section defining "unfair labor practices.

S. Rep. 73-1184, 1 Leg. Hist. 1100, 1102-1103 (1934) (emphasis added). *See also* S. Rep. 74-573, 2 Leg. Hist. 2308 (1935) ("Neither the National Labor Relations Board nor the courts are given any blanket authority to prohibit whatever labor practices that in their judgment are deemed to be unfair").

In the House debates on S. 1958 (which by then contained five unfair labor practices), Representative Joe H. Eagle emphasized that the NLRB's limited authority over employers was integral to the Act's constitutionality:

> Reactionaries upon this floor today in arguing against the constitutionality of this measure have pretended that it falls within the category of the *Schechter* case. They are not familiar with this bill, else they could not and doubtless would not say any such thing.
>
> In this bill *we are merely providing five things that we declare as a matter of law constitute labor abuses, unfair labor practices*. We ourselves are declaring *specific things* that are unfair labor practices. Then we set up a board *to ascertain states of facts to apply to such legally declared unfair labor practices*; and *if* they find such unfair labor practices as a matter of fact, *they then apply the machinery we set up in this bill*.

2 Leg. Hist. 3184 (statement of Rep. Eagle) (emphasis added).[47]

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[47] Representative Eagle was a member of the House Committee on Labor. 2 Leg. Hist. 2474. The legislative history is replete with other indications that Congress intentionally limited the Board's jurisdiction over employers to actual parties and pending cases. *See*, *e.g.*, H.R. Rep. 74-969, 2 Leg. Hist. at 2919 (1935) (letter from Secretary of Labor Frances Perkins states "your bill tends to make the proposed Board *more judicial in character*" and "[a]nyone interested in making the proposed labor board as much as possible like a court should favor provisions *restricting the scope of its activities to actual cases*") (emphasis added); *id*. at 2932 ("*section 11 . . . grants no roving commission*, but is *limited to the exercise of powers and functions embodied in sections 9 and 10*," dealing with representation and unfair labor practice cases) (emphasis added); *id*. at 2933 ("The Board is to be solely a *quasi-*

President Roosevelt, upon signing the Wagner Act, also stressed that the NLRB's jurisdiction over employers was limited to actual cases involving violations or elections:

> This act defines, as a part of our substantive law, the right of self-organization of employees in industry for the purpose of collective bargaining, and provides methods by which the Government can safeguard that legal right. It establishes a National Labor Relations Board *to hear and determine cases in which it is charged that this legal right is abridged or denied*, and to hold *fair elections* to ascertain who are the chosen representatives of employees.
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> * * *
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> The National Labor Relations Board *will be an independent quasi-judicial body*. It should be *clearly understood* that it will *not* act as mediator or conciliator in labor disputes. . . .
>
> This act . . . does not cover all industry and labor, but is applicable *only when violation of the legal right of independent self-organization* would burden or obstruct interstate commerce.

2 Leg. Hist. 3269 (statement of President Roosevelt upon signing S. 1958) (emphasis added)

The Supreme Court upheld the constitutionality of the Wagner Act in *NLRB v. Jones & Laughlin Steel Corp.*, 301 U.S. 1 (1935). There, the Supreme Court likewise stated:

> The grant of authority to the Board *does not purport to extend to the relationship between all industrial employees and employers*. Its terms do *not* impose collective bargaining upon all industry regardless of effects upon interstate or foreign commerce. It purports to reach *only what may be deemed to burden or obstruct that commerce* and, thus qualified, it must be construed as contemplating the exercise of control within constitutional bounds. . . . Whether or not particular action does affect commerce in such a close and intimate fashion as to be subject to federal control, and hence to lie within the authority conferred upon the Board, is left by the statute to be determined *as individual cases arise*.

Id. at 31-32 (emphasis added; citations omitted). *See also Republic Aviation Corp. v. NLRB*, 324 U.S. 793, 799-800 (1945) ("Plainly, this statutory plan for an adversary proceeding requires that the Board's orders on *complaints of unfair labor practices* be based upon evidence which is placed before the Board by witnesses who are subject to cross-examination by opposing parties") (emphasis added).

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judicial body with clearly defined and limited powers" and "[i]ts policies are *marked out precisely by the law*") (minority view of Rep. Marcantonio) (emphasis added); 2 Leg. Hist. 3207 (same). *Accord*: H.R. Rep. 74-972, 2 Leg. Hist. 2965-66, 2978-79 (1935); H.R. Rep. 74-1147, 2 Leg. Hist. 3059, 3076, 3077 (1935).

The Board's notice rule acknowledges that (i) the Board lacks "roving investigatory powers"; (ii) representation proceedings must be "set in motion with the filing of a representation petition"; and (iii) Board action in cases involving alleged violations are not permissible "until an unfair labor practice charge is filed."[48] Yet, the rule disregards these limitations based on conclusory statements that the Act's Section 6 rulemaking authority is "general" and "broad."[49] The rule also mischaracterizes a 1935 Senate hearing where one witness, opposing the Act, warned that the Board would exercise rulemaking authority to expand the Act's requirements.[50]

The Board's rulemaking authority – even if "general" and "broad" in some respects – is not unlimited.[51] Section 6 contains "words of limitation"[52] restricting the Board to rulemaking necessary "to carry out the provisions of this Act."[53] The notice rule goes beyond Section 6

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[48] 76 Fed. Reg. at 54,010, citing NLRA § 10(a), 29 U.S.C. § 160(a) (other citations omitted). The same concessions are made in the Board's brief filed with this Court. *See* NLRB's Brief, *supra* note 30, at 8.

[49] *See*, *e.g.*, 76 Fed. Reg. 76 Fed. Reg. at 54,008 ("a general grant of rulemaking authority fully suffices to confer legislative (or binding) rulemaking authority upon an agency"); *id.* at 54,009 ("a broad grant of rulemaking authority will suffice for the agency to engage in legislative rulemaking").

[50] The notice rule cites a "Wagner Act-era Senate hearing" in which "it was acknowledged that the language of Section 6 indeed grants 'broad powers' to the Board." 76 Fed. Reg. at 54,009, citing 2 Leg. Hist. 2002 (statement of Donald A. Callahan). The accompanying citation refers to a Senate Labor Committee hearing held on March 29, 1935, where Mr. Callahan – a company president – opposed the Act as a "deliberate attempt to fasten upon industry . . . a system of organized labor." 2 Leg. Hist. 1999, 2000. Mr. Callahan described a large number of negative consequences associated with the Act, and as to the Board's rulemaking authority, he warned: "I do not believe the members of this committee are naive enough to doubt that the first effort of this board will be to find many directions in which such broad powers can be exercised. It is the history of boards such as this, that they know no limitations and brook no interference." *Id.* at 2002. None of the Committee members commented on Mr. Callahan's remarks, and his personal opinion – that the Board would "find many directions" to exercise "broad powers" with "no limitations" – cannot properly be attributed to Congress. Numerous cases also recognize the principle that "opponents of a piece of legislation tend to exaggerate its flaws; their statements are poor evidence of legislative intent." *Hatfield v. Bishop Clarkson Memorial Hospital*, 679 F.2d 1258, 1263 n. 10 (8th Cir. 1982) , *citing Holtzman v. Schlesinger*, 414 U.S. 1304, 1313 n.13 (1973) (Marshall, J., on application for stay); *Hardin v. Kentucky Utilities Co*., 390 U.S. 1, 11 (1968).

[51] The Board under Section 6 has "broad" authority to take an array of administrative actions not expressed in the statute, but the statute limits the Board's jurisdiction *over employers* to the participants in pending cases. For example, the Board can engage in direct outreach activities directed to employees generally advising them of rights afforded under the Act, and this is a significant aspect of the Board' web site. Board Members and professional staff also can participate in the American Bar Association section on labor and employment law. However, the Board cannot adopt entirely new employer obligations and penalties not reflected in the Act.

[52] *Cf. Fibreboard Paper Products Corp. v. NLRB*, 379 U.S. 203 (1964) ("It is important to note that the words of the statute are words of limitation. . . . The limiting purpose of the statute's language is made clear by the legislative history of the present Act.") (Steward, J., concurring).

[53] 29 U.S.C. § 156.

authority because it creates a new obligation applicable to employers generally, with penalties that negate the Act's other express provisions.[54] This exceeds permissible interpretation and application of the Act. As the Court of Appeals for the D.C. Circuit stated in *Railway Labor Executives'*, 29 F.3d at 670:

> Unable to link its assertion of authority to any statutory provision, the Board's position in this case amounts to the bare suggestion that it possesses *plenary* authority to act within a given area simply because Congress has endowed it with *some* authority to act in that area. *We categorically reject that suggestion*. Agencies owe their capacity to act to the delegation of authority, either express or implied, from the legislature.

Id. (emphasis in original and emphasis added; citations omitted).

The notice rule's "need" justification reduces to dissatisfaction with jurisdictional constraints that Congress built into the Act. In effect, the Board argues: (i) the NLRA prevents the Board from exercising jurisdiction over any employer unless someone files a charge or petition; (ii) therefore, a "need" exists for the Board to take action against *all* employers, *without* the filing of a charge or petition, so the Board can satisfy the "charge or petition" requirement.[55] It is not reasonable to suggest that Congress intended to permit the Board to bypass jurisdictional prerequisites – deemed essential to the Act's constitutionality – so the Board could comply with them. The mere statement of such a proposition demonstrates its lack of merit. *Sheridan v. United States*, 487 U.S. 392, 402 n. 7 (1988) ("courts should strive to avoid attributing absurd designs to Congress"); *U.S. v. American Trucking Assns., Inc.*, 310 U.S. 534, 543 (1940)

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[54] The notice rule states noncompliance will prompt the Board to disregard the statute of limitations set forth in Section 10(b), and potentially find employers liable for antiunion discrimination under Section 8(a)(3) without independent evidence of unlawful motivation, among other things.76 Fed. Reg. at 54,049 (to be codified at 29 CFR § 104.214). The Amici join in the positions expressed by Plaintiffs that such "remedies," by overriding explicit statutory provisions, independently warrant a conclusion that the notice rule exceeds the Board's authority and is contrary to the NLRA. *Cf. Local 1424, IAM v. NLRB*, 362 U.S. 411, 429 (1960) (Board cannot, in the interest of public policy, disregard Section 10(b) six-month limitation period set forth in Section 10(b) because "the accommodation between these competing factors has already been made by Congress").

[55] The NLRB brief argues that a "need" exists for the notice requirement "because the NLRA does not give the Board . . . roving investigatory powers" and requires filing of "an unfair labor practice charge" or "representation petition," so it is "crucial" that the Board impose its notice rule on employers (as to whom charge or petition has *not* been filed). NLRB Brief at 8.

(statutory language should not be construed in a manner producing "absurd or futile results"). Nor is it reasonable to conclude that the Act prohibits the non-posting of a notice, given the Supreme Court's indication that the NLRA "purports to reach *only what may be deemed to burden or obstruct . . . commerce*." *NLRB v. Jones & Laughlin Steel Corp.*, 301 U.S. at 31 (emphasis added). When an employer complies with the Act and has no pending election petition, commerce is not burdened by the absence of a generalized notice describing the Act.

The NLRB has no jurisdiction to create a notice obligation extending the Act "to the relationship between all . . . employers and employees" (*id.*), and Congress believed the Board's exercise of such jurisdiction would violate Article I of the United States Constitution. These considerations independently warrant summary judgment in Plaintiffs' favor.

C. The NLRB's Creation of an Employer Notice Obligation, Without Congressional Authorization, Adversely Affects Important Rights Afforded by Other Statutes

The NLRB's creation of a general notice-posting obligation also undermines the protection afforded by statutes which, *unlike* the NLRA, contain express notice requirements. On the federal level, many laws explicitly require employers to notify employees of statutory rights.[56] In other statutes, Congress has expressly required employee notification regarding particular events, agreements or benefits.[57] There is a third category where, like the NLRA,

[56] *See*, *e.g.*, Railway Labor Act, § 2, Eighth, 45 U.S.C. § 152, Eighth (enacted in 1926; notice obligations added in 1934); Title VII of the Civil Rights Act of 1964 ("Title VII"), 42 U.S.C. § 2000e–10 (enacted 1964); the Age Discrimination in Employment Act ("ADEA"), 29 U.S.C. § 627 (enacted 1967); the Occupational Safety & Health Act ("OSHA"), 29 U.S.C. §§ 651, 657(c) (enacted 1970); the Employee Polygraph Protection Act ("EPPA"), 29 U.S.C. § 2003 (enacted 1988); the Americans with Disability Act ("ADA"), 42 U.S.C. §§ 12101, 12115 (enacted 1990); the Family Medical Leave Act ("FMLA"), 29 U.S.C. §§ 2601, 2619(a) (enacted 1993); and the Uniformed Service Employment & Reemployment Rights Act ("USSERA"), 38 U.S.C. § 4334 (enacted 1994).

[57] *See*, *e.g.*, the Workers Adjustment and Retraining Notification Act ("WARN"), 29 U.S.C. §§ 2101, 2102(a)(1) (requiring notice in advance of plant closings or mass layoffs) (enacted 1988); the Employee Retirement Income Security Act ("ERISA"), 29 U.S.C. §§ 1001, 1021(a), 1022 (requiring issuance of summary plan descriptions and other disclosures regarding certain benefit plans) (enacted 1974); the Older Workers Benefit Protection Act ("OWBPA"), 29 U.S.C. §§ 626(f)(1)(H) (requiring disclosures regarding age discrimination waivers in group exit incentive or other employment termination programs) (enacted 1991); the Fair Credit Reporting Act ("FCRA"), 15 U.S.C. §§ 1681b(b)(2), (3) (requiring notice and disclosure of credit reports used in certain employment decisions) (enacted 1970); the Consolidated Omnibus Budget Reconciliation Act ("COBRA"), 29 U.S.C. §§ 1161, 1166 (requiring notice to employees participating in group health plans regarding coverage

statutory notice obligations are not expressed in the statute nor have been applied by any agency.[58] Even more federal statutes – though not primarily about employment – are administered by agencies that have an interest in workplace issues without requiring employer notice-posting.[59] Finally, state laws impose an even broader assortment of notice obligations on employers. For example, the State of New York requires up to *ten* employment-related notices,[60] and California requires up to *eighteen* employment-related notices.[61]

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continuation rights triggered by qualifying events) (enacted 1986); and the Internal Revenue Code ("IRC"), 26 U.S.C. § 6051(a) (requiring annual issuance of written statement to employees showing wages, tax deductions, and related information) (enacted 1954).

[58] *See, e.g.*, the Federal Arbitration Act ("FAA"), 9 U.S.C. §§ 1 *et seq*. (governing enforceability of agreements to arbitrate disputes) (enacted 1925); the Norris LaGuardia Act, 29 U.S.C. §§ 101, 103 (rendering unenforceable any agreements where employees commit not to join a union, among other things) (enacted 1932); the Labor Management Relations Act ("LMRA"), 29 U.S.C. §§ 186(a), (b), (d) (making it unlawful, with potential criminal penalties, for union employees/officers to receive or demand any money or other thing of value from any employer, with limited exceptions) (enacted 1947); the Labor-Management Reporting and Disclosure Act ("LMRDA"), 29 U.S.C. §§ 401, 432, 433 (creating certain rights for employees who are union members, and requiring reports, with potential criminal penalties, by employees/officers of unions and employers, regarding certain payments and receipts) (enacted 1959); the Immigration Reform and Control Act ("IRCA"), 8 U.S.C. §§ 1324a *et seq*. (prohibiting employment of unauthorized aliens, with potential criminal penalties, and prohibiting discrimination based on national origin or citizenship status, among other things) (enacted 1986).

[59] Federal agencies whose activities potentially affect the workplace include the U.S. Department of Commerce, the Bureau of Industry and Security, International Trade Administration, Minority Business Development Agency and Patent and Trademark Office have a significant in impact on the workplace. The Department of Commerce's strategic plan for the fiscal years 2004 through 2009 highlighted its "efforts to respond to and influence the . . . enhancement of economic growth for American industries, workers, and consumers. . ." *See* The Bureau of Industry and Security, http://www.bis.doc.gov/about/index.htm (last visited Nov. 14, 2011). The Environmental Protection Agency ("EPA") has an interest in preventing pollution at the workplace, raising awareness of health and safety issues and providing guidance to employers and employees. *See* The U.S. Environmental Protection Agency, http://www.epa.gov/epahome/workplac.htm (last visited Nov. 5, 2011). Workplace issues can also be addressed by the Criminal Division of the U.S. Department of Justice in connection with the Foreign Corrupt Practices Act. *See* The U.S. Department of Justice, http://www.justice.gov/criminal/fraud/fcpa/ (last visited Nov. 14, 2011).

[60] Required notices under New York law, depending on the industry and type of employer, are imposed under the New York Construction Industry Fair Play Act; Article 23-A of the Correction Law relating to the employment of people with a criminal conviction, New York State Division of Human Rights Discrimination Prohibited; Deduction from Wages; Tip Appropriation; Job Safety & Health Protection; Prevailing Rate of Wages; Unemployment Insurance Notice, Workers' Compensation and Disability Benefits and New York State Clean Indoor Act. *See* New York State Department of Labor, http://www.labor. ny.gov/workerprotection/laborstandards/ employer/posters.shtm (last visited Nov. 14, 2011).

[61] Required notices under California law, depending on the industry and type of employer, are imposed under the Industrial Welfare Commission wage orders, California Minimum Wage, Payday notice, Safety and Health Protection on the Job, Emergency phone numbers, Access to Medical and Exposure Records, Operating Rules for Industrial Trucks, Injuries Caused by Work, Workers' Compensation Carrier and Coverage, Whistleblower Protections, No Smiling Signage, Log and Summary of Occupational Injuries and Illnesses, Farm Labor Contractor Statement of Pay Rates, Prevailing Wage Rate, Pregnancy Disability Leave, Family Care and Medical Leave,

There is a public interest not just in protecting the choices reserved to Congress, but also in protecting legislative decisions regarding when requiring too much information is equivalent to providing no information. At some point, there is a limit on the ability of employees to review and understand new notices adding to what Congress, by express language, already requires in the workplace. The Board itself has recognized that space limitations prevent notices from identifying all federally protected rights.[62] The Board also has applied the common sense principle that required notices can be undermined by the posting of unauthorized notices and the manner in which they are posted. *See Bingham-Williamette Co.*, 199 NLRB 1280 (1972), *enfd. mem.* 491 F.2d 1406 (5th Cir. 1974) (separate notice "tended to detract from the effectiveness of [NLRB's remedial] notice and constituted noncompliance with settlement agreement); *Arrow Specialties, Inc.*, 177 NLRB 306 (1969), *enforced*, 437 F.2d 522 (8th Cir. 1971) (same); *Overland Hauling, Inc.,* 168 NLRB 870 (1967) (election set aside because manner of posting pre-election notice failed to adequately apprise employees of rights).

For this reason as well, the Board's creation of a notice obligation applicable to employers generally should be deemed in excess of the Board's authority and contrary to the NLRA. *Local 357, Teamsters Local v. NLRB*, 365 U.S. at 671-72, 676.

Unemployment and Disability Insurance, Time Off to Vote. *See* California Department of Industrial Relations, http://www.dir.ca.gov/ wpnodb.html (last visited Nov. 14, 2011).

[62] Although the Board's notice rule does not recognize any practical limit on the number of agency posters that can be reasonably required in the workplace, the Board has invoked space limitations to justify the absence of any reference to state right-to-work laws from its notice rule poster. *See* Defendants' Memorandum in Support of Cross-Motion for Summary Judgment, Docket # 21-1, filed 11/9/11, at 23 ("By its very nature, an 8" x 17" poster does not have the space needed to exhaustively list all rights and remedies connected to the NLRA").

CONCLUSION

Based on the above considerations and the positions advanced by the Plaintiffs, the Amici House Members request that this Court grant Plaintiffs' motions for summary judgment.

Respectfully submitted,

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CERTIFICATE OF SERVICE

The undersigned counsel certifies that, on this 15th day of November 2011, he/she electronically filed a true and correct copy of the foregoing "BRIEF OF AMICI CURIAE THE HONORABLE JOHN KLINE, CHAIRMAN, COMMITTEE ON EDUCATION AND THE WORKFORCE, UNITED STATES HOUSE OF REPRESENTATIVES, AND REPRESENTATIVES DAN BURTON, LEE TERRY, DARRELL ISSA, TODD RUSSELL PLATTS, J. RANDY FORBES, JOE WILSON, RODNEY ALEXANDER, JOHN CARTER, STEVAN PEARCE, STEVE SCALISE, STEVE AUSTRIA, GREG HARPER, LYNN JENKINS, TOM MCCLINTOCK, DAVID P. ROE, GLENN THOMPSON, TIM WALBERG, SANDY ADAMS, LOU BARLETTA, LARRY BUCSHON, FRANCISCO CANSECO, SCOTT DESJARLAIS, TREY GOWDY, JOE HECK, BILL HUIZENGA, MIKE KELLY, JAMES LANKFORD, KRISTI NOEM, ALAN NUNNELEE, MIKE POMPEO, BEN QUAYLE, REID RIBBLE, TODD ROKITA, DENNIS ROSS, AND DANIEL WEBSTER IN SUPPORT OF PLAINTIFFS" with the Clerk of the Court using the CM/ECF system, and thereby served a copy on the following counsel:

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