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NOTICE-POSTING OF EMPLOYEE RIGHTS: NLRB RULEMAKING AND THE UPCOMING BACKFIRE

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TABLE OF CONTENTS

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I. INTRODUCTION

Two recent federal court of appeals decisions subtly illustrate the extent to which American nonunion employers are afraid of unions. Whether or not that fear is rationally based, most of those employers evidently believe that sharing unilateral control over their employees' wages and working conditions—which is generally reinforced by the still potent twentieth-century employment-at-will doctrine[1]—would decrease their net income. They are apparently satisfied with accepting the benefits of an archaic master-servant relationship, where the servants—the typical employees of today—are virtually powerless to share control of the major conditions of their employment.

Generated by such fear—or hatred—of unions, most of these nonunion firms, who employ all but about 6.6 percent of the nation's private-sector non-supervisory employees,[2] have either resorted to extraordinary measures, both legal and illegal, or would likely be willing to resort to such measures, in order to prevent their employees from achieving federally-protected union representation and collective bargaining. This article focuses on two extraordinary products of such union-prevention efforts, the appellate decisions in *Chamber of Commerce of the United States v. NLRB* (hereinafter "*Chamber*")[3] and *National Association of Manufacturers v. NLRB* (hereinafter "*NAM*").[4] Those were successful declaratory and injunctive actions that were not designed to directly discourage employees from joining unions, but rather to make it difficult for most of them even to learn about their rights to union representation and collective bargaining and how to enforce those rights. Those actions were integral features of coordinated efforts of several powerful lobbying organizations—especially the United States Chamber of Commerce, the National Association of Manufacturers, and the National Right to Work Legal Defense and Educational Fund—and their formidable political allies[5]

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1. *See generally*, KENNETH G. DAU-SCHMIDT ET AL, LEGAL PROTECTION FOR THE INDIVIDUAL EMPLOYEE (2011) (discussing the employee-at-will doctrine); S*ee also* Joseph DeGuiseppe, Jr., *The Effect of the Employment-At-Will Rule on Employee Rights to Job Security and Fringe Benefits*, 10 FORDHAM URB. L.J. 1, 34-39 (1981).

2. Economic News Release, U.S. Bureau of Labor Statistics, Union Members Summary (Jan. 23, 2015, 10:00 AM), http://data.bls.gov/cgi-bin/print.pl/news.release/union2.nr0.htm.

3. 721 F.3d 152 (4th Cir. 2013).

4. 717 F.3d 947 (D.C. Cir. 2013).

5. The proximity and order of the dates of the following items, all of which are in 2011, are indicative of a coordinated campaign: On *August 30*, the Board issued the notice-posting rule here in issue, *see infra* note 6; on *September 2*, a bill was filed in the U.S. House of Representatives, H.R. 2833, 112th Cong. (2011) ("To repeal [that] rule requiring employers to post notices relating to the National Labor Relations Act."); on *September 8*, the National Association of Manufacturers ("NAM") filed suit in the D.C. District Court, Nat'l Ass'n of Mfrs. v. NLRB, 846 F. Supp. 2d 34 (D.D.C. 2012) (No. 11-1629), that was reviewed by the D.C. Court of Appeals in *NAM,* which was later

to invalidate a substantive rule of the National Labor Relations Board (NLRB or Board) that would have required all employers under the Board's jurisdiction to post a Board-supplied written notice advising employees of their rights under the National Labor Relations Act (NLRA or Act) and how to enforce those rights.[6] At issue in both cases was the Board's right to require the same type of governmental notice-posting commonly seen in most American workplaces—a notice that directly complies with the Act's declared policy.[7]

In *Chamber*, the Fourth Circuit held—without any serious reference to the *Chevron*[8] doctrine, which is supposed to govern judicial review of a federal agency's interpretation of its statutory authority—that the Board lacked authority to issue the notice-posting rule for the alleged reason that "there is no function or responsibility of the Board not predicated upon the filing of an unfair labor practice charge or a representation petition"[9] because "the substantive provisions of the Act make clear that the Board is a *reactive* entity, and thus do not imply that Congress intended to allow *proactive* rulemaking of the sort challenged here through the general rulemaking provision of Section 6 [of the Act]."[10] That conclusion ignored the quasi-legislative functions spelled out in the text of the Act and in the rich history of many prior instances of substantive rules issued by the Board with judicial approval.[11] Furthermore, it

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consolidated with a similar suit, filed on *September 16* by the National Right to Work Legal Defense and Education Foundation, Inc., the National Federation of Independent Business, and the Racquetball Centers, Inc. Nat'l Ass'n of Mfrs. v. NLRB, 846 F.Supp.2d 34 (2012)); on *September 19*, a similar lawsuit filed by the Chamber of Commerce of the United States and the South Carolina Chamber of Commerce in U.S. District Court, South Carolina Dist. Charleston Div., Chamber of Commerce of the U.S. v. NLRB, 856 F. Supp. 2d 778 (D.S.C. 2012) (No. 11-2516), which was reviewed by the 4th Circuit Court of Appeals in *Chamber*, Chamber of Commerce v. NLRB, 856 F. Supp. 2d 778 (2012) *aff'd*, 721 F.3d 152 (4th Cir. 2013); on *October 6*, a bill was filed in the U.S. Senate, S. 1666, 112th Cong. (2011) ("To prohibit the implementation of certain rules of the National Labor Relations Board relating to the posting of notices on unionization"); on *November 15*, thirty-six Republican members of the House of Representatives filed an amici curiae brief supporting plaintiffs in the aforesaid D.C. District Court case, Brief for the Hon. John Kline et al. as Amici Curiae Supporting Plaintiffs, Nat'l Ass'n of Mfrs. v. NLRB, 846 F. Supp. 2d 34 (D.D.C. 2012) (No. 11-1629); on *November 15* a virtually identical amici curiae brief was filed by the same thirty-six Republican members of the House of Representatives supporting plaintiffs in the aforesaid lawsuit in Charleston, South Carolina, U.S. District Court. (Similar amici briefs were later filed in the corresponding appellate cases).

6. Notification of Employee Rights under the National Labor Relations Act, 76 Fed. Reg. 54,006 (Aug. 30, 2011).

7. 29 U.S.C. § 151; s*ee infra* text accompanying note 51.

8. Chevron, U.S.A., Inc. v. Natural Res. Def. Council, Inc., 467 U.S. 837 (1984); s*ee* Part II.B.

9. 721 F.3d at 154.

10. *Id.* at 161 (emphasis added).

11. *See infra* Part III.

conspicuously ignored the recent Supreme Court decision in *City of Arlington, Texas v. FCC (Arlington),*[12] which reconfirmed *Chevron's* requirement of judicial deference to an agency's reasonable construction that is in accord with the purpose of its enabling statute. The *Chamber* case is reviewed in detail in Part IV below.

In *NAM*, the D.C. Circuit held that by virtue of the example of First Amendment protection of free speech,[13] the Board's rule requiring employers to post notices with which they disagreed, for which failure to post would constitute an unfair labor practice ("ULP"), violates the employer's right under section 8(c)[14] (the so-called *free-speech* provision) because "[t]he right to disseminate another's speech necessarily includes the right to decide not to disseminate it."[15] That conclusion is erroneous, for the speech in question, i.e., the posted notice, was a properly-labeled governmental expression of a common legally-acceptable practice; thus even if it posed a First-Amendment-like obstacle, it should have been held valid because it rationally served an important public interest. A full analysis of the *NAM* case is provided in Part V below.

It is my opinion that failure to seek certiorari review in each case was a serious mistake[16] for both decisions are grossly contrary to established canons of administrative law, and their presence leaves a wake of confusion that raises disturbing questions regarding the future applicability of the *Chevron* doctrine to all agency rulemaking under the Administrative Procedures Act (APA),[17] but especially to NLRB rulemaking. Those decisions represent such a radical departure from mainstream administrative law that their reversal by the Supreme Court—notwithstanding the commonly assumed divisional proclivities of the Court's membership—would have been a likely outcome, especially after the *Arlington* case, which, as Justice Scalia wrote, reinforces "the scope of the doctrine enshrined in *Chevron*" and highlights "that case's now-canonical formulation."[18] *Arlington* was decided two weeks following the D.C. Circuit's *NAM* decision and three weeks before the Fourth Circuit's *Chamber* decision, but neither court, despite rehearing opportunities, chose to follow or even attempted to distinguish that renewed *Chevron* mandate.

Now to the role of this article, which addresses the issues and problems raised by those two appellate decisions. I shall first review

12. 133 S. Ct. 1863 (2013).

13. U.S. CONST. amend. 1.

14. 29 U.S.C. § 158(c) (2012).

15. Nat'l Ass'n of Mfrs. v. NLRB, 717 F.3d 947, 956 (D.C. Cir. 2013).

16. No explanatory report was issued explaining why certiorari was not sought. *See* NLRB's Office of Public Affairs, *The NLRB's Notice Posting Rule*, NLRB.GOV (Jan. 6. 2014), http://www.nlrb.gov/news-outreach/news-story/nlrbs-notice-posting-rule.

17. 5 U.S.C. § 553 (2012).

18. City of Arlington v. FCC, 133 S. Ct. 1863, 1868 (2013).

the past and present features and requirements of NLRB rulemaking, both generally and with reference to the invalidated notice-posting rule; this will be followed by an analytical review of the two appellate decisions. The latter will demonstrate how those decisions are at cross-purposes with established law—a critique that should also provide useful guidance for future rulemaking. And finally, I shall point out that notwithstanding the negativity of those decisions, there is yet another procedure which the Board could effectively and legally promulgate to inform employees at their workplaces of their NLRA rights and how to enforce them. That procedure is a new rule that I shall propose—a rule that could become an effective *backfire* emanating from those two judicial ventures in NLRA obstructionism.

II. HOW THE NOTICE-POSTING RULE SHOULD HAVE BEEN DECIDED IN ACCORDANCE WITH ESTABLISHED ADMINISTRATIVE LAW

The NLRB has a long history of requiring specific advance prophylactic action without evidence of prior wrongdoing, such as the requirement that unions give advance notice to represented employees regarding their financial obligations under union-shop and agency-shop agreements. That was the practice even before the Supreme Court's requirement in *Chicago Teachers Union, Local No. 1 v. Hudson,* that "the Union's collection of agency fees include an adequate explanation for the basis for the fee,"[19] and also its related holding with specific reference to the NLRA in *Communication Workers v. Beck,*[20] which followed *Hudson.* In *California Saw and Knife Works* the Board decreed a comprehensive series of procedural obligations that unions must comply with regarding giving notice to nonmember employees regarding their *Beck* rights.[21] That a prophylactic notice that was to be required of employers was invalidated in the *Chamber* and *NAM* cases suggests a double standard at work—pun acknowledged.

In order to describe the traditional administrative-law standard with which to compare and evaluate the decisions here under review, the following discussion lays out the uncontested law and facts that should have been deemed relevant in determining the validity of the Board's notice-posting rule. As the reader will observe, the basic issue was not complex, for this was in reality a garden-variety *Chevron* "step-two" issuance of a rational interpretation by a federal agency of its statutory authority—and a proper application of that authority—all of which should have been reconfirmed, especially after the *Arlington* decision.

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19. 475 U.S. 292, 310 (1986).

20. 487 U.S. 735, 780 (1988) (Blackmun, J., concurring and dissenting).

21. 320 N.L.R.B. 224, 231-34 (1995), *enforced sub. nom*, Int'l Ass'n of Machinists & Aerospace Workers v. NLRB, 133 F.39 1012 (7th Cir. 1998).

A. Background to the Rule

First, to achieve full disclosure, I here note Judge Arthur Raymond Randolph's recitation of the rule's history in his opinion in the *NAM* case, where he recognized my personal participation in the matter at hand, stating that

> [t]he path leading to the posting rule goes back to 1993 when a law professor [i.e., myself] petitioned the Board [to issue a notice-posting rule[22]]. Despite prodding this law professor and, later, several others, the Board declined to act. Then, in 2010, the Board [in accordance with APA notice-and-comment procedures[23]] issued a notice of proposed rulemaking. . . . After receiving more than 7000 comments, the Board published a final rule on August 30, 2011 . . . .[24]

Based on information derived from those comments, the Board concluded that "many employees are unaware of their NLRA rights and therefore cannot effectively exercise those rights," a conclusion which it based on various factors, including "the comparatively small percentage of private sector employees who are represented by unions . . . ; the high percentage of immigrants in the labor force . . . ; and the absence of a requirement that, except in very limited circumstances, employers or anyone else inform employees about their NLRA rights."[25] Therefore, because so many employees are unaware of their NLRA rights, the Board determined that a "notice posting requirement is a reasonable means of promoting greater knowledge among employees."[26] It also observed that it "has been presented with

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22. Proposed Rules Governing Notification of Employee Rights Under the National Labor Relations Act, 75 Fed. Reg. 80,410, 80,411 (Dec. 22, 2010) (to be codified at 29 C.F.R. pt. 104). An earlier landmark that led to that path was an NLRB rulemaking proceeding in 1992 and 1993 in which various employer-oriented organizations, including the major plaintiffs in the two cases here under review, argued that Section 6 of the Act did provide the Board with ample authority to require *unions* to inform union-represented employees by workplace postings or mail about their rights "to join or refrain from joining a union and the financial obligation incident to each status." Union Dues Regulations, 57 Fed. Reg. 43,635, 43,638 (Sept. 22, 1992) (to be codified at 29 C.F.R. pt. 103.40(e)-(f)). These same organizations reversed that position in the cases here under review—their revised argument being that Section 6 does not grant the Board jurisdiction to issue a compulsory notice rule—but the only significant difference is that the contested rule would require *employers* rather than *unions* to post the notices. *See* 29 C.F.R. Part 103.40(e) & (f); Union Dues Regulation 57 Fed. Reg. 43,635; *see also* Nat'l Ass'n of Mfrs. v. NLRB, 846 F. Supp. 2d 34, 48 n.9 (D.D.C. 2012); *see also* cases cited *supra* at notes 19-21.

23. 5 U.S.C. § 553.

24. Nat'l Ass'n of Mfrs. v. NLRB, 717 F.3d 947, 949-50 (D.C. Cir. 2013) (citations omitted).

25. Notification of Employee Rights Under the National Relations Labor Act, 76 Fed. Reg. 54,006, 54,014-15 (Aug. 30, 2011), *invalidated by* Chamber of Commerce of the U.S. v. NLRB, 721 F.3d 152 (2013) *and* Nat'l Ass'n of Mfrs. v. NLRB, 717 F.3d 947 (D.C. Cir. 2013).

26. *Id.* at 54,015.

no evidence persuasively demonstrating that knowledge of NLRA rights is widespread among employees,"[27] and, ironically, it noted that it had "received numerous comments opposing the rule precisely because the commenters believe that the notice will increase the level of knowledge about the NLRA on the part of employees [and] will lead to increased unionization," which was obviously not deemed "a valid reason for not informing them of their rights."[28] The Board also noted that "remarks in multiple opposing comments strongly suggest that the commenters themselves do not understand the basic provisions of the NLRA [which reinforces] the Board's belief that, in addition to informing employees of their NLRA rights so that they may better exercise those rights, posting the notice may have the beneficial side effect of informing *employers* concerning the NLRA's requirements."[29] It was thus noted that the posted notice would achieve a prophylactic effect that was also needed. Indeed, in the opinion of the district court which the Fourth Circuit enforced, Judge David C. Norton noted that "preventing" unfair labor practices was one of the Board's proper functions.[30]

The Board was thus faced with a pressing need to take reasonable and relatively unobtrusive steps to help correct a nation-wide condition that was undermining the responsible role that Congress had conferred upon that agency. Issuance of the notice-posting rule was deemed the appropriate response, for it was in accord with the means which the Supreme Court—as indicated by the cases noted in the next two sections below—has considered appropriate for such circumstances.

B. The Chevron Two-Step

Although the opinions in both the *Chamber* and *NAM* cases attempt to convey the appearance of elaborate legal analyses (as will be explicated further)[31] they are in fact only superficial presentations which mask what was in reality a garden-variety *Chevron step-two* scenario. Just as the Supreme Court has validated comparable NLRB statutory interpretations in at least twenty cases in the past (as will be noted below),[32] *Chevron* would have easily provided validation for the Board's notice-posting rule. The basic two-step *Chevron* doctrine and its application should therefore have prevailed. A description of that doctrine follows. (This descriptive outline, which sets out the

27. *Id*.

28. *Id*. at 54,016.

29. *Id*. at 54,017.

30. Chamber of Commerce of the U.S. v. NLRB, 856 F. Supp. 2d 778, 792 (D.S.C. 2012). In fact, the *statutory* heading of Section 10 of the Act is "*Prevention* of Unfair Labor Practices."

31. *See infra* Parts IV and V.

32. *See infra* note 49.

fundamental *Chevron* guidelines, may also be usefully applied in future rulemaking.)

Recital of the *Chevron* requirements begins naturally where the *Chevron* Court began, with this opening instruction:

> First, always, is *the question . . . at issue*. If the intent of Congress is clear, that is the end of the matter; for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress. [But if] the statute is silent or ambiguous with respect to the *specific issue*, the question for the court is whether the agency's answer is based on a permissible construction of the statute.[33]

The Court then added: "If a court, employing *traditional tools of statutory construction*, ascertains that Congress had an intention on the *precise question at issue*, that intention is the law and must be given effect."[34] It is readily apparent that the NLRA is silent with respect to the specific issue of notice-posting, i.e., silent as to whether the Act expressly authorizes issuance of such a universal rule. Without a doubt, this Act is devoid of any "*specific"* reference to such a requirement.

Chevron also tells us where to search for requisite statutory authority, and it underscores the judicial limits on that process: "Sometimes the legislative delegation to an agency on a particular question is implicit rather than explicit. In such a case, a court may not substitute its own construction of a statutory provision for a *reasonable interpretation* made by the administrator of an agency."[35] According to the Court, when the agency makes rules "to fill any gap left, *implicitly* or *explicitly*, by Congress, [s]uch legislative regulations are given controlling weight unless they are *arbitrary, capricious, or manifestly contrary to the statute*." [36] Regarding the notice-posting rule here in issue, the gap was given to the Board to fill both *explicitly* and *implicitly*.

Congress granted it *explicitly* in s*ection 6* of the NLRA, which provides the following plain language to be construed and applied:

> The Board shall have authority from time to time to make, amend, and rescind, in the manner prescribed by the Administrative Procedure Act, *such rules and regulations as may be necessary to carry out the provisions of this Act*.[37]

This section has already been interpreted by the Supreme Court in *American Hospital Association v. NLRB* (*AHA*).[38] Referencing the

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33. Chevron, U.S.A., Inc. v. Natural Res. Def. Council, Inc., 467 U.S. 837, 842-43 (1984) (footnotes omitted) (emphasis added).

34. *Id*. at 843 n.9 (emphasis added).

35. *Id*. at 844 (footnote omitted) (emphasis added).

36. *Id*. at 843-44 (citations omitted) (emphasis added).

37. 29 U.S.C. § 156 (2012) (emphasis added).

38. 499 U.S. 606, 601 (1991).

"sparse legislative history of the provision,"[39] the Court there stated that

> As a matter of statutory drafting, if Congress had intended to curtail in a particular area the broad rulemaking authority granted in § 6, we would have expected it to do so in language expressly describing an exception from that section or at least referring specifically to the section.[40]

Thus the textual clarity of section 6 standing alone—even without its strong and consistent legislative history[41]—would have sufficed to validate the notice-posting rule under *Chevron* step two. Validation of that rule under section 6 would thus fit easily into the axiom the Court expressed in *Consumer Products Safety Commission v. GTE Sylvania, Inc.,*[42] that "the starting point for interpreting a statute is the language of the statute itself. Absent a clearly expressed legislative intention to the contrary, that language must ordinarily be regarded as conclusive."[43] There is certainly no "clearly expressed legislative intention to the contrary" in the NLRA regarding issuance of a rule that would have furthered the Act's long-standing and unamended declared purpose of encouraging collective bargaining and union organizing[44] and would thus have prevented employers from *interfering* with employees exercising their Section 7 rights by withholding from them information about those rights.

The *gap* that Congress left for the Board to fill *implicitly* by issuance of this "legislative regulation" is contained in the text of the following three provisions, for these are the "*provisions"* which were being "*carried out*" by the authorization in Section 6:

Section 1:

> It is hereby declared to be *the policy of the United States* to eliminate the causes of certain substantial obstructions to the free flow of commerce and to mitigate and eliminate these obstructions when they have occurred by *encouraging the practice and procedure of collective bargaining and by protecting the exercise by workers of full freedom of association, self-organization, and designation of representatives of their own choosing, for the purpose of negotiating the terms and conditions of their employment or other mutual aid or*

39. *Id*. at 613.

40. *Id.; see also infra* notes 87-88, 115-116.

41. *See infra* notes 114-138 and accompanying text.

42. 447 U.S. 102 (1980).

43. *Id*. at 108.

44. *See* Charles J. Morris, *How the National Labor Relations Act Was Stolen and How It Can Be Recovered: Taft-Hartley Revisionism and the National Labor Relations Board's Appointment Process*, 33 BERKELEY J. EMP. & LAB. L. 1, 23-24 (2012) (reviewing Congress's several reaffirmations of that policy and its rejection of any changes in that policy). *See* statutory text note 46 *infra*.

protection.[45]

Section 7:

> Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all of such activities. . . .[46]

Section 8(a)(1):

> (a) It shall be an unfair labor practice for an employer—
>
> (1) *to interfere with*, restrain, or coerce employees in the exercise of the *rights guaranteed in section 7* of this [Act.][47]

The critical language in each of these provisions—sections 1, 6, 7, and 8(a)(1)—all of which is broad, plain, and unambiguous, fits the construction process described by Chief Justice Roberts in two separate opinions when he was a judge on the D.C. Circuit Court of Appeals. He reminded that "[t]he Supreme Court has consistently instructed that *statutes written in broad, sweeping language should be given broad, sweeping application*."[48] Such application should have confirmed the Board's reading of these provisions as a proper bases for issuance of the notice-posting rule.

That rule was thus entitled to garden-variety *Chevron*-type treatment, such as the Supreme Court applied in the twenty cases noted below,[49] the significance of which was wholly ignored in both the

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45. 29 U.S.C. § 151 (2012) (emphasis added).

46. 29 U.S.C. § 157.

47. 29 U.S.C. § 158(a)(1) (emphasis added).

48. *In re* England, Sec'y of Navy, 375 F.3d 1159, 1179 (D.C. Cir. 2004) (quoting his opinion in Consumers Elecs. Ass'n v. FCC, 347 F.3d 291, 298 (D.C. Cir. 2003)) (emphasis added).

49. The cases are here divided between the following eleven pre-*Chevron* cases and nine post-*Chevron* cases.

Pre-*Chevron* cases: Phelps Dodge Corp. v. NLRB, 313 U.S. 177, 194 (1941) ("The relation of remedy to policy is peculiarly a matter for administrative competence . . . ."); NLRB v. Hearst Publ'ns, 322 U.S. 111, 131 (1944) ("[W]here the question is one of specific application of a broad statutory term in a proceeding in which the agency administering the statue must determine it initially, the reviewing court's function is limited."); Republic Aviation Corp. v. NLRB, 324 U.S. 793, 805 (1945) (employer barred from prohibiting solicitation during nonworking time) NLRB v. A. J. Tower Co., 329 U.S. 324, 330 (1946) ("Congress has entrusted the Board with a wide degree of discretion in establishing the procedure and safeguards necessary to insure the fair and free choice of bargaining representatives by employees."); NLRB v. Seven-Up Bottling Co., 344 U.S. 344, 346 (1953) (Congress "charge[d] the Board with the task of devising remedies to effectuate the policies of the Act[;] [T]he power, which is a broad discretionary one, is for the Board to wield, not for the courts."); NLRB v. Truck Drivers Local Union 449 (Buffalo Linen), 353 U.S. 87, 96 (1957) (The function of "balancing . . . conflicting legitimate interests . . . to effectuate national labor policy is often a difficult and delicate responsibility, which the Congress committed primarily to the [NLRB], subject to

Chamber and *NAM* opinions. As the Court articulated in *Beth Israel Hospital v. NLRB,* the rationale for judicial acceptance of the NLRB's reasonable interpretation of the Act where Congress has not supplied an unambiguously expressed intent on the precise question in issue, is that "[i]t is the Board on which Congress has conferred the authority to develop and apply fundamental national labor policy. [T]hat body, if it is to accomplish the task which Congress set for it, necessarily must have authority to formulate rules to fill the interstices of the broad statutory provisions."[50] And those rules are expected to reflect changes in historical circumstances—such as the changed demographic circumstances to which the Board was responding with the notice-posting requirement,[51] for, as the Court instructed in *NLRB v. J. Weingarten,* "[t]he responsibility to adapt the Act to *changing patterns of industrial life* is entrusted to the Board."[52]

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limited judicial review."); NLRB v. Erie Resistor Corp., 373 U.S. 221, 236 (1963) ("[The Board has a] special function of applying the general provisions of the Act to the complexities of industrial life."); NLRB v. J. Weingarten, Inc., 420 U.S. 251, 266 (1975) ("It is the province of the Board, not the courts, to determine whether or not the 'need' exists in light of changing industrial practices and the Board's cumulative experience in dealing with labor-management relations."); NLRB v. Iron Workers Local 103, 434 U.S. 335, 350-351 (1978) ("The Board's resolution . . . represents a defensible construction of the statute . . . . An administrative agency is not disqualified from changing its mind . . ."); Eastex, Inc. v. NLRB, 437 U.S. 556, 568-69 (1978) (the Board's determination that distribution of certain political literature was for the purpose of "mutual aid or protection" was valid); NLRB v. City Disposal Sys., Inc., 465 U.S. 822, 829 (1984) ("[T]he task of defining the scope of § 7 'is for the Board to perform in the first instance' . . . and, on an issue that implicates its expertise in labor relations, a reasonable construction by the Board is entitled to considerable deference." (citations omitted)).

Post-*Chevron* cases: Am. Hosp. Ass'n v. NLRB, 499 U.S. 606 (1991); Fall River Dyeing & Finishing Corp. v. NLRB, 482 U.S. 27, 42 (1987) ("If the Board adopts a rule that is rational and consistent with the Act, . . . then the rule is entitled to deference from the courts."); NLRB v. United Food and Commercial Workers, Local 23, AFL-CIO, 484 U.S. 112, 123 (1987) (the Court found a complex statutory interpretation "rational and consistent with the statute."); NLRB v. Curtin Matheson Scientific, Inc., 494 U.S. 775, 787 (1990) ("[A] Board rule is entitled to deference even if it represents a departure from the Board's prior policy." (citing NLRB v. J. Weingarten, Inc., 420 U.S. 251, 265-66 (1975)); Holly Farms Corp. v. NLRB, 517 U.S. 392, 403 (1996) ("We find the Board's answer reasonable."); Ford Motor Co. v. NLRB, 441 U.S. 488, 495, 497 (1979) ("Construing and applying the . . . language of § 8(d), 'other terms and conditions of employment,' are tasks lying at the heart of the Board's function.'"); Beth Israel Hosp. v. NLRB, *see infra* notes 55-56; Charles D. Bonanno Linen Serv., Inc. v. NLRB, 454 U.S. 404, 413-14 (1982) (upholding Board's determination that an impasse is not an unusual circumstance that justifies employer's withdrawal from multiemployer bargaining unit); NLRB v. Transp. Mgmt. Corp., 462 U.S. 393, 402-403 (1983) ("[T]he Board's construction here, which may not be required by the Act, is at least permissible under it." (quoting *Weingarten,* 420 U.S. at 266-267)).

50. 437 U.S. 483, 500-01 (1978).

51. *See supra* notes 25-27 and accompanying text.

52. 420 U.S. at 265 (emphasis added).

C. Evaluating the Board's "Jurisdiction" under Chevron and City of Arlington

Inasmuch as the holdings in the *Chamber* and *NAM* cases both purport to be based on determinations that the Board lacked *jurisdictional* authority to issue the rule in question, it is especially appropriate to examine the Supreme Court's reconfirmation and clarification of the role of *Chevron* in the *Arlington* case in construing an agency's interpretation of its own authority—i.e., its jurisdiction. Had *Arlington* been followed, the Board's authority to issue the notice-posting rule would unquestionably have been confirmed.

The critical features in *Arlington* are strikingly similar to those applicable to the notice-posting rule here in issue. *Arlington* involved another New Deal statute, the Communication Act of 1934,[53] and its independent agency, the Federal Communication Commission (FCC). That statute authorized the FCC—not unlike the language in section 6 of the NLRA—to "prescribe such rules and regulations as may be necessary in the public interest to carry out [its] provisions."[54] At issue was the FCC's promulgation of a declaratory ruling under a statutory provision that concerned the processing of an application for placing a new antenna on an existing tower; the ruling defined a statutory "reasonable period of time" as a requirement for presumptive periods of 90 and 150 days for which compliance was deemed mandatory.[55] This was challenged as contrary to statutory *authority*. The Court's grant of certiorari was limited to "[w]hether a court should apply *Chevron* to review an agency's determination of its own jurisdiction."[56]

The Court's definitive conclusion, framed by Justice Scalia's descriptive language in the majority opinion, was that the distinction between "'jurisdictional' and 'nonjurisdictional' interpretations is a mirage."[57] "Because the question—whether framed as an incorrect application of agency authority or an assertion of authority not conferred—is always whether the agency has gone beyond what Congress has permitted it to do, there is no principled basis for carrying out some arbitrary subset of such claims as 'jurisdictional.'"[58]

Illustrating that it has consistently applied *Chevron* where the agency had provided a construction of a jurisdictional provision of a statute that it administers, the Court cited the above-noted *NLRB v. City Disposal Systems, Inc*.[59] for the proposition that "no 'exception exists to the normal [definitional] standard of review' for 'jurisdictional

53. 47 U.S.C. § 201 (2012); City of Arlington v. FCC, 133 S. Ct. 1863, 1866-68 (2013).

54. 47 U.S.C. § 201(b).

55. *City of Arlington*, 133 S. Ct. at 1866-68, 1873-75; 47 U.S.C. § 332(c)(7)(B)(ii).

56. 133 S. Ct. at 1873.

57. *Id.* at 1868.

58. *Id.* at 1869.

59. *Supra* note 49.

or legal question[s] concerning the coverage of an Act.'"[60]

City Disposal is especially relevant because the Respondent there had argued that since "the scope of the 'concerted activities' clause in [NLRB] section 7 is essentially a *jurisdictional* or legal question concerning the coverage of the Act, [the Court] need not defer to the expertise of the Board"[61]—which, as we shall see, is the same "jurisdictional" approach applied by the Fourth Circuit in the *Chambers* case.[62] The Supreme Court in *City Disposal* countered that "[w]e have never . . . held that such an exception exists to the normal standard of review of Board interpretation of the Act,"[63] whereupon it approved the Board's holding that a "lone employee's invocation of a right grounded in his collective-bargaining agreement is, therefore, a *concerted activity* in a very real sense."[64]

The *Arlington* Court reiterated that

> [w]here Congress has established a clear line, the agency cannot go beyond it; and where Congress has established an ambiguous line, the agency can go no further than the ambiguity will fairly allow. But [if] "the agency's answer is based on a permissible construction of the statute," that is the end of the matter.[65]

The FCC's interpretation of its authority was therefore deemed valid because "Congress has unambiguously vested the FCC with general authority to administer the Communications Act through rulemaking and adjudication, and the agency interpretation at issue was promulgated in the exercise of that authority."[66]

III. A SHORT HISTORY OF NLRB RULEMAKING AND HOW THE NOTICE-POSTING RULE WOULD HAVE FIT THE PATTERN

Further analysis of the rule in question is contained in the following historical review (which might also prove useful in guiding the Board and non-governmental parties who might be involved in future NLRB rulemaking.) This short history of successful rulemaking by the Board begins with *decisional history*, followed by *the non-role of motive* and then *conventional legislative history*.

A. The Historical Decisional Record

Although most substantive NLRB rules have traditionally been

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60. 133 S. Ct. at 1871 (quoting *NLRB v. City Disposal Sys., Inc.*, 465 U.S. 822, 830 n.7 (1984)).

61. 465 U.S. at 830 n.7 (emphasis added).

62. *See* Part IV.

63. 465 U.S. at 830 n.7.

64. *Id.* at 832 (emphasis added).

65. 133 S. Ct. at 1874-75 (quoting from Chevron, U.S.A., Inc., v. Natural Res. Def. Council, Inc., 467 U.S. 837, 842 (1984).

66. *Id.* at 1874.

issued through *adjudication,* the notice-posting rule now in issue—like the rule in *AHA*—was expressly promulgated under *s*ection 6*,* which is particularly appropriate for the intended purpose. Section 6 provides a wider scope of rulemaking authority than adjudication alone, for it applies to "the *provisions* of" the Act[67]—hence *all* provisions, including sections 1 and 7—whereas adjudicatory rulemaking must be limited to defining or carrying out *unfair labor practices* under section 8[68] and/or *representation* matters under section 9.[69] Without diminishing any deference owed under *Chevron* standards,[70] that broader scope under section 6 would have further bolstered the legal validity of the notice-posting rule. In fact, the express utilization of section 6 complied remarkably with the congressional intent defined by the Supreme Court's amalgam of opinions in *NLRB v. Wyman-Gordon Co.*,[71] *NLRB v. Bell Aerospace Co.*,[72] the *AHA* case,[73] and—indirectly—*SEC v. Chenery Corp. (Chenery II).*[74] The following decisional history begins with those cases.

Wyman-Gordon involved a rule which the Board had fashioned in *Excelsior Underwear, Inc.*,[75] that required an employer in a representation-election case to provide the NLRB regional director within seven days after a consent-election agreement or declaration of an election with a list containing the names and addresses of all eligible voters, which would then be turned over to the union-party to the election.[76] The Board's rationale for this rule was that the union's lack of home addresses represented an impediment to the employees' receiving information needed for a free and reasoned choice in voting for or against union representation.[77]

Later, in *Wyman-Gordon*, the employer refused to provide the "*Excelsior* list" and refused to comply with a subpoena for that list.[78] When that case reached the Supreme Court, the Court declared the *Excelsior* rule valid with an odd combination of four justices under Justice Fortas' plurality opinion and three justices under Justice Black's concurring opinion.[79] The Fortas opinion concluded that

67. 29 U.S.C. § 156 (2012) (emphasis added).

68. 29 U.S.C. § 158.

69. 29 U.S.C. § 159.

70. *See supra* text accompanying notes 32-37, 56-69.

71. 394 U.S. 759 (1969).

72. 416 U.S. 267 (1974).

73. Am. Hosp. Ass'n v. NLRB, 499 U.S. 606 (1991).

74. 332 U.S. 194 (1947).

75. 156 N.L.R.B. 1236, 1239 (1966)).

76. *Wyman-Gordon*, 394 U.S. at 762-66 (applying the rule promulgated in Excelsior Underwear, Inc.)

77. Excelsior Underwear, Inc., 156 N.L.R.B. 1236, 1240 (1966).

78. 394 U.S. at 761.

79. *Id.* at 766, 769.

although *Excelsior* was a rule of general applicability, it had not been validly issued because the Board had not complied with section 6's notice-and-comment procedures and other APA requirements; nevertheless, the rule was deemed enforceable as a valid product of an adjudicated case.[80] Justice Black's opinion, quoting from *Chenery II*, simply held that the rule was valid as a legally-binding product of judicial adjudication, for "the choice made between proceeding by general rule or by individual, ad hoc litigation is one that lies primarily in the informed discretion of the administrative agency."[81] Justice Black noted that the Board, like most administrative agencies, had been granted both *quasi-legislative* power and *quasi-judicial* power, but the "line between these two functions is not always a clear one."[82] With reference to Section 6, however, he stressed that

> [t]he Act does specify the procedure by which the rule-making power is to be exercised, requiring publication of notice for the benefit of interested parties and provision of an opportunity for them to be heard. . . . Congress had a laudable purpose in prescribing these requirements, and *it was evidently contemplated that administrative agencies like the Labor Board would follow them when setting out to announce a new rule of law to govern parties in the future.*[83]

That analysis by Justice Black as to the relative qualities of section 6 and adjudicatory rulemaking, with its reliance on *Chenery II*, was later adopted by the Court when it approved the Board's adjudicatory rule in *Bell Aerospace*.

Bell Aerospace involved the Board's ruling in an adjudicated case that narrowed the jurisdictional exclusion of "managerial employees."[84] Repeating Justice Black's reliance on *Chenery II* with reference to APA-rulemaking, the Court declared that

> [t]he function of filling in the interstices of the . . . Act should be performed as much as possible, through this quasi-legislative promulgation of rules to be applied in the future. But any rigid requirement to that effect would make the administrative process inflexible and incapable of dealing with many of the specialized problems which arise. . . . Not every principle essential to the effective administration of a statute can or should be cast immediately into the mold of a general rule. Some principles must await their own development, while others must be adjusted to meet particular, unforeseen situations.[85]

Accordingly, the Court concluded with the oft-quoted declaration that

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80. *Id.* at 766.

81. *Id.* at 772 (*citing* SEC v. Chenery Corp., 332 U.S. 194, 203 (1947)).

82. *Id.* at 770.

83. *Id.* at 771 (emphasis added).

84. NLRB v. Bell Aerospace Co., 416 U.S. 267, 269 (1974).

85. *Id.* at 292-93 (quoting *Chenery II*, 332 U.S. at 202-03) (emphasis added).

> the Board is not precluded from announcing new principles in an adjudicative proceeding and that the choice between rulemaking and adjudication lies in the first instance within the Board's discretion.[86]

Regarding the Board's final choice of procedures in *Bell Aerospace*—whether it could be rulemaking under the APA or through adjudicative procedures—the Court indicated that either would be an appropriate choice.[87]

It required several decades, however, to put into effect the Court's recommendation that the "function of filling in the interstices of the . . . Act should be performed, as much as possible, through . . . quasi-legislative promulgation of rules to be applied in the future."[88] It was not until the Court's unanimous approval of the Board's rule in *AHA*, which defined appropriate collective-bargaining units for acute-care hospital employees, that this concept was fully realized and reconfirmed.[89] After referencing the previously noted "sparse legislative history of the provision,"[90] the Court emphasized the wide scope of section 6 rulemaking with its conclusion that "[a]s a matter of statutory drafting, if Congress had intended to curtail in a particular area the broad rulemaking authority granted in § 6, we would have expected it to do so in language expressly describing an exception from that section or at least referring specifically to the section."[91]

It was thus firmly established that an appropriate means for the Board to exercise its quasi-legislative power of fashioning a rule of general application is through rulemaking under section 6. Accordingly, the Board's notice-posting rule should have been held validly issued under that section because it would have provided a suitable means of "*encouraging* the practice and procedure of collective bargaining" and other concerted activities in accordance with "the policy of the United States" by presenting employees with information they need to exercise their right to engage in section 7 activities; and by declaring that failure to post the notice *interferes* with those rights and thus constitutes an unfair labor practice in violation of Section 8(a)(1), it would have also incorporated the Act's more commonly applied enforcement procedures to prevent and remedy *interference* with the exercise of those "rights guaranteed in section 7."

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86. *Id.* at 294.

87. *Id.* at 295 where the Court noted:

> It is true, of course, that rulemaking would provide the Board with a forum for soliciting the informed views of those affected in industry and labor before embarking on a new course. But surely the Board has discretion to decide that the adjudicative procedures in this case may also produce the relevant information necessary to mature and fair consideration of the issues.

88. *Id.* at 292 (quoting *Chenery II*, 332 U.S. at 202-03).

89. Am. Hosp. Ass'n v. NLRB, 499 U.S. 606, 618-19 (1991).

90. *See supra* text accompanying notes 39-40.

91. 499 U.S. at 613.

It is elementary that when an employer commits an unfair labor practice—regardless of whether that ULP is defined by express statutory language in Section 8(a) or by a previously defined rule or policy based on section 8(a)(1) that emanates from either an earlier adjudicated case or from section 6 rulemaking—that employer becomes properly subject to the Act's enforcement process.

B. The Non-Role of Motive

Regarding such rules as were validated in the previously noted *Chevron*-type cases,[92] especially those involving protected concerted activity under the "mutual aid or protection" guarantee in section 7,[93] it should be recognized that the employer's *motive* is not relevant. As illustrated by the target notice-posting rule, regardless of *why* an employer might fail to post that notice, it is the *absence* of such posting that interferes with the employees' right to engage in protected concerted activity, for without access to the notice many employees will likely to be unaware of those rights, hence unable to enforce them. It is thus the *failure to post* that interferes, not the employer's motive for not posting. The leading decision on the irrelevancy of motive in section 8(a)(1) violations is *NLRB v. Burnup & Sims, Inc.*.[94] The Supreme Court there upheld a violation of section 8(a)(1) where the employer's good faith but mistaken belief as to an employee's conduct was not a defense against the interference-effect of the employer's action.[95] Unlike section 8(a)(3),[96] under which a finding of discriminatory motive is normally essential for a discharge to be unlawful,[97] motive is not a factor in cases involving independent section 8(a)(1) conduct.[98] It is sufficient that the employer's conduct—regardless of the absence of discriminatory motive—tends "to weaken or destroy"[99] employees' section 7 rights.[100]

Motive is thus irrelevant where the employer's failure to perform an affirmative duty that protects employees' right to engage in section 7 concerted activity constitutes interference with employee rights in

92. *See* cases *supra* note 49.

93. 29 U.S.C. § 157.

94. 379 U.S. 21 (1964).

95. *Id.* at 22-24.

96. 29 U.S.C. § 158(a)(3).

97. *See generally* THE DEVELOPING LABOR LAW: THE BOARD, THE COURTS, AND THE NATIONAL LABOR RELATIONS ACT, 316-328, (John E. Higgins, Jr et al. eds., 6th ed. 2012) [hereinafter DEVELOPING LABOR LAW].

98. 29 U.S.C. § 158(a)(1).

99. *Burnup & Sims*, 379 U.S. at 23-24.

100. For further authority regarding this basic § 8(a)(1) concept, see *Medeco Sec. Locks, Inc. v. NLRB,* 142 F.3d 733, 747 (4th Cir. 1998); *NLRB v. Hudson Transit Lines, Inc.,* 429 F.2d 1223, 1227-28 (3d Cir. 1970); and *American Freightways Co.*, 124 N.L.R.B. 146, 147 (1959).

violation of section 8(a)(1)—such as in the intended proactive requirement that the employer post the NLRB notice in the workplace. As the Board, in accord with established precedent,[101] pointed out in *Technology Service Solutions,*

> we find no basis for . . . holding that an overt act must occur for an employer to violate Section 8(a)(1). [There are] circumstances in which an *employer's failure to act* may interfere with, restrain, or coerce employees in the exercise of their Section 7 rights; nothing in the statute precludes such failures to act from being found violations of Section 8(a)(1).[102]

By the same token, another example of a judicially approved proactive rule is the previously noted representation-case rule in *Excelsior* that requires the employer to furnish a voter name-and-address list prior to an election under section 9.[103]

C. General-Coverage Rules that Require Affirmative Action in the Absence of WrongDoing

The mandate of an affirmative duty with an intended *prophylactic* effect is a common factor found in NLRA rules that protect against section 8(a)(1) *interference* with section 7 rights. Thus, the rule that would have required notice-posting in the workplace would have been a natural companion to the workplace no-solicitation rule that the Board created seventy-two years ago and which the Supreme Court approved in *Republic Aviation Corp. v. NLRB.*[104] Both requirements are general in nature, obligating employers to perform a simple but legally necessary act in order to "*guarantee*"[105] employees the knowledge and opportunity to exercise their section 7 rights in the workplace. Adopting the Board's language, the Court in *Republic Aviation* declared that a no-solicitation rule applicable during nonworking time "must be presumed to be an unreasonable impediment to self-organization and therefore discriminatory."[106] General coverage of the notice-posting rule would likewise have been consistent with a determination that an employer's refusal to post the

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101. C*iting* in its decision *McDermott Marine Construction*, 305 N.L.R.B. 617 (1991) (union entitled to employee access on off-shore oil platform), and *S&H Grossinger's, Inc.,* 156 NLRB 233, 251, 261 (1965), *enforced*, 327 F2d (2d Cir. 1967) (granting union's access to employees at remote location was warranted). Technology Service Solutions, 324 N.L.R.B. 298, 301 (1997).

102. Tech. Serv. Solutions, 324 N.L.R.B. at 301 (emphasis added).

103. *Id.,* at 1242-43 (1966).

104. Republic Aviation Corp. v. NLRB, 324 U.S. 793 (1945). The rule began in *Peyton Packing Co.,* 49 N.L.R.B. 828, 843-44 (1943). The *Republic Aviation* Court noted especially that the workplace is "uniquely appropriate" for communication about Section 7 rights." 324 U.S. at 801 n.6.

105. This is the strong active verb with which Congress chose to define the Board's duty in § 8(a)(1). 29 U.S.C. § 158(a)(1).

106. 324 U.S. at 803 n.10 (quoting Peyton Packing Co., 49 N.L.R.B. at 843-44).

notice would represents a similar "unreasonable impediment" to employee rights.

Those affirmative action rules that require no prior wrongdoing by the employer have included both *representation* (RC case)—i.e. fair-election—rules and *unfair-labor-practice* (C case) rules. As previously noted, a major example of such a representation case rule is *Excelsior Underwear's* requirement that the employer produce names and addresses of eligible voters for the union's use prior to an election.[107] There are many examples of proactive RC case rules.[108] And there are numerous examples of proactive, i.e. prophylactic, C case rules, including those contained in the following cases, all of which are general-coverage requirements of affirmative duties in the absence of any employer wrongdoing: *Jeannette Corp. v. NLRB,*[109] upholding a general rule against an employer's "prohibiting employees from discussing wage rates among themselves, [for that] impose[s] an unlawful impediment and restraint upon employees' right to engage in concerted activity for mutual aid and protection guaranteed by Section 7 . . . .";[110] the previously noted *NLRB v. J. Weingarten, Inc.,* which upheld a general rule that employers in union recognized workplaces must allow the presence of a union representative during an investigatory-disciplinary hearing when requested by the employee being interviewed;[111] *California Saw & Knife Works,* which requires unions to give nonunion employees advance notice of their *Beck* rights;[112] and *Eastex, Inc. v. NLRB,* which held that employee distribution of a union newsletter discussing external employee-related political matters constitutes concerted activity protected by section 8(a)(1).[113]

D. The Legislative History of Section 6, Including Newly Revealed Involvement of the Taft-Hartley Congress

As demonstrated earlier**,** Section 6's broad statutory text is sufficient to have validated the notice-posting rule.[114] Although section 6 standing alone is thus a cake complete, its compelling legislative

107. 156 N.L.R.B. at 1239-40.

108. *See* DEVELOPING LABOR LAW, *supra* note 97, at 2830-49.

109. 532 F.2d 916 (3d Cir. 1976), *enforcing* Jeannette Corp., 217 N.L.R.B. 653 (Apr. 30, 1975).

110. 217 N.L.R.B. at 658. For general treatment of NLRA coverage of nonunion employees, see Charles J. Morris, *NLRB Protection in the Nonunion Workplace: A Glimpse at a General Theory of Section 7 Conduct*, 137 U. PA. L. REV. 1673 (1989).

111. 420 U.S. 251, 266-67 (1975).

112. 320 N.L.R.B. 224, 231 (1995) (requiring notice of employees' *Beck* rights established in *Commc'ns Workers of Am. v. Beck*, 487 U.S. 735 (1988)); *see supra* notes 20-21.

113. 437 U.S. 556, 568-70 (1978).

114. *See supra* text accompanying notes 1-30 & 91-92.

history offers additional proof of congressional intent that spreads icing on that cake. As previously noted, the Supreme Court's review of that section's history under the original 1935 Act alone fully confirms that broad reading.[115] In addition, however, previously undetected or unobserved historical data concerning the 1947 Taft-Hartley amendment to section 6 supports that reading even more specifically.

Accordingly, I am taking this opportunity to highlight and emphasize a previously unrevealed role of the Taft-Hartley Congress in the legislative history of section 6, which my research uncovered and which I presented in amicus curiae briefs in the two appellate cases here under review—but to no avail. Earlier attention to the history of that section seems to have been confined to its inception in the original 1935 Wagner Act, particularly by the Supreme Court in its review in *AHA*.[116] Until my findings, no recorded attention has apparently been paid to the history of the re-enactment of section 6 in the Taft-Hartley Act.[117] Such inattention was likely due to a simple lack of awareness, for the history of this Taft-Hartley amendment was probably assumed to be irrelevant inasmuch as the key language of the section was not changed, and the only addition was what appeared to be merely a pro forma reference to the Administrative Procedures Act, which had been enacted the previous year.[118] However, although the final text was essentially a reiteration of the original text, that outcome was achieved only after express congressional rejection of an effort by the House of Representatives to totally strip the clause of its substantive content.[119]

Apparently unaware of this Taft-Hartley history, the Supreme Court's evaluation, of section 6 in *AHA,* as previously noted, was confined to what it termed the "sparse legislative history" in the 1935 Act, from which it nevertheless was able to definitively conclude from the "ordinary meaning of the statutory language which was reinforced by the structure and the policy of the NLRA[, that as] a matter of statutory drafting, if Congress had intended to curtail in a particular area the broad rulemaking authority granted in § 6, we would have expected it to do so in language expressly describing an exception from that section or at least referring specifically to the section."[120]

As the subsequent legislative record will here demonstrate,

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115. *Id.*

116. The Board's main brief to the Supreme Court in that case contained no reference to the history of § 6 in the Taft-Hartley Act. Brief for the NLRB, Am. Hosp. Ass'n v. NLRB, 499 U.S. 606 (1991) (NO. 90-97), 1991 WL 11007870.

117. Labor Management Relations Act, Pub. L. No. 80-101, 61 Stat. 136 (1947) (codified at 29 U.S.C. §§ 141-197 (2012)).

118. Administrative Procedures Act, Pub. L. No. 79-404, 60 Stat. 237 (1946) (codified as amended at 5 U.S.C. §§ 551-559 (2012)).

119. *See* Morris, *supra* note 44, at 26-28.

120. Am. Hosp. Ass'n v. NLRB, 499 U.S. 606, 613 (1991).

however, that section's legislative history was not "sparse." Nevertheless, the Court's all-encompassing reading of section 6 is strongly reconfirmed by the following multi-layered Taft-Hartley legislative-history. In 1947, the House of Representatives passed and sent to the Senate an amended, restrictive version of section 6 that would have totally denied the Board any authority to engage in *substantive* rulemaking, but this was rejected by the Senate and by conference committee and ultimately by the Congress. Here are the details of that history:

The original Section 6 in the 1935 Wagner Act read:

> The Board shall have authority from time to time to make, amend, and rescind such rules and regulations as may be necessary to carry out the provisions of this Act. Such rules and regulations shall be effective upon publication in the manner which the Board shall prescribe.[121]

The Hartley Bill ("H.R. 3020") that passed the House substituted an amended version which inserted a reference to the APA but deleted "rules" from the text, and limited the Board's authority to promulgation of only "such regulations as may be necessary to carry out [the agency's] "respective functions."[122] That House amendment to section 6 read:

> The Board and the Administrator,[123] respectively, shall have authority from time to time, in the manner prescribed by the Administrative Procedure Act, to make, amend, and rescind such *regulations* as may be necessary *to carry out their respective functions* under this Act.[124]

The purpose of this change, which by its text would have confined the Board's "regulations" to procedural matters only, was revealed in the committee's minority report —which was not disputed by the House majority in its committee report on H.R. 3020[125]—as follows:

> It seems clear that it is the intent of the authors to *eliminate the statutory authority of the Board to issue,* in addition to procedural regulations, *substantive changes* which under the Administrative Procedure Act might be construed as "*substantive rules*."[126]

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121. The National Labor Relations Act of 1935, Pub. L. No. 74-198, § 6, 49 Stat. 449, 452 (1935).

122. LEGISLATIVE HISTORY OF THE LABOR MANAGEMENT RELATIONS ACT, 1947, at 175-76 (1985) [hereinafter LEGIS. HIST. T-H ACT].

123. H.R. 3020 would have created this new office, but it did not survive Conference-Committee consideration. *Id.* at 317.

124. *Id.* at 49 (emphasis added).

125. *See id.* at 317.

126. *Id*. at 366 (emphasis added). This minority report identified the House majority's immediate objectives, which were to prevent the Board from issuing *substantive rules* empowering it to conduct pre-hearing elections without the express consent of the parties and to grant certifications based only on authorization cards rather than

The Senate rejected the entire House bill, including the amended section 6, and drafted and passed its own bill, S. 1126, for which Senator Robert Taft was chief sponsor.[127] That Senate bill contained no change in the Wagner Act's text of section 6 other than a change in the final sentence which read: "Such rules and regulations shall be effective upon publication in the Federal Register."[128] The Senate's committee report confirmed that this "only amendment to this section [is] in accordance with the requirements of the Administrative Procedure Act.[129]

The Senate passed Taft's bill with only a few amendments.[130] Both bills were then sent to conference committee where the House's deletions relating to substantive rulemaking and limitations on incorporation of the APA in section 6 were rejected.[131] The original language of section 6 was restored with full reference to "rules and regulations," and reference to the APA was inserted.[132] The final text of section 6 (with the insertion italicized)—hence the text in the present Act—thus reads as follows:

> The Board shall have authority from time to time to make, amend, and rescind, *in the manner prescribed by the Administrative Procedure Act,* such rules and regulations as may be necessary to carry out the provisions of this Act.[133]

With reference to this amended section 6, the published Taft-Hartley conference committee report explained that

> [i]t is made to assure that the subsequent amendment of the National Labor Relations Act without changing this section will not supersede the general rules prescribed in the Administrative Procedure Act which are now applicable to the Board's powers to promulgate regulations.[134]

It is thus noteworthy that the Taft-Hartley Congress rejected the House's effort to eliminate the Board's *substantive* rulemaking authority and confirmed that the "subsequent amendment," i.e., the amendment that constituted the Taft-Hartley Act, "will not supersede

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elections. *Id*. at 330, 336, & 1542.

127. *Id*. at 99, 226.

128. *Id*. at 109.

129. *Id*. at 426.

130. *See id.* at viii-ix; 1400.

131. *See* i*d.* at 510.

132. *Id*.

133. *Id*. at 5 (emphasis added).

134. *House Conference Report*, at 542 (The Senate did not issue a published report); *see* WILLIAM N. ESKRIDGE, JR., ET AL, CASES AND MATERIALS ON LEGISLATION: STATUTES AND THE CREATION OF PUBLIC POLICY, *Appendix B: Canons of Statutory Interpretation* 27 (4th ed. 2007) ("Committee reports (especially *conference committee reports* reflecting the understanding of both House and Senate) are the most authoritative legislative history" that can be produced (emphasis added)).

the general rules prescribed in the Administrative Procedure Act which are now applicable to the Board's powers to promulgate regulations."[135]

Had Congress enacted the House's amended language, section 6 would have denied the Board authority to issue substantive rules, authorizing only procedural "*regulations"* to "*carry out*" the agency's "*functions.*"[136] Accordingly, Congress's express rejection of that effort negates any contention that section 6 does not confer full substantive rulemaking authority upon the Board regarding "the provisions of the Act," hence *all* of its provisions. Taft-Hartley's rejection of change to the critical text and its ultimate consideration and amendment thus reconfirmed the intended broad and inclusive scope of section 6.

> *The Supreme Court has repeatedly addressed the significance of a congressional rejection of efforts to change a statute's wording. In Bradley v. School Board of Richmond it declared that courts should generally be "reluctant . . . . to read into [a] statute . . . . limitation[s] that Congress eliminated."[137] And in INS v. Cardoza-Fonseca it asserted that "[f]ew principles of statutory construction are more compelling than the proposition that Congress does not intend sub silentio to enact statutory language that it has earlier discarded in favor of other language."[138]*

E. The Legislative History Of Section 8(a)(1)

There is also relevant legislative history about another one of the key "provisions"[139] that would have been "carried out" by the notice-posting rule, to wit, section 8(a)(1). During debate on his bill, Senator Wagner on two recorded occasions advised his Senate colleagues of the

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135. LEGIS. HIST. T-H ACT, *supra* note 122, at 542.

136. *See supra* text accompanying notes 122-126.

137. 416 U.S. 696, 716, n.23 (1974) (holding that Congress's explicit rejection of House amendment limiting ability to recover attorneys' fees was evidence that Congress did not intend such limitation).

138. 480 U.S. 421, 442-43 (1987) (quoting from Nachman Corp. v. Pension Benefit Guar. Corp., 446 U.S. 359 (1980) (Stewart, J., dissenting)). *See also* Bob Jones Univ. v. United States, 461 U.S. 574, 600 (1983) (holding that Congress's failure to pass bills overturning the IRS's interpretation of a statute demonstrated congressional acquiescence with the agency's interpretation); United States v. Riverside Bayview Homes, Inc., 474 U.S. 121, 137 (1985) (holding that Congress's rejection of legislation curbing an agency's jurisdiction was evidence that Congress did not intend to overrule the agency's interpretation); Albemarle Paper Co. v. Moody, 422 U.S. 405, 414 n.8 (1975) (holding that Congress's rejection of a House amendment to Title VII (42 U.S.C. §§ 2,000e) that would have barred back pay to persons who had not filed EEOC charges showed Congress did not intend such a rule).

139. *See supra* notes 47-51 and accompanying text.

specific meaning of section 8(1),[140] first stating that it would have the "widest possible application"[141] and later characterizing the provision as having "the broadest reasonable interpretation of its omnibus guarantee of freedom."[142] And the final House report made clear, with reference to Section 8(1), that it and the other ULP provisions were "not intended to limit in any way the interpretation of the general provisions of [Section 8(1)]."[143] The widest possible application of the phrase "to interfere with*"* was thus recognized and intended when the Act was passed in 1935.

That broad meaning was again expressly recognized—and not changed—by the Taft-Hartley Congress when the phrase "*interfere with"* was being discussed and considered on the floor of the Senate in relation to section 8(b)(1).[144] That provision, which was applicable to *union* ULPs, was originally intended to be identical to its section 8(a)(1) counterpart, which was applicable to *employer* ULPs.[145] However, because "*interfere with"* was known to have an extremely broad meaning, Senator Irving Ives moved to amend Section 8(b)(1) by expressly deleting those two words. After he pointed out in floor debate that because of its broad meaning, retention of those words "may later, by interpretation and effect, defeat legitimate attempts at labor organization,"[146] his deletion amendment was adopted without objection.[147] The intended *broad* meaning of "*interfere with"* in Section 8(a)(1) was therefore fully recognized in both the 1935 and 1947 legislative histories.

IV. THE ERRONEOUS—BUT STILL STANDING—*CHAMBER* CASE

Now to the centerpiece targets of this article. First, the *Chamber* case, which proffers a novel approach to *Chevron*. In the initiation and core of her opinion for the Fourth Circuit's panel, Judge Alllyson K. Duncan selectively acknowledges and construes (or misconstrues) the functions of the NLRA under the inaccurate premise that "*there is no function or responsibility of the Board not predicated upon the filing of*

140. The pre-Taft-Hartley designation of § 8(a)(1).

141. 2 LEGISLATIVE HISTORY OF THE NATIONAL LABOR RELATIONS ACT, 1935, 2333 (1959) [hereinafter 2 LEGIS. HIST. NLRA].

142. *Id*. at 2487.

143. *Id.* at 3066.

144. *See* 1 LEGISLATIVE HISTORY OF THE LABOR MANAGEMENT RELATIONS ACT, 1947, 686 (1948) [hereinafter 1 LEGIS. HIST]; 29 U.S.C. § 158(b)(1).

145. *Id.* at 109.

146. 2 LEGISLATIVE HISTORY OF THE LABOR MANAGEMENT RELATIONS ACT, 1947, 1025 (1948) [hereinafter 2 LEGIS. HIST. T-H ACT].

147. *Id*. at 1139. Accordingly, § 8(b)(1)(A) only prohibits unions from "restrain[ing] or coerc[ing] employees in the exercise of the rights guarantee in Section 7;" it does not prohibit unions from "*interfer[ing*] with" those rights.

an unfair labor practice charge or a representation petition."[148] She thus overlooks entirely the Act's *quasi-legislative* functions contained in both statutory text and Supreme Court precedent, acknowledging only its *quasi-judicial functions*. Notwithstanding omnipresent proof to the contrary, she asserts and emphasizes that

> there is no general grant of power to the NLRB outside the roles of addressing ULP charges and conducting representation elections. Indeed, [that] none of the Act's provisions contain language specifically limiting the Board's authority to enact a notice-posting requirement reflects the absence of statutory authority for actions outside those defined responsibilities as a threshold matter.[149]

Nevertheless, she accurately repeats the *Chevron* requirement that asks

> whether Congress has directly spoken to the *precise* question at issue. If the intent of Congress is *clear,* that is the end of the matter; for the court, as well as the agency, must give effect to the *unambiguously* expressed intent of Congress.[150]

And she appears to concede—what turns out to be only lip-service, however—that "[o]nly 'if the statute is silent or ambiguous with respect to the *specific* issue' are we to proceed to *Chevron's* second step asking 'whether the agency's answer is based on a permissible construction of the statute,'" and to reach that point "we must use the 'traditional tools of statutory construction' to ascertain congressional intent"[151] and "are only to employ the deference of step two when the 'devices of judicial construction have been tried and found to yield no *clear sense* of congressional intent.'"[152] At that point, ignoring the obvious fact that the Act is indeed *silent or ambiguous* with respect to the *specific* issue of *notice-posting* and that the Board's action was therefore permissible because it was not "arbitrary, capricious, or manifestly contrary to the statute,"[153] she makes a 180 degree turn that contradicts the *Chevron* mandate she has just quoted—a mandate that should have been reinforced by the "hot-off-the-press" *Arlington* decision—and instead announces and applies a novel and unique interpretation of the APA, asserting that

> [b]ecause we do not presume a delegation of power simply from the absence of an express withholding of power, we do not find that *Chevron's* second step is implicated "any time a statute does not

148. Chamber of Commerce of the U.S. v. N.L.R.B. 721 F.3d 152, 154 (4th Cir. 2013) (emphasis added).

149. *Id.* at 159-60.

150. *Id.* (emphasis added) (quoting Chevron U.S.A., Inc. v. Natural Res. Def. Council, 467 U.S. 837, 842-43 (1984)).

151. *Id.* (quoting *Chevron*, 467 U.S. at 843 n.9).

152. *Id.* (quoting from Gen. Dynamics Land Sys., Inc. v. Cline, 540 U.S. 581, 600 (2004) (emphasis added)).

153. *Chevron*, 467 U.S. at 844.

> expressly negate the existence of a claimed administrative power."[154]

In truth, however, because the Act was silent on the subject, *Chevron's* second step was clearly implicated, for "a court may not substitute its own construction of a statutory provision for a reasonable interpretation made by the administrator of an agency."[155] The notice-posting rule should therefore have been held valid.

On the contrary, however, the Duncan opinion asserts that because "the Board is nowhere charged with informing employees of their rights under the NLRA, we find no indication in the plain language of the Act that Congress intended to grant the Board the *authority* to promulgate such [a notice-posting] requirement."[156] In other words, she is saying that the Board is without authority to fashion any rule that has not been specifically authorized in plain language in the text of the Act—thus section 6 would have no substantive function, and certainly not the broad function spelled out by the Court in *AHA*.[157] In fact, if that concept were generally followed it would totally destroy the *Chevron* doctrine, for it would effectively eliminate an agency's authority to exercise its *step-two* rulemaking authority.

The *Chamber* court's definition of the Board's *authority* thus grossly contradicts the heart of the *Chevron* doctrine, a conclusion that, as we have seen, was reasserted and clarified in *Arlington*.[158] There the Supreme Court addressed the specific question of

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154. *Chamber of Commerce of the U.S.,* 721 F.3d at 160. She even grasps at the straws of *Brown & Williamson Tobacco Corp. v. FDA*, 153 F.3d 155 (4th Cir 1998) and *American Bar Ass'n v. FTC*, 430 F.3d 457 (D.C. Cir. 2005), which were irrelevant examples of "attempted turf expansion" by the involved agencies, i.e., regulation of tobacco by the Food and Drug Administration (FDA), and regulation of practicing attorneys as "financial institutions" by the Federal Trade Commission (FTC). *Id.* at 159. These were attempted expansions of administrative authority for which there was no congressional intent, whereas there is undisputed congressional intent, both in text and legislative history, as to the Board's authority to regulate conduct relating to encouragement of the practice and procedure of collective bargaining and protection of workers' rights under section 8(a)(1). *See supra* notes 47, 139-47 and accompanying text.

155. *Chevron*, 467 U.S. at 844.

156. *Chamber of Commerce of the U.S.*, 721 F.3d at 160-61 (emphasis added). The opinion also by-passes the Board's contention that the word "necessary" in section 6 is inherently ambiguous and that *Mourning v. Family Publ'ns Serv., Inc.*, 411 U.S. 356, 369 (1973) was accordingly applicable because of its holding that a promulgated regulation is valid "so long as it is 'reasonably related to the purposes of the enabling legislation.'" The opinion's justification for bypassing that conclusion was that "this guidance is relevant only once we have determined that a statute is ambiguous," 721 F.3d at 161—truly a non-sequitur, for there was absolutely no basis for finding in the text, or elsewhere, a non-ambiguous congressional intent to expressly deny the Board the right to fashion the notice-posting rule.

157. *See supra* notes 38-40, 90-99, 120-21 and accompanying text.

158. *See supra* Part II.C.

"[w]hether . . . a court should apply *Chevron* to . . . an agency's determination of its own jurisdiction,"[159] to which it unequivocally responded in the affirmative, holding "that "we have consistently held 'that *Chevron* applies to cases in which an agency adopts a construction of a jurisdictional provision of a statute it administers.'"[160] Thus, the declaration in the *Chamber* opinion that the Board is nowhere charged with informing employees of their rights under the NLRA should have been dispositive of the validity of the issue, for in the language of the *Arlington* Court, "Congress knows to speak in plain terms when it wishes to circumscribe, and in capacious terms when it wishes to enlarge, agency discretion."[161] And "'no exception exists to the normal [deferential] standard of review;' for 'jurisdictional or legal question[s] concerning the coverage' of an Act.'"[162]

Nevertheless, with unwavering persistence, Judge Duncan repeats her blind-like reading of the Act by declaring that

> the substantive provisions of the Act make clear that the Board is a *reactive* entity, and thus do not imply that Congress intended to allow *proactive* rulemaking of the sort challenged here through the general rulemaking provision of Section 6.[163]

She thus wholly ignores the Act's important *proactive quasi-legislative functions* that Section 6 spells out and emphasizes and which legislative history confirms and which the adjudicative record abundantly illustrates—as in the prophylactic and general-rule cases previously examined. She thus ignores the commonly recognized nature of the administrative process. As that process was succinctly described by Justice Black in *Wyman-Gordon*:

> Most administrative agencies, like the Labor Board here, are granted two functions by the legislation creating them: (1) the power under certain conditions to make rules having the effect of laws, that is, generally speaking, quasi-legislative power; and (2) the power to hear and adjudicate particular controversies, that is quasi-judicial power.[164]

As the record has shown, as illustrated by the twenty rulemaking cases noted above, the Board has long exercised such quasi-legislative authority, which the *Chamber* court ignored.[165] Furthermore, even if

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159. City of Arlington v. FCC, 133 S. Ct. 1863, 1867-68 (2013) (citation omitted).

160. *Id.* at 1871 (quoting from I. R. PIERCE, ADMINISTRATIVE LAW TREATISE § 3.5, at 187 (2010)).

161. *Id.* at 1868.

162. *Id.* at 1871 (quoting from NLRB v. City Disposal Sys., Inc., 465 U.S. 822, 830, n.7 (1984)) (insertions in original).

163. Chamber of Commerce of the U.S. v. NLRB, 721 F.3d 152, 161 (4th Cir. 2013) (emphasis added).

164. NLRB v. Wyman-Gordon Co., 394 U.S. 759, 770 (1969).

165. *See supra* note 49 and accompanying text.

violation of a specific ULP provision of the Act were a necessary predicate for substantive rulemaking—as the Duncan Opinion contends[166]—section 8(a)(1) would certainly have filled that bill, as the notice-rule indicated by its specific application of that provision.[167] The ULP violation is simply the employer's *interference* with Section 7 rights by depriving employees of knowledge of those rights and how to enforce them by its refusing to post a notice of those rights in the workplace, which is comparable to the many previously established rules requiring employer proactive conduct in order to protect Section 7 rights.[168] Were it not for the seriousness of this analysis, the Opinion's refusal to "accept an interpretation of the Act that would allow the NLRB to bootstrap Section 8(a)(1) into authority to enact the *unprecedented* rule at issue here"[169] would be laughable, for *every* proactive section 8(a)(1) rule that the Board has previously enacted was "*unprecedented*" when enacted.

That concludes my treatment of the *Chamber* decision—a decision that defies conventional legal analysis. Is it a thinly-veiled exercise in result-intended decision-making? Or is it simply a pre-*Arlington* product by a judge whom Justice Scalia described in *Arlington* as "[t]he federal judge as haruspex, sifting the entrails of vast statutory schemes to divine whether a particular agency interpretation qualifies as 'jurisdictional,' [but] is not engaged in reasoned decisionmaking?"[170] Regardless, the decision clearly violates basic *Chevron* administrative law, and certiorari review should have been sought.

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166. "We . . . read the language in Section 6 as requiring that some section of the Act provide the explicit or implicit authority to issue a rule." *Chamber of Commerce of the U.S.*, 721 F.3d at 160. However, with reference to the Board's cases in which it has articulated rules of general applicability through adjudication, the opinion asserts that "those cases were all adjudications resulting from ULPs and based on rights *explicitly* granted by the NLRA." *Id.* at 164 n.12 (emphasis added). On the contrary, those grants were neither explicit nor implicit, but rather were based on the broad prohibition in Section 8(a)(1) of *interference* with "the exercise of the rights guaranteed in Section 7," statutory rights which Congress intended to be broad and non-explicit. *See supra* notes 149-54 and accompanying text. Illustrative of the commonality of the Board's proactive rules that the Board cited (*see* Reply Brief of the NLRB at 24, Chamber of Commerce of the U.S. v. NLRB, 721 F.3d 152 (2013) (No. 12-1757)), which the *Chamber* Opinion ignored, was *Guardsmark, LLC v. NLRB*, 475 F.3d 369, 377 (D.C. Cir. 2007), where the court found a violation of a long established § 8(a)(1) no-solicitation and no distribution rule, holding that

> [b]ecause [the] language [of the employer's rule] prohibits solicitation and distribution 'at all times while on duty or in uniform,' the Board correctly read [that it] bars solicitation and distribution at all times when the employees are on duty whether in or out of uniform and at all times while employees are in uniform whether on or off duty.

167. 29 C.F.R. § 104.210 (2012).

168. *See supra* notes 49, 91, 105, 107-10.

169. *Chamber of Commerce of the U.S.*, 721 F.3d at 163 (emphasis added).

170. City of Arlington v. FCC, 133 S. Ct. 1863, 1871 (2013).

V. THE PERPLEXING—BUT STILL STANDING—*NAM* CASE

The other target case, the *NAM* decision, is also perplexing. Judge Randolph, who wrote the D.C. Circuit's Opinion, ignores entirely that the Board's notice-posting rule and the Act's broad rulemaking authorization in Section 6 would normally indicate a *Chevron* administrative-procedure case. Instead, he presents a novel approach that essentially ignores *Chevron*.[171] He posits instead a reliance on a methodology of constitutional comparison that builds on the relation between section 8(c) and the First Amendment that portrays employers as the Board's victims.[172] He holds that their being required to post notices with which they disagree violates what he deems their section 8(c) First-Amendment-like right to remain silent,[173] a conclusion for which there is neither Board nor judicial precedent.[174] The not-surprising reaction to this ruling, which uses the cover of free speech to suppress free speech, was expressed by the New York Times' editorially as "outrageous."[175]

Section 8(c) reads as follows:

> The expressing of any views, argument, or opinion, or the dissemination thereof, whether in written, printed, graphic, or visual form, shall not constitute or be evidence of an unfair labor practice under any of the provisions of this [Act], if such expression contains no threat of reprisal or force or promise of benefit.[176]

Judge Randolph does not question the even-handedness and fairness of the poster's portrayal of the statutory rights. Indeed his

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171. *See* Nat'l Ass'n of Mfrs. v. NLRB, 717 F.3d 947, 960 (2013). His only *Chevron* reference is a passing excerpt from the Opinion of the district court below regarding an alternative remedial feature not central to the main issue and not treated in this article. *Id.*

172. *Id.* at 956-60.

173. He cites what the D.C. Circuit had written in *UAW-Labor Employment & Training Corp. v. Chau*, 325 F.3d 360 (D.C. Cir. 2003), a preemption case in which unions unsuccessfully challenged the G. W. Bush administration's executive order requiring government contractors to post notices informing employees of their rights under *Communication Workers of America v. Beck*, 487 U.S. 735 (1988), i.e., their rights to join or refrain from joining a union and the financial obligations associated with those rights, to wit, that "Section 8(c) 'implements the *First Amendment'* in the labor relations area. NLRB v. Gissel Packing Co., 395 U.S. 575, 617 (1969). And the *First Amendment* includes not only the right to speak, but also the right not to speak . . . ." UAW-Labor Empl't & Training Corp., 325 F.3d at 365 (emphasis added). He asserts in a recent case, however, that "[w]hether § 8(c) is broader than the First Amendment . . . is an issue we need not decide. Nor do we need to consider whether § 8(c) is narrower than the First Amendment in some respects." *Nat'l Ass'n of Mfrs.*, 717 F.3d at 955 n.8.

174. *Cf.* the hypothetical statement of the *UAW* court that "even assuming that the § 8(c) right includes the right not to speak, an employer's right to silence is sharply constrained in the labor context." *UAW-Labor Emp't. & Training Corp.*, 325 F.3d at 365.

175. Editorial, *The N.L.R.B.'s Contested Poster*, N.Y. TIMES, May 9, 2013, *available at* http://www.nytimes.com/2013/05/10/opinion/the-nlrbs-contested-poster.html.

176. 29 U.S.C. § 158(c) (2012).

opinion acknowledges that

> [t]he poster informs employees of their right to form, join, or assist a union; to bargain collectively through representatives of their choosing; to discuss wages, benefits, and other terms and conditions of employment with fellow employees or a union; to take action to improve working conditions; to strike and picket; or to choose not to engage in any of these activities.[177]

Yet, notwithstanding the neutrality of that message, he finds that because the employer plaintiffs "object to the message the government has ordered them to publish on their premises," the rule violates section 8(c).[178] He asserts that "[a]lthough § 8(c) precludes the Board from finding noncoercive speech to be an unfair labor practice, or evidence of an unfair labor practice, the Board's rule does both"[179] because, notwithstanding that "[i]t is obviously correct that the poster contains the Board's speech," employers are required to "disseminate" that poster "upon pain of being held to have committed an unfair labor practice," for the "language of § 8(c) covers [the] '*dissemination*' of 'any views, arguments, or opinions.'"[180] He therefore declares that inasmuch as "[t]he right to disseminate another's speech necessarily includes the right to decide not to disseminate it,"[181] and because refusal to post the notice—i.e., the Board's speech—constitutes an unfair labor practice, that right to refuse is protected by section 8(c). This is a conclusion based solely on his comparison with his own constricted view of First-Amendment authority,[182] not on any NLRB-related case law.

Judge Randolph arrives at the foreoing conclusion without pausing to confront either applicable NLRA judicial precedent or applicable First-Amendment case law that addresses governmental actions or regulations that might encroach upon First Amendment free speech. Nor does he pause to heed the Supreme Court's cautionary reading of section 8(c) in the *Gissel* case that

> Any assessment of the precise scope of employer expression [hence, also a right to non-expression] must be made in the context of its labor relations setting. Thus, an employer's rights cannot outweigh the equal rights of the employees to associate freely, as those rights are embodied in § 7 and protected by § 8(a)(1) and the proviso to § 8(c). And any balancing of those rights must take into account the

177. *Nat'l Ass'n of Mfrs.*, 717 F.3d at 950.

178. *Id.*

179. *Id.* at 955.

180. *Id.* at 956 (emphasis added).

181. *Id.*

182. *Id.* ("[*A*]*ll* speech inherently involves choices of what to say and what to leave unsaid.") (citing Pac. Gas & Elec. Co. v. Pub. Utils. Comm'n, 475 U.S. 1, 11 (1986)) (emphasis added)); W. Va. Bd. of Educ. v. Barnette, 319 U.S. 644 (1943); Riley v. Natl'l Fed'n of the Blind, 487 U.S. 781 (1988), discussed *infra* at notes 198-99).

> economic dependence of the employees on their employers . . . .[183]

Had he examined NLRA precedent, he would have encountered numerous cases where an employer is required to allow speech of which it disapproves to be spoken and disseminated on its premises. For example, as the reader will recall, the foundational *Republic Aviation* case requires employers to allow union-solicitation speech by employees at their workplace on nonworking time.[184] And in *Lechmere* the Supreme Court referred to remote locations, such as *Grossingers, Inc.*, a mountain resort, as "classic examples" of conditions that warrant union presence at an employer's premises for union solicitation-speech access to employees.[185] The reader will also recall the rule in *Weingarten,* where the employer is required to allow participation of a union steward at a disciplinary meeting with an employee when the employee so requests.[186] And in *Eastex, Inc. v. NLRB*, the employer was required to allow distribution of a union's multipurpose newsletter in the employer's non-work areas on non-work time.[187]

Judge Randolph's opinion is likewise deficient in its purported reliance on comparative First Amendment precedent. It ignores the critical standards spelled out by the Supreme Court in cases applicable to governmental regulations that might encroach on First Amendment free speech, particularly *United States v.* O'*Brien,*[188] and *Rumsfeld v. Forum for Academic and Institutional Rights ("FAIR")*[189] (although, curiously, he does draw upon the opening part of the latter case). In the 1968 *O'Brien* case, the Supreme Court established the basic—and sensible—four-part standard that prevails to this day (except apparently in the instant *NAM* decision), which is that a regulation that appears to conflict with First Amendment free-speech

> is sufficiently justified if it is [1] within the constitutional power of the Government; [2] if it furthers an important or substantial governmental interest; [3] if the governmental interest is unrelated to the suppression of free expression; and [4] if the incidental restriction on alleged <u>*First Amendment*</u> freedoms is no greater than is essential to the furtherance of that interest.[190]

FAIR, one of *O'Brien's* most recent progeny cases, concerns the federal law that requires institutions of higher education to give

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183. NLRB v. Gissel Packing Co., 395 U.S. 575, 617 (1969).

184. Republic Aviation Corp. v. NLRB, 324 U.S. 793 (1945) (employer barred from prohibiting solicitation during nonworking time).

185. Lechmere, Inc. v. NLRB, 502 U.S. 527, 539-40 (1992) (citing NLRB v. S&H Grossinger's, Inc., 372 F.2d 26, 29-30 (2d Cir. 1967)).

186. NLRB v. Weingarten, Inc., 420 U.S. 251, 266-67 (1975).

187. 437 U.S. 556, 570-74 (1978).

188. 391 U.S. 367 (1968).

189. 547 U.S. 47 (2006).

190. *O'Brien*, 391 U.S. at 377.

military recruiters access to their premises—a Supreme Court opinion which Judge Randolph does acknowledge, though incompletely.[191] The Court in *FAIR* held that notwithstanding the allegation that the schools were being unconstitutionally compelled to speak the government's message with which they disagreed, that requirement did not violate the First Amendment because it conformed to *O'Brien* standards.[192] And it emphasized what it had declared in *Prune Yard Shopping Center v. Robins*, "that there was little likelihood that the views of those engaging in the expressive activities would be identified with the owner, who remained free to disassociate himself from those views."[193] Accordingly, as the Court noted, the affected schools—like the employers who were being required to post the NLRB message with which they disagreed—were "free to dissociate [themselves] from those views;" [194] and the school's students—like the employees who would read the posted notice—could appreciate the difference between those two sources.

Instead of examining the Board's rule in relation to the above NLRA factors and the *O'Brien* First-Amendment thesis, Judge Randolph cites no NLRA precedent and purports to rely entirely on several inapplicable constitutional law cases cited by Chief Justice Roberts in the FAIR case for his observation that "[s]ome of [the] Court's leading First Amendment precedents have established the principle that freedom of speech prohibits the government from telling people what they must say."[195] Without mentioning *O'Brien*, Judge Randolph's first two FAIR-cited cases are those where the governmental interest was insufficient to override constitutional free speech: *Wooley v. Maynard,* which involved a New Hampshire law that required motorists to display the state motto "Live Free or Die" on their license plates,[196] and *West Virginia State Board of Education v. Barnette,* where the state law required school children to recite the Pledge of Allegiance and salute the flag.[197] His other FAIR-cited case was *Riley v. National Federation of the Blind,* where the means chosen to accomplish a legitimate governmental objective was deemed unconstitutional only because it was unduly burdensome and not narrowly tailored—hence a violation of *O'Brien's* fourth standard.[198]

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191. *See* Nat'l Ass'n of Mfrs. v. NLRB, 717 F.3d 947, 956, 958 (D.C. Cir. 2013) (citing *Forum for Academic and Institutional Rights, Inc.*, 547 U.S. at 61, 63).

192. 547 U.S. at 67-68.

193. *Id.* at 65 (quoting Pruneyard Shopping Ctr. v. Robins, 447 U.S. 74, 88 (1980)).

194. *Id.* (quoting *Pruneyard Shopping Ctr.*, 447 U.S. at 88).

195. Nat'l Ass'n of Mfrs., 717 F.3d at 956 (quoting from *Forum for Academic and Institutional Rights, Inc.*, 547 U.S. at 61) (alteration in original).

196. 430 U.S. 705 (1977).

197. 319 U.S. 624 (1943).

198. 487 U.S. 781, 797-98 (1988). It involved a North Carolina law that was intended to prevent fraud by donation-solicitors by requiring them to disclose to potential donors

Apparently Judge Randolph at that point stopped reading the FAIR case, for he fails to mention the Court's ultimate holding that there was no free-speech violation because the recruiting law complied with the *O'Brien* tests and its progeny cases.[199]

Among the *O'Brien* progeny cases, *Turner Broadcasting System, Inc. v. FCC* is directly on point.[200] The issue there was whether provisions in the federal statute that require cable television companies to dedicate some of their channels to broadcasting programs of local television stations (known as *must-carry* provisions) violates First Amendment rights of cable television companies who were thus required—like the employers under the Board's notice-posting rule—to publish messages against their will.[201] The Supreme Court concluded that "[b]ecause the burden imposed by *must-carry* is congruent to the benefits it affords [and] is narrowly tailored to preserve a multiplicity of broadcast stations for . . . households without cable," which was an acceptable congressional objective, the *must-carry* provisions did not violate the First Amendment.[202]

As further demonstration that *must-carry* met *O'Brien* standards, the Court highlighted some of the benchmarks that it had articulated in two prior progeny cases. In *Ward v. Rock Against Racism* it stressed that "the essence of narrow tailoring" is "focus[ing] on . . . the evils the [Government] seeks to eliminate [without] significantly restricting a substantial quantity of speech that does not create the same evils."[203] And in *Clark v. Community for Creative Non-Violence* it noted that "[n]one of [the regulation's] provisions appear unrelated to the ends that it was designed to serve."[204] Pursuant to those standards, the NLRB's notice-posting rule was legitimately focused, for it addressed the evils of employees' widespread lack of knowledge about their rights under the NLRA and how those rights can be enforced. As the district court decision that was reviewed in *NAM* had held—without contradiction on appellate review—the NLRB's "dissemination of information about employee rights is well within its bailiwick. The Board is not attempting to regulate entities or individuals other than

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the percentage of donated revenue retained by the soliciting charity, i.e., the unwanted speech; it also purported to define by a complex formula the reasonable fee fundraisers could charge and required them to obtain licenses before soliciting.

199. *Forum for Academic and Institutional Rights*, 547 U.S. at 67-68; *see*, *e.g.,* Turner Broadcasting Sys., Inc. v. FCC, 520 U.S. 180 (1997); Ward v. Rock Against Racism, 491 U.S. 781 (1989); Renton v. Playtime Theatres, Inc., 475 U.S. 41 (1986); United States v. Albertini, 472 U.S. 675 (1985); Clark v. Cmty. for Creative Non-Violence, 468 U.S. 288 (1984); Members of City Council of City of Los Angeles v. Taxpayers for Vincent, 466 U.S. 789 (1984).

200. *Turner Broadcasting System*, 520 U.S. 180.

201. *Id.*

202. *Id.* at 215-16 (emphasis added).

203. 491 U.S. at 799 n.7.

204. 468 U.S. at 297.

those that Congress expressly authorized it to regulate [and] the stated purpose of the rule is directly related to the policy behind the NLRA." [205] Thus, like the regulation approved in *Community for Creative Non-Violence*, the Board's notice-posting rule was closely related to the "ends that it was designed to serve," i.e., to inform employees of their statutory rights; and it does not significantly restrict anyone's speech, including the employer's.[206] It's message is unmistakably the voice of the NLRB, a governmental agency, and not the voice of the employer, who remains free to post anything anywhere in the workplace and to tell anything to its employees, singly or in captive-audiences, provided only that such expressions contain no "threat of reprisal or force or promise of benefit."[207] Like the words of the Supreme Court in yet another *O'Brien* progeny case, this rule was "designed to serve a substantial governmental interest and allows for reasonable alternative avenues of communication."[208]

Accordingly, established NLRB law and comparisons with First Amendment law both fully confirm that the Board's notice-posting rule was not a violation of section 8(c). Judge Randolph's contrary thesis should therefore have been the subject of a certiorari petition.

VI. THE WORKPLACE-NOTICE BACKFIRE PROPOSAL

The two reviewed decisions have at least focused attention on the need for workers to know that there is a governmental agency whose functions include the encouragement of collective bargaining, protection of their right to join or not to join a union in order to engage in such bargaining, protection of their right to participate in other concerted activities for mutual aid or protection, and also providing them with the means to enforce those rights. Needless to say, the logical place for employees to learn about those rights is at their workplace.

If, however, the NLRB does not make an effort to once again require posting of an appropriate written workplace-notice—which it is unlikely to do any time in the near future—there is an alternative means that could achieve the same objective. It is my research-based conclusion that a union or a group of workers could initiate a new NLRB action that would legally produce that same result, or perhaps even a superior related result. Such an action would constitute needed *backfire* from the two reviewed decisions—an action that might

205. Nat'l Ass'n of Mfrs. v. NLRB, 846 F. Supp. 2d 34, 45 (D.D.C. 2012).

206. Clark v. Cmty. for Creative Non-Violence, 468 U.S. 288, 297; Nat'l Ass'n of Mfrs. v. NLRB, 717 F.3d 947 (D.C. Cir. 2013).

207. *See Nat'l Ass'n of Mfrs.*, 717 F.3d at 954 (quoting Chamber of Commerce of the U.S. v. Brown, 554 U.S. 60, 67 (2008)); *but cf.* NLRB v. Gissel Packing Co., 395 U.S. 575, 617-18 (1969).

208. Renton v. Playtime Theatres, Inc., 475 U.S. 41, 50 (1986) (citing *Cmty. for Creative Non-Violence*, 468 U.S. at 293).

eventually contribute to a revival of a dormant labor movement. That is the subject of the concluding section of this article.

It should be borne in mind that the creation of my proposal was necessarily based not only on the rights of employees guaranteed by the NLRA but also on the property rights of employers to control their establishments. As the Supreme Court mandated in *Babcock & Wilcox*, "[o]rganization rights are granted to workers by the same authority, the National Government, that preserves property rights. Accommodation between the two must be obtained with as little destruction of the one as is consistent with the maintenance of the other."[209] But as we were reminded in the *Gissel* case, the Supreme Court has also stressed that "an employer's rights cannot outweigh the equal rights of the employees to associate freely, as those rights are embodied in § 7 and protected by § 8(a)(1)."[210] Those two decisions thus provide the foundational underpinnings of my proposal, a plan that has the legal capacity to provide notification to employees, in their workplace, of their NLRB rights and other related communications. The following are the cases that frame the structure of this plan. The first such case is the tried-and-true granddaddy of them all, *Republic Aviation.*[211]

In *Republic Aviation*—which was decided when the Act was still young—the Supreme Court confirmed the Board's rule that allows an employer to prohibit employees from engaging in oral solicitation during working time in both working and nonworking areas, but not when employees are on their own time.[212] The Court agreed with the Board that the workplace is "the very time and place uniquely appropriate and almost solely available" to employees for the exercise of their "full freedom of association."[213] Accordingly, although the Board and the Court approved an employer's prohibition of oral solicitation during working time—for "working time is for work"[214]—they have never approved prohibiting oral solicitation during *nonworking time*, even in working areas, except where special circumstances exist. However, both the Board and the Court have recognized that a significant distinction exists between oral solicitation and distribution of literature. "[S]olicitation, being oral in nature, impinges upon the employer's interests only to the extent that it occurs on working time, whereas distribution of literature, because it carries the potential of littering the employer's premises, raises a

209. NLRB v. Babcock & Wilcox Co., 351 U.S. 105, 112 (1956).

210. NLRB v. Gissel Packing Co., 395 U.S. 575, 617 (1969).

211. Republic Aviation Corp. v. NLRB, 324 U.S. 793 (1945).

212. *Id.* at 805.

213. *Id.* at 801 n.6 (adopting the Board's language from Republic Aviation Corp., 51 N.L.R.B. 1186, 1195 (1943)).

214. *Id.* at 803 n.10 (quoting Peyton Packing Co., 49 N.L.R.B. 828, 843 (1943)); *see also* Stoddard-Quirk Mfg. Co., 138 NLRB 615, 617 (1962).

hazard to production whether it occurs on working time or nonworking time."[215] Nevertheless, because distribution of literature is a critical element in the organizational process, it is firmly recognized that "[r]ules prohibiting solicitation by employees on their own time in nonworking areas can be upheld only on a showing that special circumstances make the rule necessary to maintain production or discipline."[216] As the Board explained in *Stoddard-Quirk Mfg. Co.,* the authoritative case on distribution of union literature on the employer's premises,

> Granted that the distribution of union literature, even when it is limited to nonworking areas, is an intrusion upon an employer's acknowledged property rights, we believe that this limited intrusion is warranted if we are to accord a commensurate recognition to the statutory right of employees to utilize this organizational technique.[217]

Accordingly, notwithstanding such factors as littering or cluttering, it has long been accepted that employees have a protected right to engage in distribution of literature during their nonworking time in nonworking areas, such as in cafeterias, break rooms, employee rest areas, and parking lots[218]—those being the times and places that are deemed "uniquely appropriate and almost solely available" for employee-communication about unions.[219] Such nonworking areas that are protected for employee solicitations and distribution of literature during nonworking time thus carry a special *employee-friendly* status.

Typical of such nonworking areas that exist in many or most employing establishments, which are therefore protected for literature distribution, is one (or more) distinct area(s)—often a separate room, frequently called a "break room"—where routine written notices to

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215. Stoddard-Quirk Mfg. Co. 138 N.L.R.B. at 619.

216. NLRB v. United Aircraft Corp., Pratt & Whitney Aircraft Div., 324 F.2d 128,129 (2nd Cir. 1963) (citing Republic Aviation Corp. v. NLRB, 324 U.S. 793, 803 (1945)). The Supreme Court had previously so confirmed in the *LeTourneau* case (which was decided with *Republic Aviation*) with reference to employees distributing literature in the company parking lot during non-working time. 324 U.S. at 796-97, 802, 804. For exceptional cases involving "special circumstances", see *May Dep't Stores*, 59 N.L.R.B. 976, 981 (1944), *enforced*, 154 F.2d 533 (8th Cir. 1946) (no-solicitation rule allowed on retail selling floor "during nonworking hours (such as luncheon and rest periods)"), and *NLRB v. Baptist Hosp., Inc.*, 442 U.S. 773, 782 (1979) (distribution could be banned in hospital areas that were also available to patients).

217. 138 N.L.R.B. at 620.

218. This has become an accepted and unchallenged concept. *Supra* note 216. *See also*, *e.g.,* Vincent's Steak House, 216 N.L.R.B. 647, 647 (1975) (where the employer did not challenge the ALJ's finding that its "broad no-distribution, no-solicitation rule . . . violates the Act in that it prohibits such activities in nonworking areas during nonworking time"); Beth Israel Hosp. v. NLRB, 437 U.S. 483, 493 n.10 (1978) (where the Supreme Court acknowledged the same concept).

219. *Republic Aviation*, 324 U.S. at 801 n.6.

employees are generally posted on a wall or bulletin board, including printed notices that advise employees of their various federal and state statutory employment rights. Such a protected employee-friendly nonworking area is the ideal and appropriate location for the posting of employee-initiated notices that solicit employees for union membership or nonmembership and/or advise them of their rights under the NLRA and how those rights can be enforced. Such employee-posted notices would be no less a form of literature-distribution than pamphlets passed from hand-to-hand, and they would not unreasonably infringe on the employer's control of its property, hence they would be fully consistent with the *Stoddard-Quirk* line of cases.[220]

Likewise, in workplaces where the employer routinely posts general notices to employees electronically, such electronic means—like the above-noted postings in physical nonworking areas—provide an ideal and appropriate medium for employees to electronically post notices soliciting fellow employees for union membership or nonmembership and/or notices that advise employees of their NLRA rights and the Board's enforcement process, none of which would unreasonably interfere with the employer's property rights.[221]

Accordingly, based upon the established law described above—particularly the law relating to the protected right of employees to distribute literature on their employer's property in nonworking areas during nonworking time—I propose adoption of a substantive rule that would

> require all employers subject to the Act to allow their employees during nonworking time to post and maintain in a conspicuous place (or places) in a suitable nonworking area (or areas) on the employer's premises, written notices by an employee or employees that directly or indirectly concern the rights of employees protected by section 7 of the Act. Failure to allow such posting, subject only to reasonable requirements regarding size and quantity, shall be deemed an interference with the rights of employees guaranteed by section 7, hence an unfair labor practice in violation of section 8(a)(1).

Such posted notices—like other forms of presently permitted distribution of union literature—may, for example, be used by the

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220. Although such employee usage of an employer's facility would probably require reconsideration and appropriate adjustment of the Board's treatment of company bulletin boards that allows an employer to lawfully enforce a uniform rule that prohibits employees from using such boards for nonwork-related messages, *see Vincent's Steak House*, 216 N.L.R.B. at 647 n.3, but that should not pose any serious legal problem. *Cf.* Eaton Technologies, Inc., 322 N.L.R.B. 848, 853-54 (1997) (employer violated § 8(a)(1) by removing and destroying union literature on bulletin board, disparately enforcing its bulletin-board policy).

221. *Cf.* Purple Commc'ns, Inc., 361 N.L.R.B. No. 126 (Dec. 11, 2014) (Board granting employees access to employer's email system for NLRA protected communication during nonworking time).

posting employees to solicit other employees for union membership or nonmembership and/or to advise them of their rights available under the Act and how those rights can be enforced. And in workplaces where the employer routinely posts general notices to employees electronically, this same rule shall apply so that employees will be allowed to post notices of the above type through that same electronic media.

As noted above, failure to comply with this rule would constitute an unfair labor practice in violation of section 8(a)(1). I am not, however, supplying the typical boiler-plate procedural details that would describe such non-compliance, for it is to be assumed that when the occasion arises, the Board will spell out such reasonable procedures that an employer must follow for initial and continuing compliance with the requirements of this rule.

It should also be noted that rather than petitioning for rulemaking under section 6—which would be an available option[222]—a party interested in initiating the establishment of this rule might find it faster and more direct to utilize the adjudication process.[223] That process would begin with the effort of a single employee or group of employees to physically post, or attempt to post, a notice in an appropriate nonworking area during nonworking time. If there is no responsive prohibition or retaliation from the employer, the process might spread informally and locally—although that is not likely. More likely, a prohibition or retaliation would result from such posting, whereupon a section 8(a)(1) charge asserting interference with the exercise of section 7 rights should be filed with the Regional Office of the Board, after which usual ULP processing would apply.

In view of this article's showing of a legitimate need for a general workplace notice advising employees of their NLRA rights and the longstanding judicial recognition that employees must have a nonworking place to distribute pro-union literature during their nonworking time, this proposed rule should easily meet all *Chevron* requirements and avoid any prohibitions that might be alleged on the basis of the *Chamber* or *NAM* decisions.

Thus, notwithstanding anticipated employer and political opposition, the General Counsel and the Board should encounter no well-founded legal obstacles in granting approval of this proposed rule. This rule would thus provide a needed means for employees to easily learn at their workplace of their rights under the Act and how to protect them. Such a promulgation would thus represent an appropriate *backfire* emanating from the anti-NLRA conduct that

222. Both the Administrative Procedure Act and the NLRB's Rules and Regulations provide for notice-and-comment-rule petitioning by "interested persons." 5 U.S.C. § 553(e) (2012); 29 C.F.R. § 102.124 (2014).

223. *See* NLRB v. Bell Aerospace Co. Div. of Textron Inc., 416 U.S. 267, 294-95 (1974).

produced the *Chamber* and *NAM* decisions—a result that might spur employees and their unions to take greater advantage of their rights under the Act.

VII. CONCLUSION

The *Chamber* and *NAM* decisions treated here should have been disposed of by certiorari-review and Supreme Court reversal. Regrettably, that did not happen. I am therefore hopeful that the contents of this article might offer a modest antidote that will help prevent those decisions from doing further harm and also provide some useful clarification for future rulemaking. I am also hopeful that the simple substantive rule here proposed will in due time provide American workers with a source of information that will help them and the NLRB to achieve more of the Act's declared purpose of encouraging collective bargaining and union-organizing required to make that happen.