No. 12-5068 (consolidated with No. 12-5138)

IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA

NATIONAL ASSOCIATION OF MANUFACTURERS, *et al.*,

Appellants/Cross-Appellees,

v.

NATIONAL LABOR RELATIONS BOARD, *et al.*,

Appellees/Cross-Appellants.

On Cross Appeals from an Order of the United States District Court for the District of Columbia, C.A. No. 11-cv-01629-ABJ

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

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DATED: May 29, 2012

CERTIFICATE AS TO PARTIES, RULINGS, AND RELATED CASES

The *Amici Curiae* provide the following information pursuant to Circuit Rule 28(a):

(A) Parties and *Amici Curiae*. Except for the following, all parties, intervenors, and *amici curiae* appearing before the district court and/or in this Court are listed in the Initial Opening Brief of Appellants/Cross-Appellees, filed May 22, 2012, at i-ii (hereinafter "Appellants' Opening Brief" or "App. Op. Br."). The instant brief is submitted on behalf of the *amici curiae* listed on page one below, including The Honorable John Kline, Chairman of the House Committee on Education and the Workforce, fourteen other members of the same House Committee, and sixteen additional members of the United States House of Representatives.

(B) Rulings Under Review. References to the rulings at issue appear in Appellants' Opening Brief, at ii.

(C) Related Cases. This appeal is consolidated with No. 12-5138, a cross-appeal by the National Labor Relations Board ("NLRB" or "Board"), certain Board members and its Acting General Counsel, involving substantially the same parties and the same or similar issues as the instant appeal. *See also* App. Op. Br., at iii.

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GLOSSARY

ADA	Americans with Disability Act
ADEA	Age Discrimination in Employment Act
COBRA	Consolidated Omnibus Budget Reconciliation Act
EPPA	Employee Polygraph Protection Act
ERISA	Employee Retirement Income Security Act
FAA	Federal Arbitration Act
FCRA	Fair Credit Reporting Act
FMLA	Family and Medical Leave Act
FTC	Federal Trade Commission
IRC	Internal Revenue Code
IRCA	Immigration Reform and Control Act
LMRA	Labor Management Relations Act
LMRDA	Labor Management Reporting and Disclosure Act
NIRA	National Industrial Recovery Act
NLRA	National Labor Relations Act
NLRB	National Labor Relations Board
NMB	National Mediation Board
OSHA	Occupational Safety and Health Act
OWBPA	Older Workers Benefit Protection Act

RLA	Railway Labor Act
ULP	Unfair Labor Practice
UMW	United Mine Workers
USSERA	Uniformed Services Employment and Reemployment Rights Act
WARN	Worker Adjustment and Retraining Notification Act

IDENTITY AND INTEREST OF THE *AMICI CURIAE* AND AUTHORITY TO FILE

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

(B) Interest. This appeal arises from an agency rule issued by the National Labor Relations Board that requires employers to post workplace notices regarding the National Labor Relations Act, 29 U.S.C. §§ 151 *et seq.* ("NLRA," "Wagner Act" or "Act"), when such a notice obligation is not provided in the Act. The *Amici* House Members have an interest in this matter because details regarding the NLRA's legislative history – not described or elaborated upon by other parties – directly bear on the issues being considered in the instant appeal. Moreover, Chairman Kline and Representatives Platts, Wilson, Roe, Thompson, Walberg, Barletta, Bucshon, DesJarlais, Gowdy, Heck, Kelly, Noem, Rokita, and Ross are

members of the Committee to which the NLRA was originally referred in the House that played a leading role when Congress adopted the NLRA.[1] The *Amici* House Members also have an interest in seeing that legislative choices made by Congress are not usurped by agencies that exceed their authority or create obligations that are contrary to federal law.

(C) Authority to File. All parties in the instant appeal have consented to the filing of an amicus brief by the *Amici* House Members, which makes this brief permissible under Fed. R. App. P. 29(a).

STATEMENT REGARDING BRIEF PREPARATION AND FUNDING

Pursuant to Fed. R. App. P. 29(c)(5), the *Amici* House Members state that no party's counsel has authored this brief in whole or in part; no party or party's counsel contributed money that was intended to fund preparing or submitting of this brief; and no persons other than the *Amici Curiae* or their counsel contributed money that was intended to fund preparing or submitting this brief.

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

SUMMARY OF ARGUMENT

For two primary reasons made clear by the NLRA – and especially by the Act's legislative history – this Court should reverse the district court's decision holding that the National Labor Relations Board ("NLRB" or "Board") lawfully created and (in certain respects) could enforce a rule imposing an NLRA notice obligation on employers throughout the United States. *See* Memorandum Opinion and Order entered March 2, 2012 (Dist. Ct. Dkt. #59) (hereinafter "Mem. Op.").

First, the NLRA and especially its legislative history demonstrate that the Notice Rule impermissibly constitutes the NLRB's exercise of authority over employers generally, even if they are not the subject of an unfair labor practice ("ULP") charge or representation petition. This is contrary to the decision by Congress – when enacting the NLRA – to divest the NLRB of any discretionary authority to exercise jurisdiction over employers unless they are named in an unfair labor practice charge or representation petition. Thus, Congress intentionally limited the Board's jurisdiction to employers who are actual parties, in pending cases, where there can be adjudicated facts based on evidentiary hearings. *Chamber of Commerce of the United States v. NLRB*, 2012 U.S. Dist. LEXIS 52419 at *36 (D.S.C. April 13, 2012) (hereinafter "*U.S. Chamber*").

Second, the NLRA and especially its legislative history show that Congress intentionally excluded notice provisions from the NLRA, while adding express

notice provisions to the Railway Labor Act, 45 U.S.C. §§ 151 *et seq*. ("RLA") and a wide array of other statutes. It is also significant that an array of other notice issues were prominent during legislative hearings and debates regarding the Wagner Act legislation; the RLA and multiple additional statutes – unlike the NLRA – contain express notice requirements; during a period spanning more than 75 years the NLRB did *not* deem a broad notice obligation "necessary" to the Act's administration; and Congress amended the NLRA in 1947, 1959 and 1974 without adding a notice obligation. Therefore, the Notice Rule creates an obligation that Congress consciously chose not to impose on employers under the NLRA.

Because Congress has clearly "spoken to the precise question" of whether and what type of notice requirements would be excluded from the NLRA and included in the RLA and a wide array of other employment statutes, *Chevron U.S.A., Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 842-43 (1984), this Court should reverse the district court decision to the extent it held the NLRB lawfully created and could enforce (in certain respects) the NLRA notice requirement set forth in the Notice Rule; and this Court should affirm as to penalties invalidated by the district court decision. *See* note 2, *infra*.

ARGUMENT

This appeal involves the authority of the NLRB to create and enforce a notice obligation imposed on employers throughout the United States, even if the

employers are not the subject of a filed ULP charge or representation petition, and even though Congress did not include such a notice obligation in the NLRA.

The district court decided that the NLRB lawfully created and could enforce a broad employer notice obligation in certain respects. For two reasons, these aspects of the district court decision warrant reversal.[2]

First, when enacting the NLRA, Congress intentionally divested the NLRB of precisely the type of authority reflected in the Notice Rule – *i.e.*, an exercise of NLRB jurisdiction over employers generally, without regard to whether they are the subject of a ULP charge or representation petition. Although the original Wagner Act legislation gave the NLRB broad discretion to exercise jurisdiction

[2] The district court held that the NLRB lawfully created the notice obligation set forth in "Part A" of the Notice Rule. Mem. Op. 2, 11-26. The court held that the NLRB exceeded its authority in "Part B" of the Notice Rule by providing that employer noncompliance could (i) constitute unlawful employer interference, restraint or coercion regarding protected rights under NLRA section 8(a)(1), 29 U.S.C. § 158(a)(1) (Mem. Op. 26-33); and (ii) prompt the Board to disregard the NLRA's six-month limitations period set forth in NLRA §10(b), 29 U.S.C. § 160(b) (Mem. Op. 33-36). However, the court left open the possibility that the Board might impose these penalties on a case-by-case basis, and the court left intact the Notice Rule's statement that noncompliance could also result in an inference of unlawful motivation in section 8(a)(3) cases. Mem. Op. 31, 37 n.21, 45 n.26. The *Amici* join in the positions expressed by Appellants that *all* of the Final Rule "remedies" for noncompliance improperly contravene the NLRA's express provisions and the requirement of unlawful motivation in section 8(a)(3) cases.

Thus, the *Amici* seek reversal regarding the district court's "Part A" conclusion and those "Part B" enforcement provisions that were upheld or unaddressed by the district court. The *Amici* seek affirmance regarding those "Part B" penalties that the district court decided were invalid.

over employers at the Board's initiative, *Congress intentionally divested the Board of such authority when the NLRA was enacted, and limited the Board's jurisdiction* to actual parties, in pending cases, where there can be adjudicated facts based on evidentiary hearings. This limitation was more than a legislative preference, *it was central to the Act's constitutionality*. Thus, in *U.S. Chamber*, the district court invalidated the Notice Rule, and explained: "Where Congress has prescribed the form in which the Board may exercise its authority – in this case, *in reaction to a charge or petition* – this court 'cannot elevate the goals of an agency's action, however reasonable, over that prescribed form.'" 2012 U.S. Dist. LEXIS 52419 at *36 (*quoting Amalgamated Transit Union v. Skinner*, 894 F.2d 1362, 1364 (D.C. Cir. 1990)).

Second, the Act and its legislative history demonstrate that Congress consciously excluded a variety of notice obligations from the NLRA, contrary to Congress' inclusion of notice obligations in other statutes. Indeed, *original versions of the Wagner Act legislation contained an employer unfair labor practice specifically making unlawful any employer's failure to provide notice to employees as required by the legislation*. Senator Wagner and others in Congress *eliminated* these notice provisions from the Wagner Act legislation, which occurred at virtually the same time that Congress *added* notice provisions to the RLA.

In short, when applying the two-step analysis articulated in *Chevron*, 467 U.S. at 842-43, the district court erred, in step one, by concluding that Congress had not "directly spoken to the precise question" about employer notice obligations. Mem. Op. 10-11, 16-17 n.8, 19-20. And when applying *Chevron* step two, the district court erred by finding that it was "a permissible construction of the statute" for the Board to create and, in certain respects, enforce the Notice Rule's obligations imposed on employers generally. *Chevron*, 467 U.S. at 843; Mem. Op. 11, 20-21. In these respects, as noted more fully below, the district court decision warrants reversal.

A. Congress Intentionally Divested the NLRB of Any Power to Create Obligations Applicable to Employers Generally.

The NLRA, originally known as the Wagner Act, was adopted in 1935 after 18 months of work by the House and Senate.[3] Important NLRA amendments were adopted in 1947, 1959 and 1974.[4]

The Wagner Act legislation dates back to March 1, 1934, when Senator Robert F. Wagner introduced S. 2926 during the 73d Congress. S. 2926, 73d Cong. (1934), *reprinted in* 1 NLRB, LEGISLATIVE HISTORY OF THE NATIONAL

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

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

LABOR RELATIONS ACT, *1935*, at 1 (1935).[5] Companion legislation – H.R. 8434 – was introduced in the House by Representative William Connery, Chairman of the House Committee on Labor. H.R. 8423, 73d Cong. (1934), 1 Leg. Hist. 1128 (introduced March 1, 1934).

As introduced, S. 2926 and H.R. 8434 would have given the Board broad affirmative powers to address matters at the Board's own initiative. Thus, each bill initially stated:

> Whenever *any member of the Board*, or the executive secretary, or any person designated for such purpose by the Board, *shall have reason to believe, from information acquired from any source whatsoever*, that any person has engaged in or is engaging in any such unfair labor practice, *he shall in his discretion issue and cause to be served upon such person a complaint*. . . . Any such complaint may be amended by any member of the Board or by any person designated for that purpose by the Board *at any time* prior to the issuance of an order based thereon; and *the original complaint shall not be regarded as limiting the scope of the inquiry*.

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

By the time the NLRA was enacted, however, Congress *eliminated* the Board's power, at its own initiative, to exercise jurisdiction over employers. *See* NLRA § 10(b), 29 U.S.C. § 160(b) (requiring charge as prerequisite to ULP proceedings); NLRA § 9(c)(1), 29 U.S.C. § 159(c)(1) (requiring representation petition in election proceedings).

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

The elimination of discretionary NLRB jurisdiction over employers was no accident. While Congress considered the Wagner Act legislation, concerns existed about the constitutionality of the National Industrial Recovery Act, 48 Stat. 195 (1933), 15 U.S.C. §§ 703 *et seq*. ("NIRA"). And on May 27, 1935, the Supreme Court declared the NIRA unconstitutional in *A.L.A. Schechter Poultry Corp. v. United States*, 295 U.S. 495 (1935).

The NIRA had authorized the President to approve and impose industry-specific "codes of fair competition" on employers. *Id*. at 521-24. The Supreme Court held that the formulation of such obligations involved "essential legislative functions with which [Congress] is vested," and that giving such "code-making authority" to the President (or the Executive branch) violated Article I of the U.S. Constitution as "an unconstitutional delegation of legislative power." *Id*. at 529, 537-542. In the words of Justice Cardozo, "Here in effect *is a roving commission* to inquire into evils and upon discovery correct them." *Id*. at 551 (emphasis added) (Cardozo, J., concurring).

The Supreme Court in *Schechter* contrasted NIRA's unconstitutional delegation of authority with the Federal Trade Commission ("FTC"), which was a "quasi-judicial body" (*id*. at 532). This was permissible because the FTC could only make determinations "in *particular instances*, upon *evidence*. . . ." *Id*. at 533 (emphasis added).

Based on concerns about the Wagner Act's constitutionality, Congress embraced a "quasi-judicial body" model for the NLRB, which eliminated *all* of the NLRB's discretionary authority over employers, except for those who were parties in actual ULP and representation cases. This was explained by Representative William Connery, the legislation's sponsor in the House:

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

2 Leg. Hist. 3007-3008 (statement of Rep. Connery; emphasis added).[6]

Pervasive in the Act's legislative history are similar references to the Board's lack of "roving commission" authority – *i.e.*, its inability to take action beyond *actual* parties, in *pending* cases, based on *adjudicated* facts after an *evidentiary hearing.* This was highlighted in the Senate report on the substitute version of S. 2926 passed by the Senate Labor Committee, which stated: "The quasi-judicial power of the Board *is restricted to four unfair labor practices and to cases in which the choice of representatives is doubtful*. . . . The Board is to

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

enforce the law as written by Congress; and . . . the Board acts *only when enforcement is necessary*." S. Rep. 73-1184, 1 Leg. Hist. 1100, 1102-1103 (1934) (emphasis added). *Accord:* S. Rep. 74-573, 2 Leg. Hist. 2308 (1935) ("Neither the National Labor Relations Board nor the courts are given any blanket authority to prohibit whatever labor practices that in their judgment are deemed to be unfair"); 2 Leg. Hist. 3184 (statement of Rep. Eagle) (Wagner Act does not fall "within the category of the *Schechter* case" because "we set up a board to ascertain states of facts to apply to such legally declared unfair labor practices; and if they find such unfair labor practices . . . they then apply the machinery we set up in this bill").[7]

To the same effect, President Roosevelt, upon signing the Wagner Act, stressed that the NLRB's jurisdiction over employers was limited to actual cases involving alleged ULPs or representation elections:

> This act . . . establishes a National Labor Relations Board *to hear and determine cases in which it is charged that this legal right is abridged or denied*, and to hold *fair elections* to ascertain who are the chosen representatives of employees.
>
> * * *
>
> This act . . . does not cover all industry and labor, but is applicable *only when violation of the legal right of independent self-organization* would burden or obstruct interstate commerce.

[7] *See also* H.R. Rep. 74-969, 2 Leg. Hist. at 2919 (1935) (letter from Secretary of Labor Frances Perkins); *id*. at 2932, 2933 (minority view of Rep. Marcantonio) (emphasis added); 2 Leg. Hist. 3207 (same). *Accord*: H.R. Rep. 74-972, 2 Leg. Hist. 2965-66, 2978-79 (1935); H.R. Rep. 74-1147, 2 Leg. Hist. 3059, 3076, 3077 (1935).

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

In *NLRB v. Jones & Laughlin Steel Corp.*, 301 U.S. 1 (1937), the Supreme Court upheld the NLRA's constitutionality and likewise emphasized the NLRB's limited jurisdiction:

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

Id. at 31-32 (emphasis added; citations omitted). *See also Republic Aviation Corp. v. NLRB*, 324 U.S. 793, 799-800 (1945).

The Notice Rule acknowledges that (i) representation proceedings must be "set in motion with the filing of a representation petition"; and (ii) Board action in cases involving alleged violations are not permissible "until an unfair labor practice charge is filed."[8] *See also* Mem. Op. 3 ("the Board may only exercise its adjudicatory powers once a charge . . . has been filed"). Yet, the Rule disregards

[8] 76 Fed. Reg. at 54010, *citing* NLRA § 10(a), 29 U.S.C. § 160(a) (other citations omitted).

these limitations based on conclusory statements that the Act's Section 6 rulemaking authority is "general" and "broad."[9]

The Board's rulemaking authority – even if "general" and "broad" in some respects – is not unlimited. Section 6 contains "words of limitation"[10] and the "plain language of Section 6 requires that rules promulgated by the Board be 'necessary to carry out' other provisions of the Act." *U.S. Chamber*, 2012 U.S. Dist. LEXIS 52419, at *17.

Claims that the Notice Rule is "necessary" are, in reality, expressions of dissatisfaction with jurisdictional constraints that Congress built into the Act. In effect, the Board argues: (i) the NLRA prevents the Board from exercising jurisdiction over any employer unless someone files a charge or petition; (ii) therefore, a "need" exists for the Board to take action against *all* employers, *without* the filing of a charge or petition, so the Board can satisfy the "charge or petition" requirement.

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

[10] *Cf. Fibreboard Paper Products Corp. v. NLRB*, 379 U.S. 203, 200 (1964) (Stewart, J., concurring) ("It is important to note that the words of the statute are words of limitation. . . . The limiting purpose of the statute's language is made clear by the legislative history of the present Act.").

It is not reasonable to suggest that Congress intended to permit the Board to bypass jurisdictional prerequisites – deemed essential to the Act's constitutionality – so the Board could comply with them. The statement of such an absurd proposition demonstrates its lack of merit. *Sheridan v. United States*, 487 U.S. 392, 402 n. 7 (1988); *U.S. v. American Trucking Ass'ns., Inc.*, 310 U.S. 534, 543 (1940).

The district court upheld the Notice Rule after focusing almost entirely on the NLRB's Section 6 rulemaking authority, while disregarding the Notice Rule's creation of a substantive obligation which – for the first time in the NLRA's history – constitutes the NLRB's exercise of jurisdiction over all employers, *without regard to* the filing of a ULP charge or representation petition. Contrary to the district court decision, Congress affirmatively decided that the NLRB would have no such jurisdiction, based on a view that vesting such authority in the Board would be unconstitutional. For these reasons, the district court decision upholding the Notice Rule should be reversed.

B. The NLRA and Its Legislative History Show that Congress Intentionally Decided *Not* to Include Notice Provisions in the NLRA, Contrary to Congress' Inclusion of Notice Provisions in the RLA and Other Statutes

The NLRA and its legislative history also reveal that notice obligations were originally contained in the Wagner Act legislation, as introduced, and they were *removed* prior to the NLRA's enactment; Congress at virtually the same time

added notice provisions to the RLA; and Congress adopted numerous other statutes which, *unlike* the NLRA, contain express notice requirements.

The starting point for evaluating the scope of any statute is its plain language. *Griffin v. Oceanic Contractors, Inc.*, 458 U.S. 564, 571 (1982); *Bell Atl. Tel. Cos. v. FCC*, 131 F.3d 1044, 1047 (D.C. Cir. 1997). The NLRA is replete with references to "notice" in many contexts,[11] but no provision creates an

[11] *See, e.g.*, NLRA § 3(a), 29 U.S.C. § 153(a) (regarding removal of Board members "upon notice and hearing"); § 8(d)(1), 29 U.S.C. § 158(d)(1) (referencing "written notice to the other party" before contract terminations or modifications); § 8(d)(2), 29 U.S.C.§ 158(d)(2) (referencing "notice of the existence of a dispute" to the Federal Mediation and Conciliation Services and state mediation agencies); § 8(d)(A), (B), (C), 29 U.S.C. §§ 158(d)(A), (B), (C) (referencing modified "notice" applicable to health care institutions); § 8(g), 29 U.S.C. § 158(g) (specifying content requirements applicable to health care institution "notice"); § 9(c)(1), 29 U.S.C. § 159(c)(1) (requiring "due notice" before representation hearings); § 10(b), 29 U.S.C. § 160(b) (requiring "notice of hearing" after service of unfair labor practice complaint); § 10(c), 29 U.S.C. § 160(c) (requiring "notice" before Board takes further testimony or argument in unfair labor practice proceedings); § 10(d), 29 U.S.C. § 160(d) (requiring "reasonable notice" before Board modifies or sets aside any finding or order); § 10(e), 29 U.S.C. § 160(e) (requiring court to "cause notice . . . to be served" upon filing of Board petition for enforcement of unfair labor practice orders); § 10(j), 29 U.S.C. § 160(j) (requiring court to "cause notice . . . to be served" upon filing of Board petition for interim injunctive relief); § 10(k), 29 U.S.C. § 160(k) (requiring Board resolution of unfair labor practice charges involving jurisdiction disputes absent satisfactory evidence of dispute adjustment within ten days "after notice that such charge has been filed"); § 10(l), 29 U.S.C. § 160(l) (requiring "notice" before secondary boycott temporary restraining orders and after filing of petitions for secondary boycott injunctive relief).

employer notice obligation vis-à-vis employees.[12] This supports an inference that Congress intended *not* to impose an NLRA notice obligation on employers. *See* Mem. Op. 17 ("where Congress includes particular language in one section of the statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion") (*quoting Russello v. U.S.*, 464 U.S. 16, 23-24 (1983)). *See also INS v. Cardoza-Fonseca*, 480 U.S. 421, 432 (1987).

The same conclusion is supported by comparing the NLRA to other statutes. *Alcoa Steamship Co. v. Fed. Maritime Comm.*, 348 F.2d 756, 758 (D.C. Cir. 1965). In many additional federal laws, Congress (i) expressly required general notices informing employees of statutory rights,[13] or (ii) expressly required specific notices

[12] In this brief, the phrase "notice obligation" refers to a requirement that employers provide notice *to employees* regarding various aspects of a statute. The NLRA refers to many other types of "notice," some applicable to employers, but none require employers to provide notice to employees regarding the law. *See* note 11, *supra*.

[13] RLA § 2, Eighth, 45 U.S.C. § 152, Eighth; Title VII of the Civil Rights Act of 1964 ("Title VII"), 42 U.S.C. § 2000e–10; the Age Discrimination in Employment Act ("ADEA"), 29 U.S.C. § 627; the Occupational Safety & Health Act ("OSHA"), 29 U.S.C. §§ 651, 657(c); the Employee Polygraph Protection Act ("EPPA"), 29 U.S.C. § 2003; the Americans with Disability Act ("ADA"), 42 U.S.C. §§ 12101, 12115; the Family and Medical Leave Act ("FMLA"), 29 U.S.C. §§ 2601, 2619(a); and the Uniformed Service Employment & Reemployment Rights Act ("USSERA"), 38 U.S.C. § 4334.

triggered by certain events, agreements or benefits,[14] or (iii) elected *not* to impose any notice obligation (and no such obligation has ever been deemed to exist).[15] Reciting these categories demonstrates that legislative choices have dictated whether or not (and what type of) notice obligations exist under particular laws.

Significantly, the RLA was enacted in 1926 *without* any notice provisions.[16] Yet, in 1934, RLA amendments were introduced which added two types of

[14] RLA § 2, Fifth, 45 U.S.C. § 152, Fifth (requiring notice to employees regarding invalidated contracts); Worker Adjustment and Retraining Notification Act ("WARN"), 29 U.S.C. §§ 2101, 2102(a)(1) (requiring notice in advance of plant closings or mass layoffs); Employee Retirement Income Security Act ("ERISA"), 29 U.S.C. §§ 1001, 1021(a), 1022 (requiring issuance of summary plan descriptions and other disclosures regarding certain benefit plans); Older Workers Benefit Protection Act ("OWBPA"), 29 U.S.C. §§ 626(f)(1)(H) (requiring disclosures regarding age discrimination waivers in group exit incentive or other employment termination programs) (enacted 1991); Fair Credit Reporting Act ("FCRA"), 15 U.S.C. §§ 1681b(b)(2), (3) (requiring notice and disclosure of credit reports used in certain employment decisions); the Consolidated Omnibus Budget Reconciliation Act ("COBRA"), 29 U.S.C. §§ 1161, 1166 (requiring notice to employees participating in group health plans regarding coverage continuation rights triggered by qualifying events); and the Internal Revenue Code ("IRC"), 26 U.S.C. § 6051(a) (requiring annual issuance of written statement to employees showing wages, tax deductions, and related information).

[15] NLRA; Federal Arbitration Act ("FAA"), 9 U.S.C. §§ 1 *et seq.*; Norris LaGuardia Act, 29 U.S.C. §§ 101, 103; Labor Management Relations Act ("LMRA"), 29 U.S.C. §§ 186(a), (b), (d); Labor Management Reporting and Disclosure Act ("LMRDA"), 29 U.S.C. §§ 401, 432, 433; Immigration Reform and Control Act ("IRCA"), 8 U.S.C. §§ 1324a *et seq*.

[16] 44 Stat. 577-587 (1926), 45 U.S.C. §§ 151 *et seq*.

employer notice obligations to the RLA.[17] *First*, the amendments added a *general notice* requirement to the RLA. *See* RLA § 2, Eighth, 45 U.S.C. § 152, Eighth ("Every carrier shall notify its employees by printed notices in such form and posted at such times and places as shall be specified by the Mediation Board that all disputes between the carrier and its employees will be handled in accordance with the requirements of this Act"). *Second*, the RLA amendments added a provision requiring *notice regarding the statute's invalidation of various preexisting contracts*. RLA § 2, Fifth, 45 U.S.C. § 152, Fifth ("if any . . . contract [requiring individuals to join or not join a union] has been enforced . . . then such carrier shall notify the employees . . . that such contract . . . is no longer binding on them in any way").

The original Wagner Act legislation – S. 2926 and H.R. 8434 – also contained two notice provisions. Section 5(5) created an employer "unfair labor practice" specifically based on any employer's violation of the legislation's notice requirement:

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

[17] S. 3266, 73d Cong. (1934) (introduced April 2, 1934, calendar day; March 28, 1934, legislative day). When the legislative and calendar days differ, this brief refers to the calendar day.

S. 2926 § 5(5), 1 Leg. Hist. 3 and H.R. 8434 § 5(5), 1 Leg. Hist. 1130 (emphasis added). In turn, Section 304(b) set forth a "contract invalidation" notice requirement which – similar to RLA § 2, Fifth – stated:

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

S. 2926 § 304(b), 1 Leg. Hist. 14 and H.R. 8434 § 304(b), 1 Leg. Hist. 1140 (emphasis added). Senator Wagner's bill – S. 2926 – was the subject of extensive hearing testimony, including testimony regarding the notice provisions and more general notice issues.[18]

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[18] *See* 1 Leg. Hist. 94 (testimony of Dr. Sumner Slichter); 1 Leg. Hist. 187 (testimony of John L. Lewis); 1 Leg. Hist. 694 (testimony of L.L. Balleisen). Numerous other witnesses discussed a wide range of notice issues. *See*, *e.g.*, 1 Leg. Hist. 104-105 (describing a document from Joseph Eastman, Coordinator of Railroads, providing that employees "be advised by appropriate notice posted on bulletin boards and distributed generally that . . . they are free to join or not to join any labor organization") (testimony of William Green); 1 Leg. Hist. 1055 (proposal to expand the scope of Section 304(b) to require notice regarding "any contract or agreement . . . , or any extension of such contract or agreement, in the negotiations preceding which or in the consummation of which unfair labor practices were employed") (testimony of Isadore Polier); 1 Leg. Hist. 138 (complaint that employer engaged in "deception" and "posted on its bulletin boards a garbled quotation of [NIRA] section 7(a)" which "omitted that portion . . . which states that the employees choice of representatives shall be free from the interference, restraint, or coercion of the employers") (testimony of William Green); 1 Leg. Hist. 278 (description of employer who "posted a notice to the effect that this company had this plan in effect and we must accept it and they would not bargain with any other group") (testimony of William J. Long); 1 Leg. Hist. 174 (description of company union election where "notices of the election were posted" and employees were told "the forman desired to have a 100 percent

On March 26, 1934, witness James A. Emery[19] placed into the hearing record the legislation's unfair labor practices, including Section 5(5) relating to notice.[20] Mr. Emery then expressed his opposition to Section 304(b), which resulted in the following exchange:

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

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record in his shop . . . in the company-held election") (testimony of UMW President John L. Lewis); 1 Leg. Hist. 520, 522 (references to misleading employer "posters throughout the mill" regarding employee rights, and to company union election ballot where employees, by voting, agreed to the election rules "as stated in the posted notice issued by the employees' committee . . . under the plan of employees' representation at [the] plant") (testimony of George H. Powers); 1 Leg. Hist. 572 (management witness describes having "posted" labor clause from NIRA industry code "on many of our posting boards") (testimony of George A. Seyler); 1 Leg. Hist. 705-706 (describing posting of election bulletins and nominees for union office on Company bulletin boards) (testimony of Edgar Woolford); 1 Leg. Hist. 724-25 ("set of shop rules was posted" to prevent any "misunderstanding" after company refused to sign union contract) (testimony of S.G. Brooks); 1 Leg. Hist. 805 (indicating that company union representatives "posted the rules for the election" one week in advance and gave a copy "to the Labor Board").

[19] 1 Leg. Hist. 371-73 (opening statement of Chairman Walsh; introduction of James A. Emery).

[20] 1 Leg. Hist. 387-88 (testimony of James A. Emery).

> in any industry may be, no matter how old it may be, no matter how agreeable to the parties, if the employer initiated that plan, or participated in setting it up, *the plan is not only abrogated, but the employer must immediately so notify his employees, and the plan is destroyed. Not to do so is an unlawful act. That is provided by section 304 of the bill, section (b). . . .*

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

Mr. Emery stated that Section 304(b) broadly "outlawed" preexisting employment arrangements (*id*.), which led to the following exchange:

> The CHAIRMAN. *It has been suggested by some witnesses*, witnesses who are friendly to the bill, who have appeared before the committee *that that section be eliminated from the bill*.
>
> Senator WAGNER. *Including the author*.
>
> The CHAIRMAN. *I am referring to section 304(b)*. I did not know you had agreed to the elimination, Senator, but I think others have.
>
> Senator DAVIS. *I think the committee is unanimous*.

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

Following this March 26, 1934 exchange, a substitute version of S. 2926 was reported by the Senate Committee on Education and Labor. *See* S. 2926, 73d Cong. (1934), 1 Leg. Hist. 1070 (reported May 26, 1934). This substitute version *deleted* both Wagner Act notice provisions. *Id*. at 1072-73, 1084-85. Notice provisions were similarly omitted from all subsequent versions of the Wagner Act legislation, including the version signed into law.[21]

[21] *See* S. 1958, 74th Cong. (1935), 1 Leg. Hist. 1295; H.R. 6187, 74th Cong. (1935), 2 Leg. Hist. 2445; H.R. 6288, 74th Cong. (1935), 2 Leg. Hist. 2459; H.R. 7978, 74th Cong. (1935), 2 Leg. Hist. 2857; S. 1958, 74th Cong. (1935), 2 Leg. Hist. 2944; S. 1958, 74th Cong. (1935), 2 Leg. Hist. 3032; S. 1958, 74th Cong.

As noted previously, the amendments adding employer notice obligations to the RLA were introduced *at virtually the same time* that Senator Wagner and others decided to remove the NLRA's notice provisions, as summarized below:

Wagner Act legislation[22]	**RLA amendments**[23]
March 1: House and Senate bills introduced with notice obligation provisions (S. 2926 and H.R. 8434)	–
March 14-16, 20-22: Senate Labor Committee hearings (notice provisions still in bills)	–
March 26: Senators Wagner, Walsh, and Davis mention "unanimous" support for **removing** notice provisions	–
March 27-30, April 3-7 and 9: More Senate Labor Committee hearings	**April 2:** Senate RLA bill introduced **adding** notice provisions (S. 3266)
–	**May 21:** RLA amendments (**adding** notice provisions) reported favorably to Senate (S. 3266)
May 26: Substitute bill referred to Senate, **removing** employer notice (S. 2926)	–
–	**June 6:** RLA amendments (**adding** notice provisions) introduced in House (H.R. 9861) and debated in Senate (S. 3266) **June 21:** RLA amendments (**adding** notice requirements) **signed into law** by President (H.R. 9861)
Feb 21, 1935 - July 5, 1935: Further consideration to Wagner Act (requiring **no** employer notice), which the President ultimately **signed into law** (S. 1958)	–

This legislative history leaves no room for arguments that a "gap" existed regarding a potential notice obligation for employers.[24] Here, as in *Railway Labor*

(1935), 2 Leg. Hist. 2416; S. 1958, 74th Cong (1935), 2 Leg. Hist. 3238; H.R. Rep. 74-1371 (1935), 2 Leg. Hist. 3252; S. 1958, 74th Cong. (1935), 2 Leg. Hist. 3270.

[22] *See* 1 Leg. Hist. 27-1066 (hearings held by Senate Labor Committee in 1934 on dates specified in the table). *See also* notes 16-21, *supra*, and accompanying text.

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

Executives v. Nat'l Mediation Bd., 29 F.3d 655, 671 (D.C. Cir. 1994), "'Congress has directly spoken to the precise question at issue' in this case . . . *so there is no gap for the agency to fill*." *Id*., *quoting Chevron*, 467 U.S. at 842 (emphasis added).

The district court decision relegates any discussion of this legislative history to a footnote stating (i) that the Wagner Act legislation's notice provision was "completely different from the general notice provision in the Final Rule at issue here" (*id*. at 17 n.8); and (ii) that the notice provision resulted from objections to the "abrogation portion of the provision, not on the notice posting portion" (*id*.).

For several reasons, neither of these observations diminish the relevance of the legislative history described above.

First, to the extent the Wagner Act legislation's proposed notice requirement was more narrow than what the Board is now imposing on all employers, this *hurts* – not helps – efforts to justify the notice rule. If an agency cannot impose a new requirement that Congress specifically rejected when adopting a statute like the NLRA, it is even more improper for the agency to create a *broader* requirement.

[24] 76 Fed. Reg. at 54,011.

See Railway Labor Executives, 29 F.3d at 669 ("the bald assertion of power by [an] agency cannot legitimize it").[25]

Second, the notice provisions removed from the Wagner Act legislation not only included Section 304(b) – dealing with notice regarding invalidated contracts – they also included Section 5(5), which dealt *exclusively* with an employer's failure to satisfy notice obligations. In this respect, the Notice Rule accomplishes *precisely* what Congress considered and rejected when removing Section 5(5) from the Act: the Notice Rule treats a failure to provide a notice as non-compliance with the Act.

Third, not only were notice obligations added to the RLA at the same time they were removed from the Wagner Act legislation, the RLA amendments included *both* types of notice requirements: a generalized notice obligation (requiring notice-posting regarding RLA rights), and an employer obligation to notify employees regarding invalidated contracts (similar to the Wagner Act legislation's notice obligation). The existence of both types of notice provisions in the RLA amendments demonstrates that (i) even when *formulating* the original

[25] Based on the prevalence of management-dominated "company unions" invalidated by NLRA Section 8(a)(2), the "contract invalidation" notices required by the original Wagner Act legislation would have functioned like a generalized notice requirement. Indeed, when the Wagner Act was being considered, company unions represented roughly *five times* the number of conventional union members. *See* 1 Leg. Hist. 107 (testimony of William Green).

Wagner Act legislation, Congress rejected a generalized notice obligation (which was contained in the RLA amendments as introduced and enacted), and (ii) when *adopting* the Wagner Act, Congress rejected even the more narrow "invalidated contracts" notice obligation (also contained in the RLA amendments as introduced and enacted).

Finally, the district court decision improperly fails to consider the many additional ways in which the Act's legislative history renders implausible suggestions that Congress "was unable to forge a coalition on either side" regarding a notice requirement or "it simply did not consider the question at this level." Mem. Op. 16 n.8, *quoting Chevron*, 467 U.S. at 865. As noted above, an array of issues relating to notice were prominent during the original Wagner Act's consideration by Congress (*see* notes 18-20, *supra*); the RLA and multiple additional statutes, unlike the NLRA, contain express notice requirements (*see* notes 13-14, *supra*); during a period spanning more than 75 years the NLRB did *not* deem a broad notice obligation "necessary" to the Act's administration; and Congress amended the NLRA in 1947, 1959 and 1974 without adding a notice obligation. These considerations demonstrate the intent of Congress has remained consistent: there is no employer notice obligation under the NLRA. *U.S. Chamber*, 2012 U.S. Dist. LEXIS 52419, at *46-47. *Cf. Local 357, Teamsters Local v. NLRB*, 365 U.S. 667, 671-72, 676 (1961) (NLRB exceeded its authority

by creating general notice-posting regarding hiring hall agreements; "where Congress has adopted a selective system for dealing with evils, the Board is confined to that system . . . [and] the Board cannot go farther and establish a broader, more pervasive regulatory scheme.").[26]

The inescapable conclusion is that Congress intended that the NLRA would not impose on employers a notice obligation. "Based on the statutory scheme, legislative history, history of evolving congressional regulation in the area, and a consideration of other federal labor statutes, . . . Congress did not intend to impose a notice-posting obligation on employers, nor did it explicitly or implicitly delegate authority to the Board to regulate employers in this manner." *U.S. Chamber*, 2012 U.S. Dist. LEXIS 52419, at *47-48.

[26] *See also Railway Labor Executives*, 29 F.3d at 669 (court rejects NMB's claimed authority to initiate representation disputes because, among other things, such a right was invoked "only in the last five years of its sixty-year history"); *NLRB v. Bell Aerospace Co. Div. of Textron, Inc.*, 416 U.S. 267, 274-75 (1974) ("a court may accord great weight to the longstanding interpretation placed on a statute by an agency charged with its administration").

CONCLUSION

For the above reasons and those described in Appellants' briefs, this Court should reverse the district court decision to the extent it upheld the Notice Rule and stated the Board has authority to enforce it; and this Court should affirm as to the Final Rule penalties for noncompliance that were invalidated by the district court.

Respectfully submitted,

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DATED: May 29, 2012

CERTIFICATE OF COMPLIANCE WITH RULE 32(a)

The undersigned counsel certifies this 29th day of May 2012 to the following statements:

1. This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because this brief contains 6,945 words, based on the word count of the word-processing system used to prepare this brief (Microsoft Word 2007), which is within the 7,000 word limitation applicable to amicus curiae briefs set forth in Fed. R. App. P. 29(d) and 32(a)(7), including headings, footnotes and quotations, and excluding the table of contents, table of authorities, glossary, statements and certificates of counsel, the cover, and signature lines (the exclusion of which is permitted based on Fed. R. App. P. 32(a)(7)(B)(iii), Circuit Rule 32(a)(1) and/ discussions with the Clerk's Office of this Court).

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/s/ David R. Broderdorf
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CERTIFICATE OF SERVICE

The undersigned counsel certifies that, on this 29th day of May 2012, he/she electronically filed a true and correct copy of the foregoing "BRIEF OF *AMICI CURIAE* THE HONORABLE JOHN KLINE, CHAIRMAN, COMMITTEE ON EDUCATION AND THE WORKFORCE, UNITED STATES HOUSE OF REPRESENTATIVES, AND REPRESENTATIVES DAN BURTON, LEE TERRY, DARRELL ISSA, TODD RUSSELL PLATTS, J. RANDY FORBES, JOE WILSON, RODNEY ALEXANDER, JOHN CARTER, STEVE AUSTRIA, GREG HARPER, LYNN JENKINS, TOM MCCLINTOCK, DAVID P. ROE, GLENN THOMPSON, TIM WALBERG, LOU BARLETTA, LARRY BUCSHON, FRANCISCO CANSECO, SCOTT DESJARLAIS, TREY GOWDY, JOE HECK, BILL HUIZENGA, MIKE KELLY, JAMES LANKFORD, KRISTI NOEM, ALAN NUNNELEE, BEN QUAYLE, REID RIBBLE, TODD ROKITA, AND DENNIS ROSS FOR REVERSAL IN PART AND AFFIRMANCE IN PART IN SUPPORT OF APPELLANTS/CROSS-APPELLEES" with the Clerk of the Court using the CM/ECF system, and thereby served a copy on the following counsel:

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