IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF ARKANSAS

ASSOCIATED BUILDERS AND CONTRACTORS OF ARKANSAS; ASSOCIATED BUILDERS AND CONTRACTORS, INC.; ARKANSAS STATE CHAMBER OF COMMERCE/ASSOCIATED INDUSTRIES OF ARKANSAS; ARKANSAS HOSPITALITY ASSOCIATION; COALITION FOR A DEMOCRATIC WORKPLACE; NATIONAL ASSOCIATION OF MANUFACTURERS; and **CROSS, GUNTER, WITHERSPOON & GALCHUS, P.C.,** on behalf of themselves and their membership and clients **PLAINTIFFS,** **v.** **THOMAS E. PEREZ,** in his official capacity as Secretary of Labor, U.S. Department of Labor, **MICHAEL J. HAYES,** in his official capacity as Director, Office of Labor-Management Standards, U.S. Department of Labor **DEFENDANTS.**	**CASE NO. 4:16-CV-169 (KGB)**

MEMORANDUM OF LAW IN SUPPORT OF PLAINTIFFS' MOTION FOR PRELIMINARY INJUNCTION

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I. INTRODUCTION

Plaintiffs have brought this action to enjoin the United States Department of Labor ("DOL") from enforcing its new Rule, titled "Labor-Management Reporting and Disclosure Act; Interpretation of the Advice Exemption," 81 Fed. Reg. 15924 (Mar. 24, 2016) (to be published at 29 C.F.R. Parts 405 and 406) (the "Rule"), which is otherwise scheduled to take effect on April 25, 2016.[1] Plaintiffs have filed their Motion for Preliminary Injunction pursuant to Rule 65 of the Federal Rules of Civil Procedure.

Absent injunctive relief, the challenged Rule will cause a radical change in the well-settled application of Section 203(c) of the Labor-Management Reporting and Disclosure Act of 1959 ("LMRDA" or the "Act"), 29 USC § 433(c), which states: "Nothing in this section shall be construed to require any employer or other person to file a report covering the services of such person by reason of his giving or agreeing to give advice to such employer." The Rule would effectively repeal the statutory advice exemption by sweeping aside more than fifty (50) years of consistent, judicially approved enforcement of the LMRDA's reporting requirements applicable to millions of employers represented by the Plaintiffs, both in Arkansas and nationally, and their advisors, including trade associations, lawyers, and other consultants who are also represented by the Plaintiffs in this lawsuit.

More specifically, the Rule eliminates the previously well-accepted distinction between non-reportable "advice" and reportable "persuader" activity described in DOL's 1962 LMRDA Interpretive Manual and reaffirmed by the U.S. Court of Appeals for the District of Columbia Circuit in *International Union, United Autmobile, Aerospace & Agricultural Implement Workers*

[1] It is unclear what provisions of the Rule actually take effect on April 25, 2016. The Rule further states that it "will be applicable to arrangements and agreements as well as payments (including reimbursed expenses) made on or after July 1, 2016." 81 Fed. Reg. at 15924.

of America v. Dole, 869 F.2d 616, 617 (D.C. Cir. 1989). Since 1962, DOL has consistently held that non-reportable advice includes any communication that is "submitted orally or in written form to the employer for his use, [where] the employer is free to accept or reject the oral or written material submitted to him." *Id.* But the new Rule for the first time declares that reporting will be required of all communications to employers from advisors whose object is to "indirectly persuade" employees regarding their right to organize and bargain collectively, and that "an employer's ability to 'accept or reject' materials provided, or other actions undertaken, by a consultant, . . . no longer shields indirect persuader activities from disclosure." 81 Fed. Reg. at 15926.

Consequently, under the Rule, employers who receive previously exempt guidance from outside counsel, trade associations, or other advisors on how to best communicate with their employees on union organizing issues, will be required—under threat of criminal penalty—to file public reports with DOL regarding the arrangement with their advisor(s), the nature of the advice provided to them, and the fees paid for such advice (the LM-10 report). The lawyers, associations, and other advisors who provide such previously exempt advice to employers will also be required for the first time to file public reports with DOL, under threat of criminal penalty, disclosing the nature of their advice to employers that DOL has newly characterized as "persuader" activity (the LM-20 report). As a further consequence of DOL's new Rule, advisors who are deemed to be "persuaders" must also file a greatly-expanded number of reports of *non*-persuader "labor relations advice and services" provided to employers (the LM-21 report).

DOL's new Rule usurps Congress's legislative power and violates the plain language of the LMRDA, as well as the legislative history and settled judicial interpretation of the advice exemption. In particular, the Rule is flatly inconsistent with the broad application of the advice

exemption mandated by the Court of Appeals for the Eighth Circuit in *Donovan v. Rose Law Firm*, 768 F.2d 964, 974 (8th Cir. 1985). The Rule is also arbitrary and capricious in that it creates a series of confusing and inconsistent new reporting requirements that prevent employers and their advisors from knowing whether they are in compliance. DOL has also violated the Supreme Court's standards for justifying a drastic departure from years of settled enforcement policy.

The new Rule irreparably harms the First Amendment rights of employer members of the Plaintiff associations and their advisors (which include additional members of the Plaintiff associations and the associations themselves), both by coercing speech in the form of the newly required public reports and by chilling lawful speech and membership rights of the employers and their advisors on labor relations issues, which would now have to be publicly reported for the first time in the LMRDA's history. In addition, by requiring attorneys and their employer clients to file detailed reports regarding the advice arrangements that exist between them and regarding the nature of the advice provided, the Rule irreparably and impermissibly compels disclosure of confidential information and intrudes into confidential attorney-client communications. The Rule thereby forces lawyers to breach their ethical obligations to preserve client confidences under Rule 1.6 of the Arkansas Rules of Professional Conduct (and similar ethical rules in every other state), and contravenes LMRDA Section 204, which protects privileged communications including work product. The Rule's new test for distinguishing between reportable persuader activity and non-reportable advice is so vague and confusing that it violates the Due Process Clause of the Fifth Amendment by failing to provide fair warning to employers and their advisors as to what activities will trigger criminal liability, thereby causing further irreparable harm. Finally, the Rule fails adequately to address the burdensome impact of

its requirements on millions of small business employers and their advisors, in violation of the Regulatory Flexibility Act, 5 U.S.C. § 611 ("RFA"). In each of these aspects, the Rule violates the Administrative Procedure Act, 5 U.S.C. § 706 ("APA").

As further explained below, Plaintiffs are entitled to preliminary injunctive relief pursuant to Rule 65(a) of the Federal Rules of Civil Procedure to prevent the new Rule from going into effect on its scheduled effective date of April 25, 2016. Plaintiffs are likely to succeed on the merits of their claims; Plaintiffs will be irreparably harmed in the absence of an injunction; the balance of harms strongly favors the Plaintiffs; and an injunction that preserves the status quo of the past five decades is in the public interest.

II. FACTUAL BACKGROUND FOR THIS ACTION

A. Reporting Requirements in Title II of the LMRDA

Congress passed the LMRDA in September 1959 following an investigation by the Senate Select Committee on Improper Activities in the Labor or Management Field, known at the time as the McClellan Committee, as it was chaired by Senator John McClellan of Arkansas. The McClellan Committee devoted most of its efforts to the investigation of internal union tyranny by entrenched leadership, and thus the LMRDA is directed primarily at the internal affairs of unions. *See* 81 Fed. Reg. at 15930.

The McClellan Committee also investigated the use of consultants known as "middlemen" during union organizing campaigns. The Committee found that in the 1950's these middlemen infiltrated workforces during union election campaigns, pretending to be employees when they were really management agents. They formed phony unions funded and dominated by management, and organized anti-union committees. They concealed their true allegiances and sources of income. 81 Fed. Reg. at 15930. Congress directed Section 203 of the LMRDA at these consultants, who communicated directly with employees, as opposed to merely advising

employers how management should communicate with its own employees. This intent is confirmed by Professor Archibald Cox's testimony before the Senate Subcommittee in support of the bill that became the LMRDA. Cox, a supporter of the bill, testified that the reporting requirements were intended to publicize the following: "Expenditures to a labor relations consultant or similar middle man in exchange for his undertaking to influence employees in the exercise of the rights of self-organization and collective bargaining or to furnish information concerning their activities."[2]

Consistent with the foregoing legislative intent, the LMRDA, as enacted by Congress and in its present form, requires employers to disclose:

> Any agreement or arrangement with a labor relations consultant or any other independent contractor or organization pursuant to which such person undertakes activities where an object thereof, directly or indirectly, is to persuade employees to exercise or not to exercise, or persuade employees as to the manner of exercising, the right to organize and bargain collectively through representatives of their own choosing.

29 U.S.C. § 433(a). This Section further requires an employer that enters into such an agreement to report:

> [T]he date and amount of each ... payment, loan, promise, agreement, or arrangement and the name, address, and position, if any, in any firm or labor organization of the person to whom it was made and a full explanation of the circumstances of all such payments, including the terms of any agreement or understanding pursuant to which they were made."

Id.

[2] Hearings before the Subocommittee on Labor of the Senate Committee on Labor and Public Welfare on Labor-Management Legislation, 86th Cong., 1st Sess. 128 (1959) (hereafter "Senate Hearing"). Contrary to claims by DOL in the new Rule, 81 Fed. Reg. at 15930, there is no legislative history supporting the notion that Congress intended to require reporting by consultants who confined themselves to advising employers; and who did not engage in direct communication with the employer's employees. In asserting a broader legislative intent, DOL improperly relies primarily on a book written several years after passage of the LMRDA by someone who was not a member of Congress at the time (Robert Kennedy) and whose views were not made part of the legislative history. *Id*.

Section 203(b) of the LMRDA further requires the filing of public reports by a person who, "pursuant to any agreement with an employer undertakes activities where an object thereof is, directly or indirectly... to persuade employees to exercise or not exercise, or persuade employees as to the manner of exercising, the right to organize and bargain collectively through representatives of their own choosing . . .." 29 U.S.C. § 433(b). Such a person–typically a labor relations consultant–must report, among other things: (1) the terms and conditions of the agreement or arrangement with the employer; (2) the person's receipts of any kind from employers on account of labor relations advice or services; and (3) the person's disbursements of any kind in connection with such services. *Id*.

As noted above, in subsection (c) of Section 203, Congress exempted "advice" from the reporting requirements of Section 203(a) and (b):

> Nothing in this section shall be construed to require any employer or other person to file a report covering the services of such persons by reason of his giving or agreeing to give advice to such employer . . ..

29 U.S.C. § 433(c).

The final Conference Committee Report explaining this language, H.R. Conf. Rep. No. 1147, clearly stated the intent to give the advice exemption a broad scope: "Subsection (c) of Section 203 . . . grants a broad exemption from the [reporting] requirements of the section with respect to the giving of advice."[3] The Eighth Circuit has squarely held, in direct contradiction to the new Rule, that the Conference Report's "broad exemption" language shows that the advice exemption is a "vastly different thing from a subsection that is merely a 'clarification' of the [reporting] requirement." *See Rose Law Firm*, 768 F.2d at 974; *see also UAW v. Dole*, 869 F.2d

[3] H.R. CONF. REP. No. 1147, 86th Cong., 1st Sess. 33 (1959), reprinted in 1 National Labor Relations Board, *Legislative History of the Labor Management Reporting and Disclosure Act* 937, 1959 U.S. CODE CONG. & ADMIN. NEWS 2503, 2505, cited in *Rose Law Firm*, 768 F.2d at 974.

at 618. As the Eighth Circuit further held: "[A]n employer who has done no more than request labor relations advice from an attorney has no obligation under the LMRDA to file a report." *Id.*

In Section 204 of the Act, Congress added an additional exemption from reporting by attorneys, as follows:

> Nothing contained in this chapter shall be construed to require an attorney who is a member in good standing of the bar of any State, to include in any report required to be filed pursuant to the provisions of this chapter any information which was lawfully communicated to such attorney by any of his clients in the course of a legitimate attorney-client relationship.

29 U.S.C. § 434.

Nothing in the McClellan Committee hearings, the committee reports, or the legislative history of the LMRDA suggests that Congress intended to deprive lawyers or consultants of the advice exemption from reporting, where they merely provide advice to employers about how to communicate effectively with their employees—even where such advice if followed by an employer could influence employees in whether to support or oppose unionization. Professor Cox's testimony in support of the LMRDA is directly to the contrary: He declared that "payments for advice are proper" even though "if the employer acts on the advice it may influence the employees." Cox added that only when "an employer hires an independent firm to exert the influence" would the "likelihood of coercion, bribery, espionage, and other forms of interference [be] so great that the furnishing of a factual report showing the character of the expenditure fairly be required." *Senate Hearing*, at 128.

Section 208 of the LMRDA delegates to the Secretary of Labor the authority to prescribe the forms on which the reports must be submitted, and "such other reasonable rules and regulations as he may find necessary to prevent the circumvention or evasion of such reporting requirements." 29 U.S.C. § 438. Section 208 does not confer on the DOL the authority to expand

or contract the activities as to which reporting is required or the classes of "persons" required to report.

B. DOL's Previous Implementation of the LMRDA Reporting Requirements

Following enactment of the LMRDA as set forth above, DOL prescribed reporting forms for employers and persuaders and published guidance as to the use of such forms. First, DOL prescribed Form LM-10 for the purpose of implementing the employer reporting requirement, which must be filed within ninety (90) days after the end of any employer's fiscal year in which the employer entered into a persuader agreement or arrangement.

DOL prescribed two forms to be used by consultants. Form LM-20, to be submitted to OLMS within thirty (30) days of the initiation of the consultant's agreement or arrangement, requires the consultant to report, among other things, the nature of the persuader agreement with the employer and the fees paid for persuader services. *See also* 29 C.F.R. § 406.2. Form LM-21, to be submitted within ninety (90) days after the end of the consultant's fiscal year, required the consultant to report the names and addresses of all of the employers for which the consultant provided labor relations advice or services during the year, "regardless of the purpose of the advice or services," and all receipts and disbursements from those employers in connection with those services. 29 C.F.R. § 406.3.

In 1962, then Solicitor of Labor Charles Donahue inssued public guidance with regard to the advice exemption in proceedings of the American Bar Association, Section of Labor Relations Law.[4] Donahue declared that "reviewed in the context of Congressional intent" there was "no apparent attempt to curb labor relations in whatever setting it might be couched." *Id.*

[4] CHARLES DONAHUE, *Some Problems Under Landrum Griffin*, Am. Bar Assoc., Section of Labor Relations Law, PROCEEDINGS 49 (1962).

Instead Donahue stated that "even when this advice is embedded in a speech or statement prepared by the advisor to persuade, it is nevertheless advice and must be treated as advice." Donahue's opinion has remained the consistent position of the Department of Labor from 1962 until today.

This interpretation of advice was codified by the Department in Section 265.005 of its LMRDA Interpretative Manual ("IM"), which again has remained unchanged for five decades. The IM states, in relevant part:

> [I]t is equally plain that where an employer drafts a speech, letter or document which he intends to deliver or disseminate to his employees for the purpose of persuading them in the exercise of their rights, and asks a lawyer or other person for advice concerning its legality, the giving of such advice, whether in written or oral form, is not in itself sufficient to require a report.

Id. Further the IM states that even where the employer's advisor prepares an entire speech or document, such activity constitutes advice rather than persuasion, as long as "the employer is free to accept or reject the written material prepared for him and there is no indication that the middleman is operating under a deceptive arrangement with the employer . . .." *Id*.

Thus, it has been the consistent DOL enforcement position since 1962 that no reporting obligation arises under Section 203 if (1) the consultant does not deliver or disseminate persuasive material directly to employees; (2) the employer has the ability to reject or modify persuasive material prepared and recommended to the employer by the consultant; and (3) there was no deceptive arrangement with the employer.[5]

The U.S. Court of Appeals for the District of Columbia Circuit upheld this enforcement position in *Dole*, rejecting a union's claim that DOL should require reporting if consultants

[5] The "deceptive arrangements" in the DOL manual refer to the activities of the "middlemen" exposed during the McCllelan Committee hearings in 1958-1959.

prepared written or oral materials for an employer to deliver to employees. 869 F.2d 616 (D.C. Cir. 1989). In pertinent part, the court held that DOL rationally construed the statute as not requiring reports under the circumstances described in the foregoing longstanding DOL guidance regarding the meaning of advice in Section 203(c).

No other circuit court of appeals has applied Section 203(b) or 203(c) in such a way as to require an employer advisor to file a report as a "persuader" where the advisor confined his or her role to that of communicating recommendations to management officials of the client employer.[6] As noted above, the Eighth Circuit has in any event rejected the narrower views of the advice exemption espoused by some of the other circuits, holding instead that the advice exemption must be interpreted "broadly" and that "an employer who has done no more than request labor relations advice from an attorney [or other consultant/advisor] has no obligation under the LMRDA to file a report." *Rose Law Firm*, 768 F.2d at 974.

C. DOL's New Rule Constricting The Advice Exemption

Following issuance of a Notice of Proposed Rulemaking in 2011, 76 Fed. Reg. 36184 (June 21, 2011), and receipt of public comments thereon,[7] DOL issued its final Rule on March

[6] Certain cases in other circuits heavily relied on by DOL in the new Rule dealt only with the types of reports that must be filed where a consultant/lawyer has communicated persuasive views on union organizing *directly* to employees. *Humphreys, Hutcheson and Moseley v. Donovan*, 755 F.2d 1211 (6th Cir. 1985); *Master Printers of America v. Donovan*, 751 F.2d 700 (4th Cir. 1984); *Master Printers Association v. Donovan*, 699 F.2d 370 (7th Cir. 1983); *Price v. Wirtz*, 412 F.2d 647 (5th Cir. 1969) (en banc). As further discussed below, DOL's new Rule improperly relies on these decisions as supporting expansion of the reporting requirements to consultants who confine their activities to lawfully advising employers without themselves communicating with employees. *See also Rose Law Firm*,768 F.2d at 967–71 (rejecting the other circuits' narrower view of the advice exemption).

[7] All comments opposing the proposed Rule, including those of the Plaintiffs, are contained in the Administrative Record (A.R.), which has not yet been filed with the Court. However, the A.R. is available electronically and accessible to the Court through the government's regulations.gov website. Plaintiffs specifically incorporate by reference the following comments filed on or before Sept. 21, 2011 in opposition to the proposed Rule: Comments of the Coalition for a Democratic Workplace; Comments of Associated Builders and Contractors; Comments of the Chamber of Commerce of the United States;

24, 2016. In the new Rule, DOL defines "advice" as meaning "an oral or written recommendation regarding a decision or a course of conduct" 81 Fed. Reg. at 15947. But the Rule then narrows this definition by stating: "An employer's ability to "accept or reject" materials provided, or other actions undertaken, by a consultant, common to the usual relationship between an employer and a consultant and central to the prior interpretation's narrow scope of reportable activity, no longer shields indirect persuader activities from disclosure." *Id.* at 15926. Thus, the Rule for the first time requires employers and consultants to report on advice provided by a consultant whenever an ultimate object of the advice—no matter how small or remote, and whether or not combined with other objects—is to influence employees concerning their right to organize and bargain collectively.

The new Rule further states: "**Note:** If any reportable activities are undertaken, or agreed to be undertaken, pursuant to the agreement or arrangement, the exemptions do not apply and information must be reported for the entire agreement or arrangement." *Id*. at 15927–28. Similarly, the Rule states that "if the consultant engages in both advice and persuader activities [newly defined to include previously exempt advice], the entire agreement or arrangement must be reported." *Id*. at 15937. Thus, under DOL's new and significantly limited interpretation of "advice," the advice exemption does not apply in any situation where it is impossible to separate advice from activity that goes beyond advice, and it does not apply even if activities constituting "pure" advice are performed or intertwined with what DOL deems to be "indirect persuader" activities." 81 Fed. Reg. at 15937. The reporting requirement would even attach where is is

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Comments of the American Hospitality Association; and Comments of the National Association of Manufacturers. Plaintiffs further wish to call the Court's attention to the comments filed by The American Bar Association strongly opposing the proposed rule on Sept. 21, 2011, available at regulations.gov. Also significant are letters submitted by state bar associations and state attorneys general, including the Attorney General of Arkansas, opposing the Rule. *See, e.g.*, Letter to Howard Shelenski, Administrator, OIRA (Feb. 4, 2016), *available at* state.ark.org/.

possible to differentiate between advice and alleged persuader activities.

The new Rule redefines the following non-exclusive categories of advice that have previously been found to be exempt for reporting as now constituting forms of "indirect persuasion" that will not be exempt from reporting, even if such activity consists solely of recommendations to an employer:

> (1) "Planning, directing, or coordinating activities undertaken by supervisors or other employer representatives;"
> (2) "Providing - with an object to persuade – material or communications to the employer, in oral, electronic,… or written form, for dissemination or distribution to employees;"
> (3) "Conducting a seminar for supervisors or other employer representatives … if the consultant develops or assists the attending employers in developing anti-union tactics and strategies;" or
> (4) "Developing or implementing personnel policies or actions for the employer … with an object to persuade employees."

Id. at 15938.

The foregoing redefinitions of "indirect persuasion" are riddled with exceptions whose logic is difficult to follow, but are summarized below:

REPORTABLE MATERIALS	**NON-REPORTABLE MATERIALS**
Drafting, revising or selecting persuader materials for the employer to disseminate or distribute.	Lawyers who exclusively counsel employers may provide examples or descriptions of statements found by the NLRB to be lawful..
If the revision is intended to increase the persuasiveness of the material, then the reporting requirement is triggered.	Consultant's revision of employer-created materials, including edits, correcting typographical or grammatical errors, additions, and translations, if the object of the revision is to ensure legality, as opposed to persuasion.
REPORTABLE SEMINARS	**NON-REPORTABLE SEMINARS**
Seminar agreements must be reported if the consultant develops or assists the attending employers in developing anti-union tactics and strategies for use by the employer.	Trade associations are required to report only if they organize and conduct the seminars themselves, rather than subcontract their presentation to a law firm or other consultant. Employers need not report their attendance at seminars.
REPORTABLE PERSONNEL POLICY	**NON-REPORTABLE PERSONNEL**

GUIDANCE	POLICY GUIDANCE
Reporting is required if the consultant develops or implements personnel policies or actions with the object to persuade employees. This indirect persuasion encompasses two types of activities: (1) creating persuasive personnel policies, and (2) identifying particular employees for personnel action with an object to persuade employees about how they should exercise their rights to support or not support union representation.	Development of personnel policies and actions that "merely" improve the pay, benefits, or working conditions of employees, even where they could "subtly" affect or influence the attitudes or views of the employees.
TRADE ASSOCIATIONS REPORTABLE	**TRADE ASSOCIATIONS NON-REPORTABLE**
• Where association staff serve as presenters in union avoidance seminars • Where association staff undertake indirect persuader activities for particular employer members, other than providing off-the-shelf materials	• Contracting with outside consultants to serve as presenters at association-sponsored union avoidance seminars • Providing off-the-shelf persuader materials to members • Helping members select such materials
OTHER GENERALLY REPORTABLE ACTIVITIES	**OTHER GENERALLY NON-REPORTABLE ACTIVITIES**
Any plan or direction of a course of conduct recommended to an employer that is not traditionally recognized as "legal services" and/or indirectly persuades employees regarding unionization.	An oral or written recommendation regarding decision or course of conduct, agreements where the consultants or attorneys exclusively provide legal services or representation in court, and during collective bargaining negotiations.
Counselling employer representatives on what they should say to employees to the extent such statements are indirectly persuasive and are not confined to what the employer may lawfully say to employees.	Exclusively counselling employer representatives on what they may lawfully say to employees, ensure clients comply with the law, offer guidance in employer personnel policies and best practices, or provide guidance on the NLRB
"Push" surveys	Employee attitude surveys

The extensive text purporting to explain the foregoing significant changes in the long settled meaning of "advice" makes clear that each of the foregoing (and additional) examples of "indirect persuasion," according to the new Rule, will be reportable even though they may consist entirely of recommendations by the advisor to the employer regarding a decision or a course of conduct, which the employer is free to accept or reject, and which only the employer

implements. As is also repeatedly shown in the text supporting the new Rule, DOL only considers advice to be exempt if it qualifies as "legal" advice, as "traditionally" provided by labor lawyers, without any object to persuade the employees of any employer being so advised. This, too, is contrary to the plain language of the advice exemption, which clearly exempts any form of advice, not merely "legal" advice. *See* 29 U.S.C. § 433(c).

By each of these unprecedented changes, as further discussed below, the new Rule requires employers to file reports in numerous instances in which the employer has "done no more than request labor relations advice" from an attorney, association or other form of advisor, notwithstanding the holding of the Eighth Circuit in *Donovan v. Rose Law Firm* and the plain language of Section 203(c) of the Act. Moreover, the Rule replaces the bright-line test of the Donahue Memorandum and DOL's Interpretative Manual with a subjective test in which employers cannot know how the DOL—and, ultimately, the federal courts—will determine whether the advice activity in question somehow has a persuasive object that denies employers and advisors their statutory rights to the advice exemption.

In addition to the radical changes in the application of the advice exemption, DOL has published new Form LM-10s for employers and new LM-20s for those advisors who engage in the newly broadened persuader activities. The new LM-10 requires that employers disclose "each activity performed or to be performed," the "[p]eriod during which performed," and the "[e]xtent performed," and lists thirteen different activities from which employers must select and "[e]xplain fully the circumstances of the payments(s)" for such activities. 81 Fed. Reg. at 16022. This is in contrast to the former LM-10, which required only that the employer describe "the circumstances of all payments, including the terms of any oral agreement or understanding." *See* former LM-10, question 12.

Similarly, the new LM-20 requires those who engage in persuader activities pursuant to an agreement or arrangement with employers to identify *inter alia* each activity performed, the fees received for such persuader services, and categorization of the substance of the communication in one of the same thirteen boxes listed in the LM-10.

DOL did not publish a new form LM-21 in connection with the proposed or final Rule at issue here. However, the Department indicated as part of its 2014 regulatory agenda that it intends to make changes in the form LM-21 in the near future. A number of letters were filed with DOL and with the Office of Management and Budget objecting to such a bifurcated rulemaking procedure because the LM-21 is inextricably intertwined with the reporting obligations of consultants under the LM-20. *See* Letter dated Dec. 18, 2015 Howard Shelanski, OIRA, from multiple trade associations requesting consolidation of the LM-20 and LM-21 rulemakings, *available at* http://www.abc.org/Portals/1/Documents/newsline/OIRA%20letter.pdf (last accessed April 1, 2016). DOL rebuffed these concerns in its final Rule and proceeded to issue the above referenced changes to forms LM-10 and LM-20 without identifying what changes are being contemplated concerning the Form LM-21.

III. JURISDICTION AND VENUE

This Court has federal question jurisdiction over this action pursuant to 28 U.S.C. § 1331. The court also has jurisdiction to act under section 702 of the APA, 5 U.S.C. § 702, which authorizes the Court to review an action brought by a person suffering a legal wrong because of the final action of a government agency. DOL's Rule is the final agency action of the Department of Labor and, as set forth more fully below, it adversely affects the Plaintiffs' and their constituent members and/or clients immediately upon its effective date, or at the latest on July 1, 2016. The APA authorizes the reviewing court to declare unlawful and set aside an agency action found to be arbitrary, capricious, an abuse of discretion, or otherwise not in

accordance with law, contrary to constitutional right, or in excess of statutory jurisdiction, authority, or limitations 5 U.S.C. § 706(2).

Venue lies in the United States District Court for the Eastern District of Arkansas pursuant to 28 U.S.C. § 1391(e)(1) because the Defendants are officers or employees of the United States acting in their official capacity and several of the Plaintiffs have their principal place of business in Little Rock, Arkansas, which lies within this judicial district and division.

IV. STANDING AND RIPENESS

Plaintiffs include trade associations representing thousands of employers in Arkansas and millions of employers throughout the country, as well as an individual law firm Plaintiff based in Arkansas. The Plaintiff trade associations have standing to pursue this action on behalf of their members, who consist of employers, attorney advisors and other consultants, under the three-part test of *Hunt v. Washington State Apple Advertising Commission*, 432 U.S. 333, 343 (1977), because (1) Plaintiffs' members would otherwise have standing to sue in their own right; (2) the interests at stake in this case are germane to Plaintiffs' organizational purposes; and (3) neither the claims asserted nor the relief requested requires the participation of Plaintiffs' individual members.

Plaintiffs' members would otherwise have standing to sue in their own right because they will suffer irreparable harm under the new Rule, both legal and practical, unless the Rule is declared unlawful and enjoined by this Court. *See, e.g.*, Affidavit of Bill Roachell (Roachell Aff.) at ¶¶ 4–5, Affidavit of Ben Brubeck at ¶¶ 1, 9–10, attached to the Motion as Exhibits A and B. *Inter alia*, Plaintiffs' member employers will be required to stop seeking previously exempt advice on labor relations issues from their attorneys, associations and/or other outside labor advisors due to the threat of having to file public LM-10 reports with DOL or else face criminal

penalties. *See Republican Party of Minn. v.Klobuchar*, 381 F.3d 785, 792 (8th Cir. 2004). "[A] plaintiff suffers Article III injury when [he or she] must either make significant changes . . . to obey the regulation, or risk a criminal enforcement action by disobeying the regulation." *St. Paul Area Chamber of Commerce v. Gaertner*, 439 F.3d 481, 487 (8th Cir. 2006) (quoting *Minn. Citizens Concerned for Life v. Fed. Election Comm'n*, 113 F.3d 129, 131 (8th Cir. 1997)); *see also Babbitt v. United Farm Workers Nat'l Union*, 442 U.S. 289, 298 (1979); *281 Care Committee v. Arneson*, 638 F.3d 621, 627–31 (8th Cir. 2011);[8]

Attorneys and other outside advisors who are also members of the Plaintiff associations, including Plaintiff Cross Gunter, will be required to stop communicating previously exempt advice to employers due to the threat of having to file public LM-20 and LM-21 reports, or else face criminal penalties. *See* Affidavit of Richard Roderick (Roderick Aff.) at ¶ 11, attached to the Motion as Exhibit C; *see also* Roachell Aff. ¶ 4; Brubeck Aff. ¶ 8. Cross Gunter and other lawyer members of the Plaintiff associations face the additional harm of being forced by the new Rule to breach their ethical obligations to preserve the confidentiality of client information and/or the attorney-client privilege. Roderick. Aff. at ¶¶ 10, 12; *see* ARK. R. PROF'L CONDUCT 1.6, and/or similar ethics rules adopted by every other state. In addition, the employers, attorneys, and other advisors who belong to the Plaintiff associations will be required by the new Rule to spend many hours and many dollars (grossly understated by DOL) in efforts to determine whether previously exempt advice falls within DOL's unlawfully *ultra vires* expansion of the definition regarding reportable persuader activity. Ultimately, Plaintffs will be irreparably

[8] For similar reasons, Plaintiffs' challenge to the new Rule is plainly ripe for review by this Court. *See Iowa League of Cities v. EPA*, 711 F.3d 844 (8th Cir. 2013) (ripeness found where threatened harm is "not speculative" and plaintiffs must either immediately alter their behavior or play an expensive game of Russian roulette; . . ."). *See also Ark. Right to Life State Political Action Comm. v. Butler*, 146 F.3d 558, 560 (8th Cir. 1998) (holding that plaintiffs are not required to expose themselves to arrest or prosecution under a criminal statute in order to challenge a statute in federal court).

harmed in their Due Process rights to fair warning of criminal violations because it is impossible to determine from the new Rule whether, and to what extent, previously exempt advice will still be exempt or otherwise subject to the LMRDA's reporting requirements.

The interests at stake are germane—even foundational—to Plaintiffs' principles, which include the mission of advising their members on labor relations issues and protecting the rights of their members to receive advice necessary to communicate with their employees regarding their rights to refrain from supporting unionization and/or collective bargaining, as protected by the First Amendment, the National Labor Relations Act ("NLRA"), and the LMRDA. *Klobuchar*, 381 F.3d at 792; Brubeck Aff. ¶¶ 2, 11, 13; Roachell Aff. ¶ 8.

The claims asserted and relief requested by the Plaintiff associations do not require participation of Plaintiffs' members, because Plaintiffs' Complaint is a facial challenge to the new Rule based upon the Rule's unlawful departure from the statutory authority delegated by Congress under the LMRDA and violations of the Constitution. The Complaint also challenges the arbitrary and capricious nature of the new Rule, based upon the failure of the Department to provide adequate explanation of its reversal of five decades of policy implementing the Act's requirements, and the illogical and confusing exceptions to the advice exemption that are adopted in the Rule. The Complaint is entirely based on principles of law and, thus, requires no individual employer participation. *Id*.

In addition to asserting the rights of their individual employer and employer-advisor members, the Plaintiff associations have standing to assert their claims on behalf of themselves, both as employers and as employer advisors. Plaintiffs are directly harmed by the new Rule because they regularly give advice to their member employers relating to union organizing, never before deemed reportable under the LMRDA, but which now will have to be reported publically

under the new Rule. Plaintiffs will be irreparably harmed in their exercise of the rights of Free Speech, Free Association, and Due Process in the same manner as their employer members and their employer-advisor members. Brubeck Aff.; Roachell Aff.

V. PRELIMINARY INJUNCTION STANDARD

In determining whether to grant preliminary injunctive relief against DOL's new Rule, the Court must weigh whether: (1) Plaintiffs have established a likelihood of success on the merits; (2) Plaintiffs will suffer irreparable harm in the absence of injunctive relief; (3) the balance of harm in granting or denying the injunction is in Plaintiffs' favor; and (4) granting injunctive relief is in the public's interest. *Winter v. Natural Res. Def. Council, Inc.*, 555 U.S. 7, 20 (2008); *Child Evangelism Fellowship of Minn. v. Minneapolis Special Sch. Dist. No. 1*, 690 F.3d 996, 1000 (8th Cir. 2012); *Dataphase Sys, Inc., v. CL Sys., Inc*, 640 F.2d 109, 113 (8th Cir. 1981). The Court must consider the relative strength of the four factors, balancing them all. *Id*.; *see also Brady v. Nat'l Football League*, 640 F.3d 785, 789 (8th Cir. 2011). Here, all four factors strongly support granting injunctive relief, as will be shown in the remainder of this brief.

The standard of review to be exercised by a court reviewing a final agency action under the APA is articulated in *Chevron USA, Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837 (1984). The *Chevron* analysis is a two-step process. Under *Chevron* Step 1, the Court asks whether Congress has directly spoken to the precise question at issue. *Id.* at 842. If Congress has spoken, then that is the end of the analysis, and the Court "must give effect to the unambiguously expressed intent of Congress." *Id.* at 843. Critically important in the *Chevron* Step 1 analysis is that courts should not show ***any*** deference to the Defendant DOL. *See Greater Missouri Med. Pro-Care Providers, Inc. v. Perez*, 812 F.3d 1132 (8th Cir. 2015) (quoting *King v. Burwell*, 135 S. Ct. 2480, 2489 (2015) and *Food & Drug Admin. v. Brown & Williamson Tobacco Corp.*, 529

U.S. 120, 133 (2000) ("[W]hen deciding whether the language is plain, we must read the words 'in their context and with a view to their place in the overall statutory scheme.'")).

Under *Chevron* Step 2, the Court may defer to the agency's interpretation of the statute only if it is a permissible and reasonable construction of the statute. *Chevron*, 467 U.S. at 843-44. Importantly, deference is only owed to an agency if its construction is reasonable in light of the statute's text, history, and purpose. *S. Cal. Edison Co. v. F.E.R.C.*, 116 F.3d 507, 511 (D.C. Cir. 1997). As the Supreme Court has further observed: an agency is "bound, not only by the ultimate purposes Congress has selected, but by the means it has deemed appropriate, and prescribed, for the pursuit of those purposes." *MCI Telecomms. Corp. v. Am. Tel. & Tel. Co.*, 512 U.S. 218, 231 n.4 (1994).

The Superme Court and the Eighth Circuit have held that, where Plaintiffs are challenging the new Rule, *inter alia*, as being overbroad and unconstitutional on First Amendment grounds, Plaintiffs have no obligation to show that "no set of circumstances exists" under which the Rule could be lawfully enforced. Rather, a rule having the force of law should be set aside as overbroad under the First Amendment whenever a "substantial number of its applications are unconstitutional . . .." *United States v. Stevens*, 559 U.S. 460, 473 (2010); *Phelps-Roper v. City of Manchester, Mo.*, 697 F.3d 678, 685 (8th Cir. 2012); *see also Citizens United v. Fed. Election Comm'n*, 558 U.S. 310, 335 (2010).

Finally, it is important to note in connection with the standard of review that the challenged rule in this case reverses an administrative interpretation of the LMRDA that has been in place, uninterrupted, for more than fifty (50) years. In the case of such a radical reversal of policy, the agency bears the burden of explaining and justifying the reversal. *Motor Vehicle Mfrs. Ass'n of the U.S., Inc. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 41-42 (1983); *see*

also FCC v. Fox Television Stations, Inc., 556 U.S. 502 (2009); *Perez v. Mortgage Bankers Ass'n*, 135 S. Ct. 1199 (2015).

VI. ARGUMENT

THE COURT SHOULD ENJOIN THE ENFORCEMENT OF DOL's NEW RULE BECAUSE THE PLAINTIFFS SATISFY THE CRITERIA FOR A PRELIMINARY INJUNCTION.

A. The Plaintiffs Are Likely To Succeed On The Merits Of Their Claims Because The Rule Is Contrary To The Plain Language Of The LMRDA, Is Unconstitutional, And Is Arbitrary And Capricious.

As noted above, the first step in determining whether a preliminary injunction is appropriate is to consider whether Plaintiffs are likely to succeed on the merits of their challenge to the new Rule. *Winter*, 555 U.S. at 20 (2008); *Child Evangelism Fellowship of Minn.*, 690 F.3d at 1000 (8th Cir. 2012);.*see also Laclede Gas Co. v. St. Charles Cty.*, 713 F.3d 413, 419 (8th Cir. 2013) ("In deciding whether to grant a preliminary injunction, likelihood of success on the merits is most significant."). As further explained below, likelihood of success is overwhelmingly present here, on a variety of legal grounds.

1. DOL's Unprecedented Narrowing Of The "Advice Exemption" Exceeds The Agency's Authority By Requiring Reporting On Advice, Which Is Specifically Exempted By The Statute.

Using all the "tools of statutory construction" to determine whether Congress has spoken to the issue, as required by Step 1 of *Chevron*, it is clear that the new Rule violates the plain language and Congressional intent underlying the LMRDA.[9] *See also Ragsdale v. Wolverine World Wide, Inc.*, 535 U.S. 81, 91 (2002) (overturning DOL rule where the agency "exercise[d] its authority in a manner that is inconsistent with the administrative structure that Congress

[9] Though it should be unnecessary to reach *Chevron* Step II, it is equally clear that DOL's interpretation of advice is not a permissible one based on the language, history, and overall context of the Act.

enacted into law."). DOL's new Rule contradicts the plain language of the statute, which states that reporting is not to be required "covering the services of [the consultant] by reason of … giving or agreeing to give advice." 29 U.S.C. § 433(c). As the Eighth Circuit held in *Donovan v. Rose Law Firm*, 768 F.2d 964, 974–75 (1985), Section 203(c) of the LMRDA is crafted as a "broad" exemption from the requirements of Sections 203(a) and (b). This holding fatally undermines the core premise of the new Rule, repeated several times by DOL, to the effect that the advice exemption is nothing more than a "clarification" that "makes explicit what was already implicit" in the reporting requirements. *See* 81 Fed. Reg. at 15941, 15950, 15951 (each time repeating this phrase to support DOL's new position that the advice exemption is not a "broad" one).[10] Because DOL's understanding of Congress's intent is at odds with the Eighth Circuit's stated view, the new Rule must be enjoined.

Contrary to DOL's new Rule, under the Eighth Circuit's holding, an employer that obtains advice on labor relations issues from an attorney, a trade association, or any other outside advisor/consultant cannot lawfully be found to have triggered any reporting obligation under the plain language of the LMRDA, regardless of whether the advice may enhance the persuasive nature of the employer's communication. As the appeals court held, if Congress had meant to exempt only advice unrelated to persuader activity, Section 203(c) would be unnecessary, because the activities at issue would not otherwise be reportable under sections 203(a) and 203(b). If Congress had meant to exempt only pure "legal" advice, as DOL again repeatedly

[10] In the *Rose Law Firm* case, the Eighth Circuit expressly disagreed with other circuits that had viewed Section 203(c) as merely "making explicit what was implicit in Section 203(b)." 768 F.2d at 973–75. To the contrary, relying on committee reports overlooked by the other circuit decisions, the Eighth Circuit correctly declared that the advice exemption was intended by Congress to broadly exempt conduct that would otherwise be covered by Section 203(b). *Id.*

states, then section 203(c) would be superfluous because section 204 of the LMRDA exempts communications subject to the attorney-client privilege.

By adopting the position that an advisor's recommendations to an employer on a course of conduct can somehow constitute reportable persuasion of the employer's employees, regardless of whether the employer is free to accept or reject the recommendation (81 Fed. Reg. at 15926), DOL has also departed from the commonly accepted meaning of the terms "advice" and "recommendation." Indeed, the dictionary definitions cited by DOL in the Rule's preamble state that advice ordinarily is understood to mean a "recommendation" regarding a decision or a course of conduct. *See* 81 Fed. Reg. at 15941. In turn, the dictionary definition of the term "recommendation" refers to such an action as a mere "suggestion" which the recipient is free to accept or reject. *See* http://dictionary.reference.com/browse/; *see also Recommendation*, BLACK'S LAW DICTIONARY (10th ed. 2014); Thus, contrary to DOL's newly stated view, the plain language of the Act's advice exemption, even as restated by DOL, excludes from reporting any written or verbal recommendation from an advisor suggesting that an employer communicate a message to employees about unions, even a persuasive one, so long as the employer is free to accept or rejection that recommendation, and so long as it is the employer and not the advisor who controls and communicates the actual message.[11]

For similar reasons, DOL's new interpretation is inconsistent with the legislative history of the LMRDA. The House Conference Committee Report describes Section 203(c) as "broad,"

[11] Numerous commenters in the Administrative Record pointed out this flaw in DOL's reasoning, as acknowledged in the Rule. 81 Fed. Reg. at 15948–49. In response, DOL has simply concluded that the ability of the employer to accept or reject a recommendation is "not the relevant inquiry." *Id.* at 15951, n.45. To the contrary, under the statutory language, and even under DOL's own definition of "advice" as an oral or written "recommendation," the ability of an employer to accept or reject recommendations of a consultant is the most relevant inquiry to determine whether the consultant's activities constitute "advice."

stating that Section 203(c) "grants a broad exemption from the requirements of this section with respect to giving advice." H.R. Rep. No. 1147 on S. 1555 (Sept. 3, 1959) (emphasis added). The Committee Report makes no distinction between legal and persuasive advice. Indeed, nowhere in the lengthy legislative history of the LMRDA is there even the slightest suggestion that the drafting and revision of employer communications by consultants or labor lawyers was a problem to be addressed by public reporting. Rather, Congress was concerned only with what the Fourth and Sixth Circuits later termed "extracurricular" activities of certain attorneys and consultants who communicated face-to-face with an employer's workforce. *See Douglas v. Wirtz*, 353 F.2d 30, 33 (4th Cir. 1965); *Humphreys, Hutcheson and Mosely v. Donovan*, 755 F.2d 1211, 1215–16 (6th Cir. 1985). The new DOL Rule clearly goes beyond regulating extracurricular activities of consultants. Now, DOL is attempting to usurp Congress's role by upending the plain and well-settled intent of the advice exemption and by regulating advice given to employers.

DOL wrongly argues in the Rule that advice only occurs when a person "exclusively counsels employer representatives on what they may lawfully say to employees, ensures a client's compliance with the law, or provides guidance on NLRB practice or precedent." 81 Fed. Reg. at 16044. DOL then defines reportable persuader activity as a consultant's providing materials or communications to, or engaging in other actions, conduct, or communications on behalf of an employer, that, "in whole or in part, have the object directly or indirectly to persuade employees concerning their rights to organize or bargain collectively." *Id*. at 15937 (emphasis added). These statements are inherently contradictory and internally inconsistent, because a consultant in most instances cannot provide meaningful advice on "what [an employer] may lawfully say to employees," without providing the employer with draft materials that illustrate what may lawfully be said to *persuade* employees, and which necessarily have the object—at

least on the part of many employers—of persuading employees. As then-Circuit Judge Ruth Bader Ginsburg stated in rejecting the identical contention made by a union in *UAW v. Dole*:

> The Union distinguishes doing a task for someone (not advice) and providing advice on how the task should be done. "Advice," as the [Union] defines it, could under no circumstances comprehend scripting an employer's anti-union campaign. But *the term "advice," in lawyers' parlance, may encompass, e.g., the preparation of a client's answers to interrogatories, the scripting of a closing or an annual meeting*.

869 F.2d 616, 619 n.4 (D.C. Cir. 1989) (emphasis added). If scripting the annual meeting of a corporation is considered to be advice, as it certainly is, then scripting the same company's speech about unions to its workforce must be (and is) advice as well.[12]

When a consultant or labor lawyer meets directly with employees or provides materials that the employer has no ability to revise or reject, the consultant or lawyer is not providing advice. Rather, that consultant is persuading employees, which Congress meant to make reportable under Section 203(b). *See, e.g., Rose Law Firm*, 768 F.2d at 965–66 (attorney "conducted discussions" with employer's employees); *Humphreys*, 755 F.3d at 1215–16 (same). [13] But contrary to DOL's stated view in the Rule, the Department's previous interpretation of advice did require reporting of indirect persuasion that was not advisory,

[12] It must also be observed that scripting an employer's speech to its employees is only one of the thirteen categories of advisory activity that the new Rule for the first time claims to be reportable persuader activity. See the new forms LM-10 and LM-20. DOL offers little or no justification for most of the other categories of advice, such as presenting management training seminars, assisting with employee handbooks, and training supervisors in lawful responses to union activity. If requiring reports as to any of the thirteen categories is unlawful, then the entire Rule must be set aside as overbroad, as further discussed below.

[13] Likewise, in the only previous LMRDA cases alleging persuader activity by a trade association, there was no dispute that the association communicated directly with employees of its member employers. *Master Printers of America v. Donovan*, 751 F.2d 700 (4th Cir. 1984) (association publication sent directly to the employees' homes); *Master Printers Ass'n v. Donovan*, 699 F.2d 370 (7th Cir. 1983) (chapter director gave anti-union speeches to employees of member employers).

meaning that the persuader still communicated directly with employees but did not directly persuade them in his speech or writings.[14]

On the other hand, when a labor lawyer, association, or other advisor suggests to an employer's management how a speech could most persuasively and lawfully be written – and does not himself communicate at all with rank and file employees – such action is only a "recommendation regarding . . . a course of action," which Judge Ginsberg recognized as being "advice." By contrast, the new Rule limits the meaning of "advice" to abstract expositions on the law or to mere "yes" or "no" pronouncements on whether a particular employer's proposed communication or activity is "lawful" (as opposed to "lawfully persuasive"). That is not how advice is given in the real world. Nor is there any evidence that Congress intended DOL to adopt such an absurdly narrowed definition of the advisory process, and Plaintiffs are likely to succeed in their challenge to the Rule on this ground. [15]

2. The New Rule Is Arbitrary And Capricious.

DOL's new Rule is arbitrary and capricious because it departs from more than fifty (50) years of enforcement precedent without a rational explanation. In particular, the Rule relies on factors which Congress did not intend the agency to consider; it entirely fails to consider important aspects of the problem; it relies on explanations that run counter to the evidence; and

[14] The best example of such indirect persuasion appears in the *Master Printers of America* trial court decision dealing with news and opinion articles sent by an association directly to the homes of employees. *See Master Printers of America v. Marshall*, 1980 U.S. Dist. LEXIS 15081 (E.D. VA. 1980). The district court divided the articles into two categories: indirect ("subtle") persuasion and direct persuasion, depending on how overtly the author stated that employees should not support union organizing).

[15] Even if there were any ambiguity in the statuory terms as DOL contends, then the court would nevertheless be required to invoke the rule that "ambiguity concerning the ambit of criminal statutes should be resolved in favor of lenity." *Yates v. U.S.*, 135 S. Ct. 1074 (2015) (plurality opinion) (citing *Cleveland v. U.S.*, 531 U.S. 12, 25 (2000)).

the explanation for the Rule is implausible. *See Motor Vehicle Mfrs. Ass'n of United States, Inc. v. State Farm Mut. Automobile Ins. Co.*, 463 U.S. 29, 41 (1983); *see also FCC v. Fox Television Stations, Inc.*, 566 U.S. 502 (2009); and *Perez v. Mortgage Bankers Ass'n*, 575 U.S. __, 135 S. Ct. 1199, 2015 U.S. LEXIS 1740, *21–22 (March 9, 2015) ("As we held in *Fox Television Stations*, and underscore again today, the APA requires an agency to provide more substantial justification when "its new policy rests upon factual findings that contradict those which underlay its prior policy; or when its prior policy has engendered serious reliance interests that must be taken into account.").

At the outset, the arbitrariness of the new Rule can best be seen by referring back to the "Reportable – NonReportable" chart in the Statement of Facts section of this Brief, at pp. 17-18. See also DOL's own instructions to the new LM-10 and LM-20 reports. To name only a few examples, here are some of the inconsistencies inherent in the new Rule:

- The new Rule deems an advisor to be an "indirect persuader" and requires reports if the advisor "drafts, revises or selects persuader materials" in advising the employer, even though it remains the employer's decision whether to disseminate, revise further, or distribute the materials to the employees.

- According to the Rule, if the advisor exclusively counsels employers with regard to "lawfulness" then the advisor may provide or revise examples or descriptions of statements found by the NLRB to be lawful, without reporting; but if the revision is intended to increase the persuasiveness of the material, apparently even if "lawfully persuasive," then the reporting requirement is triggered.

- The Rule allows advisors to provide "off the shelf" materials to employers without reporting; but if they actually *advise* the employers by helping them select the right materials for their campaign, then the consultants *lose* the "advice" exemption; unless of course the advisor is a trade association, who is allowed to help select such material, but only so long as the association staff do not advise the employer how to tailor the material to the employer's particular needs.

- The Rule says that consultants can present seminars on union organizing to groups of employers without reporting, unless of course the presenters advise the attending employers how to "develop anti-union tactics and strategies for use in a union campaign,"even though such advice is not particular to any individual employer. (See "off

the shelf" discussion above). Trade associations can sponsor such seminars without reporting, but if the associations' own staff presents the same advice as the consultants then reporting will be required. Employers can attend anti-union seminars and receive the advice, without themselves filing reports, even though the consultant and/or the association staff member who presents the advisory program is required to file reports.

- Reporting is required if the consultant develops or implements personnel policies or actions with the object to persuade employees. But no reporting is required if the policies only "subtly" affect or influence the attitudes or views of the employees.

The list goes on. *See* pp. 17-18, *supra*.

What most of these arbitrary line-drawing efforts have in common is that they do not bear any relation to how advice, including legal advice, is given to businesses (on any subject) in the real world. Contrary to the new Rule, employers are entitled to ask for and receive advice not only regarding what course of conduct is "lawful" but also regarding what messages will be most *effective* to achieve their lawful business objectives. Such labor relations advice often mixes questions of law and strategy. It is impossible to pigeonhole each piece of advice in a union organizing campaign, and the Rule's efforts to force such separation between types of advice, some reportable and most not, is simply impossible to comply with.

A brief consideration of DOL's stated reasons for reversing its longstanding enforcement policy under the LMRDA further demonstrates the arbitrariness of the new Rule. First, DOL has improperly characterized its own enforcement history under the LMRDA, attempting to deny that it has consistently enforced the advice exemption in a manner opposite to the Rule. Contrary to statements in DOL's rulemaking, Solicitor Donahue's 1962 opinion has remained the consistent position of DOL with regard to the meaning of "advice" under the LMRDA from 1962 until today. As the Rule recognizes, Section 265.005 of the current LMRDA Interpretative Manual has remained unchanged for the past five decades.DOL's claim that it briefly changed its

enforcement of the advice exemption is mistaken and cannot alter the fact that the Department has not previously enforced the LMRDA in the manner that the new Rule attempts to do.[16]

Equally misguided is DOL's second contention that post-LMRDA Congressional and Executive branch criticisms of labor consultant activity somehow justify the new Rule's radical change in enforcement policy. The Department refers to House Subcommittee Reports from 1980 and 1984 which purported to find inadequate enforcement of the LMRDA's consultant reporting provisions. 81 Fed. Reg. at 15933-34, 15963. Unstated in DOL's Rule is that neither the House nor the Senate took action in response to the Subcommittee Reports, because a majority of the Congress was satisfied with the Department's enforcement of the LMRDA, and disagreed with the Subcommittees' findings. The Supreme Court has held that Congressional silence over a period of decades in response to a settled position by a government agency constitutes ratification thereof, and is a "persuasive" indication of Congressional intent. *See FDA v. Brown & Williamson Co.*, 529 U.S. 120, 156–58 (2000); *see also NLRB v. Bell Aerospace*, 416 U.S. 267, 274–75 (1974).[17] Thus, far from justifying DOL's change of position here, Congress's decision to take no action on the House subcommittee reports strongly supports Plaintiffs

[16] DOL relies on an abortive effort to change the enforcement of the advice exemption in the final days of the Clinton Administration. Although DOL announced its intent to effectuate such a change on January 11, 2001, the incoming Administration first delayed the effective date of the re-interpretation and then rescinded it before it ever took effect. 66 Fed. Reg. 2782 (Jan. 11, 2001) (revised interpretation slated to take effect in 30 days); *suspended* 66 Fed. Reg. 9724 (Feb. 9, 2001); *rescinded* 66 Fed. Reg. 18,864 (April 11, 2001).

[17] As the Supreme Court held in *NLRB v. Bell Aerospace*, 416 U.S. at 274–75: "[A] court may accord great weight to the longstanding interpretation placed on a statute by an agency charged with its administration. This is especially so where Congress has re-enacted the statute without pertinent change. In these circumstances, congressional failure to revise or repeal the agency's interpretation is persuasive evidence that the interpretation is the one intended by Congress." *See also Sebelius v. Auburn Regional Med. Ctr.*, 133 S. Ct. 817, 827–28 (2013); *Commodity Futures Trading Comm'n v. Schor*, 478 U.S. 833 (1986).

argument that DOL's longstanding application of the "advice" exemption reflected the true Congressional intent underlying the LMRDA.

The Department further contends in the Rule that "current industrial relations research evidences a proliferation of the consultant industry and substantial use by employers of labor relations consultants." 81 Fed. Reg. at 15961–62. But the LMRDA was not enacted to outlaw labor relations consultants or to discourage their lawful advisory activities. The purpose of the Act was to expose and require reporting of specifically enumerated *persuader* activities, *i.e.*, those activities by which the consultants acted as "middlemen" between employers and their employees by communicating directly with the employees. It is clear from DOL's rulemaking discussion of the supposed new research into the consulting industry, however, that the Department erroneously believes that its mission should be to somehow reduce the number of consultants and/or to discourage them from providing lawful advice that helps an employer to persuade its own employees with regard to unionization. DOL's apparent objective is directly contrary to the will of Congress and is, therefore, arbitrary and capricious.

It should be irrelevant to the Department's analysis whether an alleged majority of employers hire consultants during union organizing campaigns, as supposedly reported by some studies. 81 Fed. Reg. at 15961-64. None of the studies relied on by the Department identify the extent to which any such consultants have violated either the NLRA or the LMRDA. None of the studies claims that the failure to report exempt consultant activity has resulted in violations of either Act. Nor do the studies measure the extent to which consultant advisors—lawyers, associations, and other third party experts—may have *reduced* the number of employer violations by educating clients and association members as to the legal prohibitions and assisting them in complying with the tenets and nuances of this area of law.

In any event, the studies relied on by the Department have been refuted and shown not to be credible with regard to the influence of labor relations consultants on union organizing campaigns.[18] By relying on such studies, the Department reveals a bias in favor of union organizing and against the right of employers to obtain lawful and legitimate advice from experts in the field of labor relations.

Equally suspect is the Department's contention that there is an "underreporting problem" among consultants. This claim is based on the supposed connection, described above, between the number of consultants and the number of reports that DOL believes consultants should be filing. Again, the supposition that consultants are hired in a majority of union organizing campaigns does not mean that such consultants are hired to be "middlemen" to engage in *persuader activity*. To the contrary, as evidenced by numerous comments in the Administrative Record, the vast majority of lawyers and business associations have taken great care over the past fifty (50) years to avoid engaging in persuader activity by limiting their actions to conduct exempted from reporting by the statutory "advice" exemption. DOL offers no sound justification for the claim that the number of reports filed is "7.4% of those expected." 81 Fed. Reg. at 15964.

Also unsupported is the Department's claim that changing the advice interpretation would "enable employees to make a more informed choice regarding the exercise of their rights to organize and bargain collectively." *Id*. at 15932. At the outset, it is beyond DOL's authority to disregard Congressional intent by expanding the amount and types of information subject to

[18] *See* Administrative Record, comment by Chamber of Commerce of the United States dated September 21, 2011, at pp. 9–11.

disclosure under the Act.[19] Certainly, it is impermissible for DOL to fashion its definition of advice in order to make it more difficult for employers to communicate with their employees regarding unionization.

Nor is there evidence that the Rule is in fact necessary to permit employees to make a more informed choice regarding whether to be represented by a labor organization before an election involving advice from a consultant is held. The current union winning percentage in representation elections is approaching 70%, one of the highest winning rates in decades.[20] Whatever assistance is being provided to employers by the consulting community, there is no reason to think that such advice is hindering union organizing activities. Indeed, most of the reports to be filed under the DOL's new interpretation of Section 203 will not be filed until well after the related organizing campaign has concluded and the election is over. The goal supposedly at the heart of the DOL's new Rule will in most cases not be attained because the NLRB time frames are too short to allow it.[21]

Thus, DOL's failure to provide a rational explanation for the new Rule, the arbitrary results of the Rule, and the Department's evident reliance on factors not intended by Congress to be considered and disregard of the realities of the workplace, constitute grounds for finding that Plaintiffs are likely to succeed in their contention that the new Rule is arbitrary and capricious within the meaning of the APA.

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[19] LMRDA Section 208, the DOL's basis for issuing regulations, authorizes only "reasonable rules and regulations. . . to prevent the circumvention or evasion of such reporting requirements." There is no authority to expand the requirements.

[20] *Three Quarter Review of Revised R-Case Rules* (NLRB Feb. 25, 2016), *available at* http://www.nlrb.gov/news-outreach (last accessed April 1, 2016).

[21] The Department makes no meaningful response to this point, other than to suggest without authority that employees may benefit from reports filed by a particular consultant for some other employer(s) after past union campaigns. *Id*. at 15961.

3. The Rule Violates The Right of Employers To Communicate With Their Employees Under The First Amendment And Section 8(c) Of The NLRA, And Violates The First Amendment Rights Of Employers' Advisors To Assist In Such Communication Efforts.

(a) The rule burdens the speech of employers and their advisors.

The First Amendment to the United States Constitution guarantees employers the right to "persuade to action with respect to joining or not joining unions." *Thomas v. Collins*, 323 U.S. 516, 537–38 (1945); *NLRB v. Virginia Electric and Power Company*, 314 U.S. 469, 476–77 (1941); *NLRB v. Gissel Packing Co.*, 395 U.S. 575, 617–18 (1969) ("[A]n employer's free speech right to communicate his views to his employees is firmly established and cannot be infringed by a union or the Board.")

Section 8(c) of the NLRA, 29 U.S.C. § 158(c), further codifies the employer's right to express its "views, argument or opinion" to its employees. In *Chamber of Commerce v. Brown*, 554 U.S. 60 (2008), the Supreme Court emphasized that Congress manifested in section 8(c) the congressional intent "to encourage free debate on issues dividing labor and management." *Id.* at 67–68. The Court went on to state that Congress had "characterized this policy judgment, which suffuses the NLRA as a whole, as favoring uninhibited, robust, and wide-open debate in labor disputes, stressing that freewheeling use of the written and spoken word . . . has been expressly fostered by Congress and approved by the [NLRB]." *Id.* at 68.

In 1959, Congress acknowledged the importance of section 8(c) through LMRDA section 203(f), which provides: "nothing contained in this section shall be construed as an amendment to, or modification of the rights protected by, section 8(c) of the National Labor Relations Act, as amended." 29 U.S.C. § 433(f). Thus, employer communications with employees about unionization and collective bargaining enjoy protection under the First Amendment, the NLRA, and the LMRDA.

As DOL's own statistics confirm, the significant majority of employers seeking to communicate with their employees on the subject of unions have found it necessary to obtain advice from their attorneys, trade associations, or other advisors with expertise in the labor field. This is because the line between free speech and unlawful coercion in the union organizing context is difficult for the courts and even the NLRB to draw, and an employer's error can result in a costly unfair labor practice charge or setting aside an election.[22] Since employer speech under the First Amendment or the labor statutes requires both legal and labor relations advice in order to be effective, any burden placed on the right of employers to obtain both types of advice burdens employers' freedom of speech. It is also important to recognize that not only does the Rule place a burden on employer speech, but the burden is entirely content based. The Rule applies only to speech that contains a persuasive message opposing unionization, and it applies only to employer – and not union – persuasive speech.[23]

(b) The Rule does not satisfy the strict scrutiny applied to content-based restrictions on speech.

The Supreme Court has recently held that government regulation of speech is "content-based if a law applies to particular speech because of the topic discussed or the idea or message expressed." *Reed v. Town of Gilbert*, 135 S. Ct. 2218, 2227 (2015). In *Reed* , the Supreme Court made it clear that in determining whether a regulation is content-based, it is not necessary to show that the government disagrees with the message conveyed by the speech. It is enough that the regulation requires "enforcement authorities to examine the contents of the message that is

[22] *See, e.g.*, John E. Higgins, Jr., THE DEVELOPING LABOR LAW 95–209, 505–49 (6th Ed. 2012).

[23] The Rule analogizes repeatedly, but erroneously, to certain financial reports filed by unions outside the persuader field. 81 Fed. Reg. at 15977. It remains undisputed that unions are not required to report to anyone their efforts to persuade employees to support unionization.

conveyed to determine whether a violation has occurred." *McCullen v. Coakley*, 134 S. Ct. 2518, 2531 (2014).

A government regulation that is content-based and either prohibits speech or compels speech is subject to strict scrutiny. *See United States v. Playboy Entm't Grp., Inc.*, 529 U.S. 803, 811 (2000) (applying strict scrutiny to a federal statute that required cable television operators providing sexually-oriented programming to scramble or block their channels); *Riley v. Nat'l Fed'n of Blind*, 487 U.S. 781, 798–801 (1988) (applying a strict scrutiny standard to content-based regulation that compelled professional fundraisers to disclose the percentage of charitable contributions actually turned over to charity). The new DOL Rule is content-based regulation because it applies only to advice to employers that DOL deems to be persuasive to employees against unionization.[24] Strict scrutiny must therefore be applied.

Under the strict scrutiny standard, the government has the burden of proof. *Reed*, 135 S. Ct. at 2231. To satisfy strict scrutiny, the government must demonstrate that: (1) the Rule promotes a compelling government interest; (2) the Rule is narrowly tailored to promote that interest; and (3) the Rule uses the least restrictive alternative that serves the statutory purpose. *FEC v. Wisc. Right to Life, Inc.*, 551 U.S. 449, 469 (2007). The DOL has failed to show that the new Rule meets any of these three requirements.

[24] The Rule is distinguishable from the campaign-finance disclosure statutes, to which the courts have applied intermediate scrutiny. Those statutes only require an organization to divulge the identity of its contributors and the amounts contributed, *e.g.*, *Citizens United v. FEC*, 558 U.S. 310, 366–67 (2010), not the details of an employer's dealings with its consultant. Campaign finance disclosure laws are also supposed to apply equally to contributors regardless of which side they are supporting in an election, unlike DOL's new Rule which limits its reporting requirements to those who support the employer's position in union organizing campaigns. As further discussed below, however, the new Rule does not meet even intermediate scrutiny standards.

First, the DOL has not articulated a "compelling governmental interest" that would justify this content-based regulation on speech. At the outset, there can be no compelling governmental interest here where DOL itself, as well as Congress and the courts, have all consistently applied the broad exemption and interpretation of "advice" that has been in effect for the past 50-plus years. Against this obvious lack of any compelling government interest supporting the new Rule, the principal justification DOL has offered is that reporting persuader agreements in detail will provide employees with "essential information regarding the underlying source of the views and materials being directed at them." 81 Fed. Reg. at 15926, 16001. This justification does not satisfy strict scrutiny as a matter of law. The Supreme Court rejected the same argument in *McIntyre v. Ohio Elections Commission*, 514 U.S. 334, 348 (1995), where the Ohio Elections Commission attempted to justify an Ohio law prohibiting anonymous political pamphleting on the grounds that forcing speakers to identify themselves provided the electorate with "relevant information." The Court held that "[t]he simple interest in providing voters with additional relevant information does not justify a state requirement that a writer make statements or disclosures she would otherwise omit." *Id.* at 348.

In justifying the new Rule under the First Amendment, DOL has heavily but improperly relied on a series of cases enforcing the reporting requirements against consultants who were all found to have communicated directly with employees and who made no claim to protection under the advice exemption as to the LM-20 requirement. *See, e.g., Humphreys, Hutcheson and Mosely v. Donovan*, 755 F.2d 1211, 1222 (6th Cir. 1985); *see also Master Printers of America v. Donovan*, 751 F.2d 700 (4th Cir. 1984); *Master Printers Assocation v. Donovan*, 699 F.2d 370 (7th Cir. 1983); *Douglas v. Wirtz*, 353 F.2d 30 (4th Cir. 1965); and *Price v. Wirtz*, 412 F.2d 647 (5th Cir. 1969). It must be observed that the Supreme Court's First Amendment jurisprudence

has evolved significantly in the thirty years since the last of these cases was decided. It is also worth reiterating that the Eighth Circuit in *Donovan v. Rose Law Firm* declared that all of these cases were wrongly decided. 768 F.2d at 967-75. In any event, the fact that the cases on which DOL now relies were all limited to direct communications between persuaders and employees is an important difference from the new Rule. The compelling interest found by the above cited court decisions in that much different circumstance is simply not present here, where the only communications at issue are those between advisors and employers, not employees. Nor can the new Rule be viewed as "narrowly tailored," as compared to the much more narrowly tailored DOL rule that was enforced in the above referenced cases.

Also, none of the previous cases addressed the First Amendment concerns of the employers themselves, as opposed to their consultants/advisors, who were the sole parties in each of the foregoing cases. Thus, the degree to which employer speech is burdened under DOL's new Rule is substantially greater than the degree to which it was burdened under the prior interpretation of the law in the older persuader cases.. As further noted above, the new LM-10 employer reporting form compels more speech than its predecessor did, and with a substantially greater chilling effect, because it requires employers to disclose more details about agreements with their attorneys and consultants than its predecessor.[25] Contrary to the Rule, the justification for the compelled speech in the previously decided persuader cases cannot be relied on by DOL to satisfy the compelling government interest requirement which must be demonstrated here.

[25] The new LM-10 requires that employers disclose "each activity performed or to be performed," the "[p]eriod during which performed," and the "[e]xtent performed," and lists thirteen different activities from which employers must select and "[e]xplain fully the circumstances of the payments(s)" for such activities. *See also* 81 Fed. Reg. at 16038.

The burden on employer Free Speech in the new Rule is further magnified by DOL's LM-21 reporting requirement that attorney advisors found to be persuaders must provide information concerning all clients for which they performed "labor relations advice or services" for an entire year regardless of whether those clients received persuader services. Under the new Rule, a lawyer who spends a few minutes giving a single client lawful advice deemed by DOL to have persuasive intent must disclose all fees received from all the firm's labor and employment clients for all engagements over the year, even though no other client asks for or receives advice on employee communications.

The Eighth Circuit upheld the Free Speech rights of a law firm against this government position in *Rose Law Firm*, in which it held:

> In particular, we have difficulty perceiving a compelling governmental interest to be served by the reporting of all receipts and disbursements related to any labor relations advice given to or services performed for clients for whom a consultant has not performed any persuader activity.

768 F.2d at 975. The DOL in its new Rule offers no justification for seeking the disclosure of confidential information with respect to these matters.

The overbreadth of the annual LM-21 reporting requirement further demonstrates that the government cannot carry its second burden under strict scrutiny of establishing that the Rule is narrowly tailored to meet the government's compelling interest. For a business association to report on every member that has received labor relations advice and services from the association, or for a law firm, consultant or other advisor to report on every client that retains the firm for any labor or employment representation for an entire year is not a narrowly tailored restriction on speech.

It must also be noted that the new Rule is not limited in its scope to employers who retain consultants during union organizing campaigns or when there is a specific labor dispute. DOL is

quite clear in the preamble to the new Rule that any advice at any time that might somehow indirectly influence employees if the employer follows that advice, is reportable. 81 Fed. Reg. at 15937–38, 16041. Under these suppositions, DOL's new Rule declares training seminars offered by trade associations or law firms to even unidentified members of attending employers' management to be reportable by any lawyer or consultant who advises attendees in such a way that they will learn how to better conduct a union campaign, even where the consultant knows nothing about the individual employers in attendance or, more importantly, their employees. By a similar argument, DOL claims that preparation of employee handbooks, even in the absence of any reported union activity at the client or association member's place of business, somehow constitutes reportable persuasion rather than non-reportable advice, if the intent underlying the advice is to persuade employees (unless such persuasion is "subtle" in nature). *Id*. at 16044.

For similar reasons, the Rule also does not meet the third element of the strict scrutiny test; namely, it is not the least restrictive means to curb abuses by the "middlemen" cited by the McClellan Committee in 1959. DOL has failed to produce any evidence that it cannot achieve the stated objective of the LMRDA simply by enforcing the current disclosure requirements. There is also no evidence of any efforts made by DOL to enforce the LMRDA disclosure requirements, and no evidence that there is any impediment to making such enforcement efforts. Regulatory provisions "no more than tenuously related to the substantial interests disclosure serves . . . fail exacting scrutiny." *Buckley v. Am. Constitutional Law Found., Inc.*, 525 U.S. 182, 204 (1999). This Court should reach the same result here.

(c) The Rule does not satisfy intermediate scrutiny.

Even if strict scrutiny were inapplicable, the Rule is unconstitutional because it does not satisfy the intermediate level of scrutiny, which requires a "substantial relation" between the disclosure requirement and a "sufficiently important" governmental interest. *Minn. Citizens*

Concerned for Life, Inc. v. Swanson, 692 F.3d 864, 874–75 (8th Cir. 2012) (en banc);[26] *see also Elrod v. Burns*, 427 U.S. 347, 362 (1976) (plurality opinion) ("The interest advanced must be paramount, one of vital importance, and the *burden is on the government to show the existence of such an interest*." (emphasis added)). *See also Nat'l Ass'n of Manufacturers v. SEC*, 748 F.3d 359 (2014), reaffirmed after rehearing w/ opinion, 800 F.3d 518 (D.C. Cir. 2015) (striking down agency requirement that businesses report their use of "conflict minerals," regardless of whether strict scrutiny or intermediate scrutiny applied, due to the agency's inability to demonstrate that the reporting requirement would in fact alleviate the harms allegedly being addressed "to a material degree.").

Here, DOL has failed to demonstrate a sufficiently important government interest to justify the compelled speech and chilling of speech under the new Rule. A sufficient government interest in the campaign-finance context has been found for disclosure requirements that provide the public with information regarding "who is speaking about a candidate shortly before an election" and the sources of funding for campaign-related ads. *Wisc. Right to Life, Inc. v. Barland*, 751 F.3d 804, 841 (7th Cir. 2014). However, no such interest exists where, as here, the identity of the speaker (the employer) and the source of funding the speech (again the employer) is already known. As such, employees are already aware that both the identity of the speaker and the source of funding the information are their employer.

The Rule also fails intermediate scrutiny because there is a "substantial mismatch" between DOL's purported informational objective and the means the DOL has chosen to achieve

[26] In *Minnesota Citizens Concerns for Life, Inc. v. Swanson*, 692 F.3d 864, 875–76 (8th Cir. 2012) (en banc), the Eighth Circuit noted that "exacting scrutiny" had yet to be clearly defined. Nevertheless, "[t]hough possibly less rigorous than strict scrutiny, . . . [t]he Supreme Court has not hesitated to hold laws unconstitutional under [the exacting scrutiny] standard." *Id.* at 876; *see, e.g.*, *Buckley v. Am. Constitutional Law Found.*, 525 U.S. 182, 186 (1999) (deciding certain Colorado laws regulating the initiative and referendum petition process failed exacting scrutiny).

it. *Cf. Minn. Citizens Concerned for Life, Inc.*, 692 F.3d at 876 ("there must be a relevant correlation or substantial relation between the governmental interest and the information required to be disclosed"); *Wisc. Right to Life*, 751 F.3d at 841. As discussed above, the new LM-10 form requires employers to reveal, among other things, assistance received from outside counsel in "developing personnel policies or practices" and "conducting a seminar for supervisors or employer representatives." Knowing that their employer was assisted by outside counsel in developing its personnel policies or in training its supervisors (both reportable events under the Rule) does not help employees develop "independent and well-informed conclusions regarding union representation and collective bargaining" (81 Fed. Reg. 16001), any more than knowing that their employer was assisted in those activities by its own research on the internet, or by obtaining assistance from an in-house labor attorney or in-house labor expert (none of which need be reported under the Rule). The underlying purpose of the statute is not served by the burdens placed on employers' speech by the Rule.

(d) The Rule is otherwise invalid under the First Amendment's overbreadth doctrine.

A showing "that a law punishes a substantial amount of protected free speech, judged in relation to the statute's plainly legitimate sweep, suffices to invalidate all enforcement of that law," unless the law is otherwise narrowed so as to remove the threat or deterrence to protected speech. *Virginia v. Hicks*, 539 U.S. 113, 118–19 (2003). As noted by the Supreme Court, many individuals, "rather than undertake the considerable burden (and sometimes risk) of vindicating their rights through case-by-case litigation, will choose simply to abstain from protected speech, harming not only themselves but society as a whole, which is deprived of an uninhibited marketplace of ideas." *Id*. The overbreadth doctrine, "by suspending all enforcement of an overinclusive law, reduces these social costs caused by the withholding of protected speech." *Id*.

Whatever rationale DOL chooses to advance in favor of the expanded reporting requirement in the new Rule, it plainly punishes a substantial amount of protected employer speech by both employers and their advisors, and must therefore be set aside. [27]

(e) The Rule violates Plaintiffs' rights to Freedom of Association.

All of the above grounds for establishing a violation of Plaintiffs' First Amendment rights equally establish a violation of Plaintiffs' Right to Freedom of Association, which is likewise protected by the First Amendment. *See Buckley v. Valeo*, 424 U.S. 1, 74 (1976); *NAACP v. Alabama*, 357 U.S. 449, 462 (1958) (compelled disclosure of membership created a restraint upon the exercise of freedom of association).

Although the Supreme Court in *Buckley* indicated that an association could be required to prove specific threats to its members arising from public disclosure, as occurred in *NAACP v. Alabama*,, at least one of the Plaintiff associations in the present case is able to carry that burden. Specifically, as indicated in the attached affidavit, Plaintiff ABC and its members nationally have been the subject of many violent, union-sponsored attacks and other coercive union tactics over recent decades. Brubeck Aff. ¶ 3–5. This history of violence, threats and coercion against ABC and its members has been documented in book form by ABC National's former general counsel, Samuel Cook. *See* Samuel Cook, FREEDOM IN THE WORKPLACE (2005). Among the numerous incidents of attacks described in the book are dozens of mass demonstrations and

[27] DOL improperly analogizes the new Rule's reporting requirements to the lobbying registration requirements upheld by the Supreme Court in *U.S. v. Harriss*, 347 U.S. 612 (1954). The *Harriss* decision actually support's Plaintiffs' challenge to the new Rule, because the Court *rejected* the government's claim that the Act should require disclosures from persons who sought to influence legislation without themselves "soliciting, collecting or receiving contributions." *Id*. at 624. Instead the Court adopted a narrower definition of "persons to whom applicable" in the Lobbying Act, holding that such persons themselves must have solicited, collected, or received contributions to trigger their duty to comply with the Act's discslosure requirements. This holding is inconsistent with DOL's new attempt to impose reporting requirements on consultants who do not themselves communicate with employees.

violent pickets targeting ABC members, destruction and vandalism of ABC member property, and personal assaults. *Id*. at 387 (index to descriptions of union violence referenced throughout the book). Brubeck Aff. ¶¶ 3-5.[28] As a result of the foregoing history of violence against ABC and its members by agents of labor organizations, some ABC members are reluctant to disclose their membership publicly. The compelled disclosure of ABC's membership through the reporting requirements of the new DOL Rule will therefore discourage some construction contractors from joining ABC, thereby infringing on their right to freedom of association.

4. The Rule Is Contrary To Law Because It Impermissibly Interferes With Attorneys' Ethical Duty To Maintain Client Confidentiality, And Otherwise Violates Section 203 Of The LMRDA.

The official instructions attached to the new Form LM-20 require that the persuader "provide a detailed explanation of the terms and conditions of the agreement or arrangement" with the client. 81 Fed. Reg. 16046. In addition to requiring that confidential information be disclosed, the instructions also state that if any agreement or arrangement is contained in a written instrument, or has been reduced to writing, the persuader must attach a copy of it to the form. Where the persuader is an attorney who has limited his conduct to advice to an employer client, now deemed reportable under the new Rule, any written evidence of the confidential

[28] The violence and threats against ABC members have continued in the years since the publication of Mr. Cook's book. Just last year, ABC property was destroyed by arson after an ABC chapter spoke out in support of passage of a "right to work" law. *See* Bob Kasarda, *Arson suspected at Dick's Sporting Goods construction site in Valparaiso [Indiana]*, THE N.W. INDIANA TIMES (April 6, 2015), *available at* http://www.nwitimes.com/news/local/porter/arson-suspected-at-dick-s-sporting-goods-construction-site-in/article_f4c4f47d-f3b9-5ace-a58c-83e908ee627a.html (last accessed March 28, 2016). The year before that, union agents were convicted of firebombing an ABC member's construction site. *See* Julie Shaw, *Irtonworkers 'hit man' pleads guilty*, PHILY.COM (Sept. 25, 2014), *available at* http://articles.philly.com/2014-09-25/news/54284405_1_ironworkers-case-union-members-other-ironworkers (last accessed March 28, 2016) (describing the arson committed by agents of the Ironworkers Union against an ABC member's construction of a Quaker meetinghouse near Philadelphia, PA). Brubeck Aff. ¶ 5. Just last week ABC members reported that they had been threatened with loss of business if their membership in the association was publicly disclosed. *Id*.

communication between attorney and client confirming the arrangements, and any written agreement between them, is subject to disclosure, as is the substance of the confidential advisory communication.

Attorneys who disclose such confidential client information under the new Rule will be in violation of Rule 1.6(a) of the Arkansas Rules of Professional Conduct, which provides that a "lawyer shall not reveal information relating to the representation of a client unless the client gives informed consent." Rule 1.6 (c) provides that a "lawyer shall make reasonable efforts to prevent the inadvertent or unauthorized disclosure of, or unauthorized access to, information relating to the representation of a client."

Recognizing the ethical dilemma posed by DOL's new Rule, the American Bar Association opposed the proposed version of the Rule in 2011, explaining that it is "clearly inconsistent with lawyers' existing duties outlined in Model Rule 1.6 and the binding state rules of professional conduct that mirror the ABA Model Rule." *See* Administrative Record, Comment Letter from Wm. T. (Bill) Robinson III, President of the American Bar Association (September 21, 2011), available at www.regulations.gov. The ABA stated that it was "defending the confidential client-lawyer relationship and urging the Department not to impose an unjustified and intrusive burden on lawyers and law firms and their clients." As the ABA further explained:

> The range of client information that lawyers are not permitted to disclose under ABA Model Rule 1.6 is broader than that covered by the attorney-client privilege. Although ABA Model Rule 1.6 prohibits lawyers from disclosing information protected by the attorney-client privilege and the work product doctrine, the Rule also forbids lawyers from voluntarily disclosing other non-privileged information that the client wishes to keep confidential. This category of non-privileged, confidential information includes the identity of the client as well as other information related to the legal representation, including, for example, the nature of the representation and the amount of legal fees paid by the client to the lawyer.

Id.

All fifty states and the District of Columbia follow the ABA's Model Rule 1.6 (or a similar rule) and maintain ethical restrictions against disclosing client identity or fees paid by the client without the client's permission. Arkansas Rule 1.6, like the Model ABA Rule, does contain an exception that allows an attorney to disclose confidential information "to comply with other law or a court order." However, because Section 203 of the LMRDA does not require that attorneys reveal confidential client information to the government, contrary to the new Rule, the "compliance with law" exception does not apply. In fact, the existence of Section 204 in the LMRDA demonstrates Congress' intent that the statute not interfere with attorneys' duty to protect confidential communications and information.[29]

On February 4, 2016, the Arkansas Attorney General signed a letter in opposition to DOL's proposed rule, stating that the new Rule:

> would undermine [attorney-client] protections by requiring the reporting of advice related to persuasion of employees, regardless of whether the lawyers who provide the advice communicate with anyone other than their clients. These new reporting requirements would put lawyers in our states in an ethical dilemma: An attorney must either risk professional disciplinary action by disclosing employer confidences or risk liability under the LMRDA by refusing to disclose employer confidences.

Letter Dated February 4, 2016 in Opposition to the Proposed Persuader Exemption Rule, available at state.ark.org/eeuploads/ag/letter_to_Administrator_Shelanski.pdf. Even where an exception to Model Rule 1.6 permits disclosure of confidential information to comply with another law, rulings in several states require an attorney to resist disclosing a client's identity in

[29] Several of the Plaintiff associations are national in their scope and have members who are labor relations attorneys belonging to the California State Bar. California's version of Rule 1.6 is arguably the strictest in the nation and contains no exception for "other laws."

required government filings unless the attorney first receives a court order requiring the disclosure.[30]

Even more serious is the position of a lawyer sued by DOL for failing to report alleged persuader services. In order to disprove such allegations—and thus avoid potential criminal liability—the lawyer will be forced to disclose why the lawyer performed the services at issue, because of the new Rule's subjective test as to the purpose of the lawyer's advice. Such a disclosure, of course, will violate the lawyer's ethical duty not to disclose confidential information, leading potentially to disciplinary proceedings. Given these risks and potential consequences, many attorneys can reasonably be expected to decline to provide labor relations advice and legal services to employers, causing employers to commit unfair labor practices inadvertently, or to give up their right to communicate with their employees to avoid the commission of unfair labor practices.

Section 203 of the LMRDA provides a privilege against disclosure of "any information which was lawfully communicated to such attorney by any of his clients in the course of a legitimate attorney-client relationship." The Final Rule violates Section 203 by requiring labor lawyers to choose between (1) revealing privileged or confidential information and exposing themselves to ethical sanctions; or (2) refusing to reveal such information and risking criminal charges. New Forms LM-10 and LM-20 require an employer and its outside counsel, respectively, to divulge specific assistance received from the attorney.

Certainly the forms require a public report on a client's confidential plans to communicate with its employees about union organizing activities and collective bargaining,

[30] *See, e.g. Mass. Ethics Opinion* 94-7 (1994); *Washington Ethics Opinion* 194 (1997); *Florida Ethics Opinion* 92-5 (1993); Georgia Ethics Opinion 41 (1984); and *D.C. Ethics Opinion* 214 (1990) to the effect that only if a court finds that the confidentiality rule does not apply and orders disclosures is the attorney's ethical duty satisfied.

even in the absence of any specific union organizing campaign. The LM-10 and LM-20 forms require the public disclosure of details such as "drafting, revising or providing a speech for presentation to employees" and "drafting, revising, or providing written materials for a presentation, dissemination or distribution to employees." These matters fall within the attorney-client privilege. *Gipson v. Sw. Bell Tel. Co.*, (2009 U.S. Dist.) Lexis 25457, *43–44 (D. Kan. 2009) (privilege applies where "the specific nature of services provided" must be revealed); *Clarke v. American Commerce National Bank*, 974 F.2d 127, 129 (9th Cir. 1992) (statements that reveal the nature of the client's motive in seeking representation fall within the privilege). For this reason as well, the new Rule violates the Act and must be enjoined.

5. The Rule Is Unconstitutionally Vague Under The Fifth Amendment.

By abandoning the previous objective test for "advice" in favor of one that depends upon a subjective motive unmoored to any recognized definition of the term, DOL has issued a Rule that deprives employers and their advisors of any fair warning of what conduct on their part is likely to be subjected to criminal penalties under 29 U.S.C. § 439.

This level of ambiguity in a statute with severe criminal sanctions is unconstitutional under the Fifth Amendment. Regulations with such sanctions "must define the criminal offense with sufficient definiteness that ordinary people can understand what conduct is prohibited and in a manner that does not encourage arbitrary and discriminatory enforcement." *Koldender v. Lawson*, 461 U.S. 352, 357 (1983). This standard of clarity is required for regulations with criminal penalties because it is "a basic principle of due process that an enactment is void for vagueness if its prohibitions are not clearly defined." *Grayned v. City of Rockford*, 408 U.S. 104, 108 (1972). Thus, laws are unconstitutionally vague if we are "left to guess" at their meaning. *Id*. Under this standard, a speaker cannot "be at the mercy of the varied understanding of his hearers

and consequently of whatever inference may be drawn as to his intent and meaning." *Thomas v. Collins*, 323 U.S. 516, 535 (1945).

To cite only a few of the many examples referred to in the Administrative Record, employers can only guess whether reporting is required when they ask a lawyer or human relations consultant to advise them as to what they may "lawfully" say if what they say is at all persuasive to employees. Or whether a guest speaker at a trade association dinner meeting must file a report if he or she speaks about the NLRB's recent changes to its union election rules and recommends that employers take immediate steps to prepare for union organizing? Or when the employer asks a benefits consultant to recommend cost-effective improvements to the employer's group health insurance plan, knowing that such improvements could help the employer reduce the desire of employees to organize a union? No employer (or advisor) can safely predict the answers to these questions under DOL's new interpretation of Section 203 — yet criminal fines and prison sentences for employers, trade associations, and law firm leaders depend on the answers. The new Rule must be set aside on this additional ground.

6. DOL Has Failed Adequately To Analyze The Adverse Impact Of The New Rule On Small Employers, As Required Under The Regulatory Flexibility Act.

Plaintiffs are also likely to succeed on the merits of their claim that the DOL has failed to conduct a sufficient regulatory flexibility analysis that complies with the RFA, 5 U.S.C. § 611, and this Court should remand the Rule to the DOL as provided in the RFA. Regulatory Flexibility Act, 5 U.S.C. § 611.

The gist of DOL's regulatory cost-benefit analysis is that the proposed change in interpretation of Section 203(c), which potentially affects every private business, many trade and business associations, every labor relations consultant, and most law firms in the United States,

will burden the economy in an amount under $10 million dollars. The flaws in this analysis are breathtaking.

DOL reasons that the only businesses affected by the change in interpretation will be those that retain consultants during union representation election campaigns and in group seminars. This assumption is directly contradicted by the Rule itself, which states that its requirements are NOT limited to any union organizing campaign or labor dispute. DOL nevertheless estimates that only 2,601 employers will enter into reportable persuader agreements (three quarters of the number of union elections conducted each year by the NLRB and the National Mediation Board). In reality, when one clearly examines the breadth and scope of this new Rule, the correct number of employers potentially covered by the new Rule is in the millions.[31]

To the 2,601 employoers alleged to be affected by this new Rule, the DOL then applies an absurdly low estimate of how long it will take each of the affected employers to gather the necessary financial and other information and to fill out the form. The estimate is one hour per filing. To the contrary, evidence in the Administrative Record indicates that hundreds of hours would have to be spent by employers and their advisors to determine whether each particular piece of advice does or does not meet DOL's vague and overbroad test for persuader activity.

DOL has, according to its own record, undertaken no analysis to determine the real world effects of the Department's new interpretation, even though the tools for such an analysis are readily available to it. As noted in the Chamber of Commerce's comments on the NPRM, even if the DOL's one-hour estimate is accurate and the employer finds an attorney willing to accept $87.59 per hour to do this work, the economic burden will exceed $200 million because the Rule

[31] U.S. Census, Statistics of U.S. Business data as of 2008 report 2,536,606 businesses in the U.S. with five or more employees. Only 18,469 businesses had 500 or more employees.

will affect millions of employers more than the 2,601 on which the DOL's estimate is based. The Chamber of Commerce estimated in its comments that total compliance costs for all affected U.S. businesses were between $910 million to $2.1 billion in the first year under the Rule and $285 million to $793 million each year thereafter. A more recent cost estimate published by the Manhattan Institute estimates the total burden for the first year would be between $7.5 billion and $10.6 billion, with subsequent annual costs amounting to between $4.3 billion and $6.5 billion. The total cost over a ten-year period could be $60 billion.[32]

In addition to these omissions, DOL has failed to account for the impact of impending changes DOL has announced for the LM-21 annual report form, which are inextricably linked to the new Rule. Indeed, it was improper for DOL to proceed to issue the new Rule making drastic changes to the Forms LM-10 and LM-20 without analyzing the impact of the planned changes to the LM-21. The changes to the LM-21 will be exponentially magnified as a result of the new Rule, and the Department was obligated to consider these linked provisions in their totality. *See Ctr. for Biological Diversity v. EPA*, 722 F.3d 401, 409–10 (D.C. Cir. 2013) (rejecting bifurcated rulemaking which the agency had inadequately justified).

DOL has not rationally addressed these concerns in the Rule, and the Rule must be set aside on this ground as well. Accordingly, the Court should remand the Rule to the DOL for a new regulatory analysis under the Regulatory Flexibility Act, 5 U.S.C. § 611(a)(4).

B. The Plaintiffs Meet the Remaining Three Criteria for a Preliminary Injunction in the Eighth Circuit.

1. Plaintiffs Will Suffer Irreparable Harm Unless The Rule Is Enjoined.

[32] Diana Furchtgott-Roth, *The High Costs of New Labor Law Regulations*, MANHATTAN INSTITUTE (Jan. 27, 2016), available at http://www.manhattan-institute.org/html/high-costs-proposed-new-labor-law-regulations-5715.html (last accessed March 28, 2016).

Once First Amendment rights have been chilled, there is no effective remedy, and it is well established in the Eighth Circuit that infringement of First Amendment rights, "standing alone," constitutes irreparable harm. *See Child Evangelism v. Minneapolis Special Sch. Dist.*, 690 F.3d 996, 1000 (8th Cir. 2012) (citing *Lowry ex rel. Crow v. Watson Chapel Sch. Dist.*, 540 F.3d 752, 762 (8th Cir.2008) ("The loss of First Amendment freedoms, for even minimal periods of time, unquestionably constitutes irreparable injury.") (quoting *Elrod v. Burns*, 427 U.S. 347, 373 (1976) (plurality)). Moreover, a person who fails to comply with the new Rule is subject to criminal sanctions and imprisonment. Therefore, injunctive relief is necessary to prevent irreparable harm.

As the attached affidavits demonstrate, the injuries that will be suffered by Plaintiffs and their members as a result of the DOL's Rule will be irreparable because they cannot be effectively redressed by this Court and cannot be undone. The chilling effect of the Rule will deter many employers from seeking counsel regarding matters pertaining to union organizing and exercising their free speech rights. Entities complying with the Rule will be required to disclose confidential and privileged attorney-client communications and other confidential information. Once a report has been submitted to DOL, the information contained in the report becomes a public record and cannot be recalled.

2. DOL Will Not Be Harmed By A Preliminary Injunction.

An order for injunctive relief in the present case will simply preserve the status quo and temporarily retain the same interpretation of the advice exemption that has been in effect for more than 50 years. There is no evidence that employees will be harmed as a result of this relief. In fact, the great majority of union elections conducted by the NLRB have been won by unions

and that percentage has increased in recent years.[33] *See Election Reports – FY 2015*, NAT'L LABOR REL. BOARD, *available at* https://www.nlrb.gov/reports-guidance/reports/election-reports/election-reports-fy-2015 (last accessed March 28, 2016). Thus, there is no harm in requiring the DOL to continue to follow its previous interpretation until this matter can be concluded.

In this regard, mere delay does not constitute sufficient harm to deny injunctive relief. *See e.g., Rogers Group, Inc. v. City of Fayetteville*, 639 F.3d 784, 789–90 (8th Cir. 2010) (delay in enforcement of new city ordinance); *Glenwood Bridge v. City of Minneapolis*, 940 F.2d 367, 372 (8th Cir. 1991) (delay caused by grant of injunctive relief was insufficient to deny request); *Coteau Properties Co. v. Dep't of Interior*, 53 F.3d 1466, 1480 (8th Cir. 1995) (government agency seeking to enforce a new decision would suffer no harm from delay).

3. The Public Interest Will Be Furthered By Injunctive Relief.

Injunctive relief is necessary to protect the public interest. Public policy demands that a governmental agency be enjoined from acting in a manner contrary to the law. *See, e.g., Child Evangelism Fellowship of Minnesota*, 690 F.3d at 1004 (likely First Amendment violation by school district favored granting injunction); *Glenwood Bridge*, 940 F.2d at 372 (public policy of ensuring a lawful bidding process outweighed city's need to complete construction project expeditiously). Beyond that, it is in the public interest to continue to promote robust debate and the free and unfettered exchange of information regarding the issue of union organizing and

[33] Indeed, from 2003 to 2015, the percentage of union victories in NLRB representation elections increased from 58.3% to 69%. *Compare* NLRB Election Reports, Year-End 2003 and 2015, *available at* http://www.nlrb.gov/reports-guidancehttp://www.nlrb.gov/reports-guidancehttp://www.nlrb.gov/reports-guidance.

collective bargaining. Moreover, the DOL's Rule violates fundamental liberties espoused in the First and Fifth Amendments to the United States Constitution.

VII. CONCLUSION

In light of the foregoing, the DOL should be enjoined from enforcing its new Rule.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, J. Bruce Cross, hereby certify that on this **1st day of April, 2016**, one true and exact copy of the foregoing **Memorandum of Law in Support of Plaintiffs' Motion for Preliminary Injunction** was filed electronically with the Clerk of Court using the CM/ECF system, which shall send notification of such filing, and via U.S. Mail, to the following:

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