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, et al,** **DEFENDANTS.**	**Case No. 4:16CV-00169 (KGB)**

PLAINTIFFS' REPLY IN SUPPORT OF MOTION FOR PRELIMINARY INJUNCTION

J. Bruce Cross, Ark. Bar No. 1974028
Abtin Mehdizdegan, Ark. Bar No. 2013136
CROSS GUNTER, WITHERSPOON & GALCHUS, P.C.
500 President Clinton Ave #200
Little Rock, AR 72201
(501) 371-9999 | (501) 371-0035 (fax)
bcross@cgwg.com | abtin@cgwg.com

Maurice Baskin (pro hac vice)
D.C. Bar No. 248898
LITTLER MENDELSON, P.C.
815 Connecticut Ave., N.W.
Washington, D.C. 20006
(202) 772-2526
mbaskin@littler.com

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I. INTRODUCTION

Plaintiffs have demonstrated by citation to the text of the Act, legislative history, and controlling judicial authority in the Eighth Circuit, that DOL's new Rule violates statutory and constitutional rights of employers and their advisors that have been preserved for more than fifty years under the LMRDA's "advice" exemption, until now. Plaintiffs have further shown that the new Rule threatens Plaintiffs and their employer and advisor members with imminent irreparable harm justifying preliminary injunctive relief, both locally and nationally, particularly with regard to the content-based burdens imposed on speech, which the Eighth Circuit has found to be *per se* irreparable harm.

In response, DOL's Opposition ("DOL Opp.") does not contest Plaintiffs' standing to sue or the ripeness of this action, both of which are undeniable. DOL misstates the facts and law governing the merits of the new Rule, however, and fails to refute Plaintiffs' strong showing of likelihood of success, which fully satisfies and exceeds Eighth Circuit standards for preliminary injunctive relief. In particular, DOL fails to reconcile the new Rule with the Eighth Circuit's holding in *Donovan v. The Rose Law Firm* as to the broad scope of the advice exemption, a holding that is fundamentally at odds with the basic premise of the Rule. DOL also fails to address recent First Amendment case law in this Circuit and at the Supreme Court striking down similar content-based reporting requirements and similar burdens on speech.

DOL's specious claim that Plaintiffs' showing of irreparable harm is "speculative" must also be rejected, and DOL has failed to identify any cognizable harm to the public interest that will result from maintaining the status quo until this litigation is finally resolved. The balance of hardships overwhelmingly favors the Plaintiffs in this case, and the Court should therefore grant the motion for preliminary injunction.

II. ARGUMENT

A. Contrary To DOL's Opposition, Plaintiffs Are Likely To Succeed On The Merits Of Their Claims That The New Rule Is Unlawful.

The parties agree that 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 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); *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.").

Plaintiffs have no difficulty meeting the Eighth Circuit's "heightened standard" for determining likelihood of success where a preliminary injunction is sought against a statute or regulation. *Planned Parenthood Minn., N.D., S.D. v. Rounds*, 530 F.3d 724, 732 (8th Cir. 2008) (*en banc*). While DOL's Opposition makes much of this requirement, DOL Opp. at 13–14, the Opposition ignores the numerous cases since *Rounds*, where courts in this Circuit have enjoined government action under the standard set forth in that case. *See, e.g., St. Louis Effort for AIDS v. Huff*, 782 F.3d 1016 (8th Cir. 2015); *Johnson v. Minneapolis Park and Recreation Board*, 729 F.3d 1094 (8th Cir. 2013); *Minnesota Citizens Concerned for Life, Inc. v. Swanson*, 692 F.3d 864, 874–75 (8th Cir. 2012) (*en banc*); *Child Evangelism Felowship of Minn*., 690 F.3d at 1000; *see also Planned Parenthood Arkansas & Eastern Oklahoma v. Selig*, 313 F.R.D. 81, 2015 U.S. Dist. LEXIS 146466 (E.D. Ark. Oct. 2, 2015) (Baker, J.). As Plaintiffs have previously shown, and as further explained below, likelihood of success is overwhelmingly present here, on multiple legal grounds.

1. DOL's Opposition Fails To Overcome The Eighth Circuit's Holding As To The Broad Scope Of The Statutory Advice Exemption And The Plain Meaning Of "Advice."

Plaintiffs Motion contends that, using all the "tools of statutory construction" under Step 1 of *Chevron*, it is clear that the new Rule violates the plain language and Congressional intent underlying the LMRDA.[1] Plaintiffs have specifically pointed out the inconsistency between the new Rule and the Eighth Circuit's holding in *Donovan v. Rose Law Firm*, 768 F.2d 964, 974–75 (1985), establishing that Section 203(c) of the LMRDA creates a "broad" advice exemption from the requirements of Sections 203(a) and (b), not a mere clarification as posited by the new Rule.

In response, DOL's Opposition persists in arguing that the statutory advice exemption does nothing more than "make explicit what was already implicit," relying on opinions of other circuit courts that the Eighth Circuit considered and *rejected*. (DOL Opp. at 18, citing opinions of "other circuits" including *Price v. Wirtz*, 412 F.2d 647, 650 (5th Cir. 1969)). DOL states, with specific reference to the *Price v. Wirtz* interpretation of Section 203(c): "This is Labor's view also." DOL Opp. at 19. DOL could hardly contend otherwise, given the number of times that the Rule itself repeats the erroneous claim that the advice exemption is nothing more than a clarification that does not broadly exempt *all* reports covering the services of an advisor "by reason of . . . giving or agreeing to give advice." *See* 81 Fed. Reg. at 15941, 15950, 15951, cited in Plaintiffs' Memorandum at 6.

DOL wrongly asserts that the statutory construction of the advice exemption underlying the new Rule "has not been squarely addressed by the Eighth Circuit." DOL Opp. at 18. By this

[1] *See also Ragsdale v. Wolverine World Wide, Inc.*, 535 U.S. 81, 91 (2002) (overturning DOL rule on this ground). Alternatively, Plaintiffs have argued that DOL's construction of the advice exemption is not a permissible one based on the language, history, and overall context of the Act, under *Chevron* Step II.

statement, DOL apparently means that the Eighth Circuit did not draw a clear line between reportable "indirect persuasion" and exempt "advice." To the contrary, the Eighth Circuit held that an employer that obtains advice on labor relations issues from a consultant attorney (such as The Rose Law Firm in that case), 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 expressly stated, 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). In addition, if Congress had meant to exempt only pure "legal" advice, as DOL again repeatedly states, then section 203(c) would be superfluous because section 204 of the LMRDA exempts communications subject to the attorney-client privilege.

Confronted with the apparent conflict between the new Rule and the foregoing Eighth Circuit opinion, as well as the contradictions between the new Rule and settled dictionary definitions of "advice" cited in Plaintiffs' opening memorandum, DOL's Opposition misstates the scope of the Rule. Thus, citing 81 Fed. Reg. at 15938-39, DOL erroneously states that "if a consultant discusses the advantages and disadvantages of an employer's proposed course of action, that consultant would merely have provided advice." DOL Opp. at 9. No such reference appears at the pages cited by DOL, or anywhere else in the new Rule.[2] In the same paragraph, DOL's Opposition implies that the Rule only requires reporting if a consultant is "managing" one or more aspects of the employer's anti-union campaign. *Id*. If only this were true. In reality,

[2] A computer search for the phrase "advantages and disadvantages" in the Rule finds that phrase used only with regard to the right of employers to discuss the advantages and disadvantages of unions with their employees. The Rule does NOT preserve the right of consultants to discuss with employers the advantages and disadvantages of a proposed course of action regarding unions, unless the consultants file reports disclosing such advice.

the Rule sweeps broadly to compel disclosure of all manner of "oral or written recommendations regarding a course of conduct," which is the definition of "advice" contained in the Rule itself.[3]

Elsewhere, DOL's Opposition takes issue with its own terminology in redefining the meaning of "advice," which as noted above applies to any oral or written "recommendation." 81 Fed. Reg. at 15937, 15939, and 15941. This is also the plain dictionary definition of advice as discussed in Plaintiffs' Memorandum, at 23. Confronted with the apparent inconsistency between its definition and the various forms of consultant recommendations that the Rule for the first time requires to be reported, DOL's Opposition's only response is a specious one: DOL claims that the plain meaning of the word "recommendation" is not at issue, because "the statutory term is 'advice.'" DOL Opp. at 22. It should be obvious that by requiring a consultant's recommendation to be reported, even though the employer retains the final say over whether to adopt the suggestion, DOL has departed from the commonly accepted meaning of both the terms "advice" and "recommendation." DOL's arguments to the contrary are not well-taken.

DOL's Opposition pays little heed to the legislative history of the LMRDA, which contradicts the stated basis for the Rule. Certainly, DOL's new interpretation is inconsistent with the House Conference Committee Report that describes Section 203(c) as a "***broad exemption***." H.R. Rep. No. 1147 on S. 1555, September 3, 1959 (emphasis added). DOL identifies no legislative history indicating that Congress intended to apply its reporting requirements to the

[3] As one of many examples of reportable conduct that belies the Opposition's *post hoc* attempt to narrow the scope of the Rule, the Rule states that a consultant who drafts or even suggests revisions to a draft employer communication to employees must file reports "if such revisions are intended to increase the persuasiveness of the material." 81 Fed. Reg. at 15938. Indeed, the Rule makes clear that if the consultant plays "any role" in creating or revising such materials (by no means limited to a managerial role), "the only issue is whether there is an object to persuade." *Id*.

drafting and revision of employer communications by consultants or labor lawyers, that only the employer – not the consultant – implements.

Certainly there is no support in the legislative history for DOL's claimed "impetus" for the Rule, *i.e.*, the alleged absence of reporting of "most" agreements or arrangements between employers and their consultants. DOL Opp. at 24. Congress indicated no desire to set any particular benchmark for the number of reports to be filed but merely specified certain types of then-common activities by consultants that Congress believed should be reported. Those "middleman" activites now are no longer common and/or are now subject to the reports that are currently filed. Today most agreements and arrangements with consultants are careful not to exceed the boundaries of giving advice to employers under the old DOL rule, and that is the simple explanation why reports need not be filed. Also contrary to DOL's claim that a central goal of the LMRDA was to promote "transparency," DOL Opp. at 22, because the true goal of the Act as expressed by Congress was to *balance* transparency with the equally important goals of protecting the right of employers to receive advice from experts in labor relations and protecting lawyer-client confidentiality.[4] 81 Fed. Red. at 15977 (admitting that Congress intended to "balance the twin goals of labor-management transparency and the prevention of unnecessary intrusion into labor relations").

DOL's Opposition also inexplicably fails to distinguish the cases cited in Plaintiffs' Memorandum under the Congressional reenactment doctrine. Pl. Mem. at 29. The Supreme Court has held that Congressional silence over a period of decades in response to a settled position by a government agency is a "persuasive" indication of Congressional intent. *See FDA*

[4] The confidential relationship between lawyer and client has been described as "sacrosanct" and "one of the bastions of an ordered liberty. *See* Epstein, The Attorney-Client Privilege and the Work-Product Doctrine, at 2 (3d ed. 1997).

v. Brown & Williamson Co., 529 U.S. 120, 156–58 (2000); *see also NLRB v. Bell Aerospace*, 416 U.S. 267, 274–75 (1974); *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). DOL's failure to distinguish or oppose these cases effectively concedes their applicability here, and reaffirms that DOL's previous, judicially approved enforcement of the LMRDA advice was the result intended by Congress.

Thus, contrary to DOL's Opposition, and using all the tools of statutory construction, the plain meaning of advice cannot be limited to those circumstances where an advisor "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." DOL Opp. at 19; *see also* 81 Fed. Reg. at 16044. Rather, as Plaintiffs have argued, the Act squarely permits consultants to advise employers not only on "what [an employer] may lawfully say to employees," but also on what messages may lawfully *persuade* employees. Senate Hearing at 128, Testimony of Archibald Cox ("Payments for advice are proper . . . [even though] if the employer acts on the advice it may influence the employees."); *see also UAW v. Dole*, 869 F.2d 616, 619, n.4 (D.C. Cir. 1989) ([T]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").

Also contrary to DOL's Opposition, the drastic narrowing of the long held meaning of advice is not necessary to give full meaning to the term "indirect" persuasion. DOL Opp. at 36. As explained in Plaintiffs' Memorandum, at 26, n.14, indirect persuasion has previously been held to refer to those statements made by consultants that are only subtly persuasive, even though they appear in a communication that is transmitted directly by the persuader to the employees.

See Master Printers of America v. Marshall, 1980 U.S. Dist. LEXIS 15081 (E.D. Va. 1980) (dividing into "direct" and indirect" categories certain magazine articles, based not on their mode of delivery by the persuader—all of the articles were delivered directly to the employees—but based solely on whether the content of their messages was subtle vs overt).

It must be reiterated that the new Rule is not restricted in its scope to consultant activities that lie at the "fringes of the definition of advice," DOL Opp. at 22, but also sweeps into the reportable category a host of activities that cannot reasonably be construed as anything but advice, regardless of the indirect objective of the advisors. Recommending drafts or revisions of communications materials, or helping employers select from "off the shelf" materials, now deemed by the new Rule to be examples of persuader activity, are undeniably forms of advice under the plain meaning of that term. Conducting seminars in which the consultant advises employers that they may engage in lawfully persuasive tactics and strategies cannot possibly be anything but advice. Recommending personnel policies, even if such policies are implemented by employers with the intent to make unions unnecessary in the workplace, likewise must fall within the advice exemption under any permissible construction of that term. DOL's Opposition does not address any of these plain language issues under its overbroad rule and/or fails to come up with a "permissible" construction of advice that does not exempt such conduct. In summary, contrary to DOL's Opposition, the Rule eviscerates the advice exemption and must be enjoined.

2. DOL's Opposition Fails To Justify The Numerous Arbitrary And Capricious Aspects Of The New Rule.

Plaintiffs Memorandum explained that the new Rule setting aside more than fifty years of enforcement precedent is arbitrary and capricious because it leads to illogical and absurd results and for which it is impossible for employers and their advisors to comply. Pl. Mem. at 26–28. In response, DOL relies on what it claims to be an agency's prerogative to reverse course, DOL

Opp. at 23, but nevertheless fails to meaningfully address the numerous logical inconsistencies inherent in the Rule's new interpretation of the LMRDA.[5] Indeed, DOL does not even attempt to account for most of the absurd outcomes resulting from the new Rule, as described at length in Plaintiffs' Memorandum (at 27–28), including the following:[6]

- DOL fails to explain the logic behind allowing consultants to provide "off the shelf" materials to employers without reporting; while mandating that consultants must file reports if they actually *advise* the employers by helping them select the right materials for their campaign. In other words, consultants *lose* the "advice" exemption by actually giving advice. 81 Fed. Reg. at 15938

- DOL also does not explain why a trade association should be allowed to help employers select "off the shelf" material, but should lose that exemption if the association staff advise the employer how to tailor the material to the employer's particular needs. Again, the act of giving advice deprives the association of the "advice" exemption. *Id*.

- DOL again fails to explain why 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. As noted above, the Rule says that "off the shelf" materials are not reportable because they are not particularized to any individual employer; yet the same logic apparently does not apply to seminars that are likewise not particularized to any individual employer. *Id*. at 15938-39.

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[5] Contrary to DOL's Opposition, the right of agencies to change course is not unlimited. DOL Opp. at 15. In particular, the Supreme Court has cautioned against allowing agencies to rely on factors which Congress did not intend the agency to consider; or to fail to consider important aspects of the problem; or to rely on explanations that run counter to the evidence; or explanations that are 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 Perez v. Mortgage Bankers Ass'n*, 575 U.S. __, 135 S. Ct. 1199, 2015 U.S. LEXIS 1740, *21–22 (March 9, 2015).

[6] DOL's Opposition attempts only to justify two of the apparent inconsistencies cited in Plaintiffs' Memorandum. DOL Opp. at 20. First, DOL claims that there is a recognizable distinction (though there is not) between consultants' creation of persuader materials (reportable) and lawyers counseling employers as to what the NLRB says is lawful (unreportable), without addressing at all the Rule's requirement that lawyers must report advice as to how employers can *lawfully persuade*. DOL also claims without support that there is some sort of well recognized distinction between reportable "push" surveys and non-reportable "attitude" surveys. There is not; and DOL has in any event declared that even attitude surveys will be reportable if they "concern employee activities during a labor dispute."

- Likewise, DOL does not explain why trade associations can sponsor union avoidance seminars under the new Rule without reporting, but if the associations' own staff presents the same advice as the consultants, then reporting will be required. Meanwhile, 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. *Id*.

- DOL also fails to justify the requirement that consultants file reports if they develop or implement personnel policies or actions with the object to persuade employees. The Rule states that no reporting is required if the policies only "subtly" affect or influence the attitudes or views of the employees. There is no logical difference between these two situations. *Id*. at 15939.

- As has also been pointed out in recent testimony before the House Education and Labor Committee, the new Rule declares that representation of an employer in collective bargaining is not reportable, but if the bargaining representative advises the employer how to communicate its bargaining proposals to the workforce (often an essential aspect of collective bargaining) reporting will apparently be required. See Testimony of Joseph Baumgarten, Hearing: The Persuader Rule," Subcommittee on Health, Employment, Labor, and Pensions, April 27, 2016, available at http://docs.house.gov/Committeehttp://docs.house.gov/Committee.

What all of these examples have in common is that DOL is picking winners and losers in the advice sweepstakes, based not on any principled definition of the statutory term, but based on DOL's arrogation to itself of the right to change the policy directive Congress wrote into the statute. It must be recalled that the statute does not merely exempt "some" advice, or only "legal" advice, or only non-persuasive advice. Section 203(c) expressly declares that NO report shall be required by reason of a person's giving or agreeing to give ANY advice to an employer.

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.

3. DOL's Opposition Ignores The Eighth Circuit's Controlling First Amendment Precedent Under Which The New Rule Must Be Found Unconstitutional.

Plaintiffs' Memorandum showed that the new Rule violates the First Amendment to the United States Constitution, which 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. Gissel Packing Co.*, 395 U.S. 575, 617–18 (1969); *see also Chamber of Commerce v. Brown*, 554 U.S. 60 (2008) (applying First Amendment principles to Section 8(c) of the NLRA, which in turn is re-codified by Section 203(f) of the LMRDA). Plaintiffs cited numerous Supreme Court and Eighth Circuit cases that compel a finding that the new Rule unlawfully burdens the speech of employers and advisors based upon its content; and that the Rule unlawfully compels speech in the form of the overbroad reports that far exceed any legitimate government interest (as evidenced by the absence of any such reporting requirement for more than fifty years).

In response, DOL's Opposition fails to address at all the controlling First Amendment decisions of the Eighth Circuit, such as the *en banc* ruling in *Minn. Citizens Concerned for Life, Inc. v. Swanson*, 692 F.3d at 874–75. That case held that a governmental reporting requirement imposed on corporations making independent political expenditures violates the First Amendment. Citing *Citizen's United v. FEC*, 130 S.Ct. 876, 898 (2010), the Eighth Circuit observed: "Minnesota's law does not prohibit corporate speech. The law does distinguish among different speakers." 692 F.3d at 871. Among other burdens, the court described as "most onerous" the ongoing reporting requirements of Minnesota's law: "Under [the] regulatory regime, an association is compelled to decide whether exercising its constitutional right is worth the time and expense of entering a long-term morass of regulatory red tape." The court further held that the reporting law "manifestly discourages" regulated entities with limited resources

from "engaging in protected political speech." *Id*. at 874. The Eighth Circuit further considered and rejected the government's defense, mirroring that of DOL's Opposition here, that businesses are already required to file reports under the tax laws. The court held: "Unlike compliance with the mandatory tax laws, the laws at issue here give [businesses] a choice – either comply with cumbersome ongoing regulatory burdens or sacrifice protected core First Amendment activity. This is a particularly difficult choice for smaller businesses and associations for whom political speech is not a major purpose nor a frequent activity." *Id.*; *see also Virginia v. Hicks*, 539 U.S. 113, 118–19 (2003), previously cited in Plaintiffs' Memorandum.

All of the foregoing reasons adopted by the Eighth Circuit in striking down Minnesota's reporting law apply equally if not more so to DOL's Persuader Rule. Indeed, the DOL Rule is actually more egregious than Minnesota's law from a First Amendment perspective, because the Rule is not "content-neutral" as Minnesota's law was. Only those who communicate the messages sought by employers with regard to unionization are required to file persuader reports. Contrary to DOL's Opposition, unions are not required to file similar reports detailing the substance of their use of persuaders, even though they regularly pay individuals known as "salts" or so-called "union front organizations" to act as undisclosed "middlemen" on the unions' behalf. *See* Vernuccio, "Attack of the UFOs Alt-labor, worker centers, and the rise of Union Front Organizations," (Capital Research Center 2013).[7]

[7] DOL mistakenly compares the LM-2 reports that unions are required to submit annually to the LM-10, LM-20, and LM-21 reports that employers and consultants must file under the new rule. (DOL Opp. at 42, n.14). The Union reports do not disclose the consultants' efforts to advise them with regard to organizing or persuading employees and have an entirely different purpose: to make sure that unions are accountable to their members in the expenditure of the employees' dues money. Only employers and employer consultants – not unions - are required to publicly disclose their efforts to communicate with employees with the advice of outside consultants.

As Plaintiffs further pointed out in their Memorandum, Pl. Mem. at 34–35, the Supreme Court has recently reaffirmed that content-based governmental regulation of speech is subject to strict scrutiny and must be struck down in the absence of a compelling government interest, narrow tailoring to promote that interest, and use of the least restrictive alternative. *Reed v. Town of Gilbert*, 136 S. Ct. 2218, 2227 (2015); *see also McCullen v. Coakley*, 134 S. Ct. 2518, 2531 (2014); *United States v. Playboy Entm't Grp., Inc*., 529 U.S. 803, 811 (2000); *Riley v. Nat'l Fed'n of Blind*, 487 U.S. 781, 798–801 (1988). Again, DOL's Opposition fails to distinguish or even address this settled First Amendment doctrine and must be deemed to have conceded it.

Instead of addressing current and controlling law in this Circuit or in the Supreme Court, DOL's Opposition relies almost exclusively on the obsolete appeals court decisions that the Eighth Circuit rejected in *Donovan v. The Rose Law Firm*.[8] Those cases are all more than thirty years old and each involved only the narrow category of "direct" persuader activity which is not at issue here. Most importantly, the writers of those opinions did not have the benefit of analyzing the persuader reporting rules under the case law that informs First Amendment doctrine today. Specifically, the cases on which DOL relies were decided long before *Citizen's United, Reed*, or *Minnesota Citizens Concerned for Life* became law. The cases on which DOL relies are thus of no value in this Circuit or in this century. The stale cases relied on by DOL clearly have no application to DOL's very different new Rule.

In addition, the compelling governmental interest that the old persuader cases found was based upon the clear desire of Congress to expose the fact that consultant middlemen who

[8] DOL cites and discusses at length *Master Printers of Am. v. Donovan*, 751 F.2d 700, 703–10 (4th Cir. 1984); *Wirtz v. Fowler*, 372 F.2d 315, 334 (5th Cir. 1966); *Humphreys, Hutcheson and Moseley*, 755 F.2d 1211, 1219–23; *Master Printers Ass'n v. Donovan*, 699 F.2d 370, 371 (7th Cir. 1983).

engaged in direct communications with employees were, in fact, speaking on behalf of their employers. Here, that governmental interest is not present in the challenged aspects of the new Rule because the Rule is for the first time requiring consultants to file reports when they do not communicate with employees at all, and there is no confusion among employees that their employers are the source of any persuader communications. Also in the previous cases, the old persuader rule was narrowly tailored to meet the government's objective because the rule applied only to communications from persuaders to employees. That narrow tailoring has been discarded under the new Rule, which applies the reporting requirements much more broadly, and contrary to the statutory advice exemption, to consultants who merely give advice to employers and do not communicate at all with employees. Finally, to the extent that the old persuader cases accepted the government's justification of the need for "transparency," DOL Opp. at 25, this justification no longer satisfies strict scrutiny as a matter of law. *See McIntyre v. Ohio Elections Commission*, 514 U.S. 334, 348 (1995) ("The 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.").

Finally, DOL's Opposition also ignores the fact that all of the previous persuader cases focused solely on the First Amendment concerns of the consultant persuaders. Here, on the other hand, Plaintiffs represent many thousands of employers whose rights of free speech are being chilled by the overbroad reporting requirements of the new Rule. As previously noted in Plaintiffs' Memorandum, the new LM-10 employer reporting form compels significantly 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. For this reason as well, DOL's new Rule violates the free speech rights of many employers in Arkansas and around the country.

As further noted in Plaintiffs' Memorandum, at 20 and 33, all of the above grounds for establishing a violation of Plaintiffs' Free Speech 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). However, DOL's Opposition improperly conflates the case law dealing with disclosure requirements, importing certain tests for injury to associational rights into the legal standards of strict or exacting scrutiny applicable to individual rights of free speech. Thus, DOL erroneously contends that Plaintiffs cannot carry their burden of proving any First Amendment violation unless they can show that disclosure will bring about "threats, harassment, or reprisals." DOL Opp. at 32. That is not the law. *See Minn. Citizens Concerned for Life, Inc. v. Swanson*, 692 F.3d at 874 (enjoining disclosure requirements based upon a mere showing by plaintiffs that they were forced to "abandon planned independent expenditures in order to avoid the accompanying regulatory burdens," *i.e.,* without any showing of threats, harassment, or reprisals).

Although the Supreme Court in *Buckley* indicated that an *association* could be required to prove specific threats to its members arising from public disclosure in order to prove a violation of assocational rights, as occurred in *NAACP v. Alabama*, that standard of proof is limited to associational rights alone. As it happens, however, one of the Plaintiff associations in the present case, Associated Builders and Contractors, has made the necessary showing to meet the associational rights standard of *Buckley* and *NAACP*. Contrary to DOL's Opposition, at page 34,

Plaintiff ABC has provided highly specific evidence of threats, harassment and reprisals against the association and its members, including an entire published book full of documented reports of many violent, union-sponsored attacks and other coercive union tactics over recent decades. Brubeck Aff. ¶ 3–5. *See also* Samuel Cook, FREEDOM IN THE WORKPLACE 387 (2005), *available at* http://amazon.comhttp://amazon.com (the index page cites to pages documenting dozens of specific acts of union violence and threats against ABC members; *see also* Brubeck Aff. ¶ 5.[9] DOL's Opposition is disingenuous in claiming that ABC's testimony is too "general" or "speculative" to satisfy the standard for proving infringement of the right to freedom of association. As a result of the foregoing history of violence against ABC and its members by agents of labor organizations, it is undisputed in the record that some ABC members are reluctant to disclose their membership publicly.

Additional recent examples of such coercive tactics of the type called for in the *Buckley* opinion can be found at *American Steel Erectors, Inc. v. Ironworkers Local Union No. 7*, 815 F.3d 43 (1st Cir. 2016) (upholding a jury verdict against union that unlawfully coerced ABC members); *Fidelity Interior Corp. v United Brotherhood of Carpenters*, 675 F.3d 1250 (11th Cir. 2012) (same). Many similar examples of threats and harassment of ABC members reported in cases decided by courts and the NLRB can be provided if the court deems it necessary. The point is irrefutable that because of the specific and lengthy history of threats, harassment and coercion

[9] *See* Bob Kasarda, *Arson suspected at Dick's Sporting Goods construction site in Valparaiso [Indiana]*, THE N.W. INDIANA TIMES (April 6, 2015), 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); *see also* Julie Shaw, *Irtonworkers 'hit man' pleads guilty*, PHILY.COM (Sept. 25, 2014), 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); *see* Brubeck Aff. ¶ 5.

by unions towards ABC, ABC has fully satisfied the *Buckley* test for infringement of associational rights resulting from compelled disclosure of payments by ABC members to the association.

While ABC's showing is unnecessary in order to claim infringement of the Free Speech rights of all the Plaintiffs and their members, as noted above and in the *Minn. Concerned Citizens* case, ABC nevertheless has demonstrated its additional ground for challenging the Rule on the basis of Freedom of Assocation. ABC members will clearly be chilled in their protected associational rights if they are required to disclose payments to ABC as a condition of obtaining advice needed to communicate effectively with their employees under the new Rule.

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.

As pointed out in Plaintiffs' Memorandum, at Page 43, the new Rule requires both employers and consultants found to have given "persuader" advice to "provide a detailed explanation of the terms and conditions of the agreement or arrangement" with the client. 81 Fed. Reg. 16046. DOL's instructions also require employers and their lawyers to disclose previously confidential communications between attorney and client confirming the arrangements, as well as the substance of the confidential advisory communications on forms LM-10, LM-20, and LM-21. In response, DOL's Opposition erroneously relies on the case of *U.S. v. Sindel*, 53 F.3d 874, 876 (8th Cir. 1995), for the proposition that the attorney-client privilege does not apply to "client identify and fee information." *Id*. That case dealt with the attorney-client privilege, whereas the present case deals with the separate issue of confidentiality of client communications under Rule 1.6 of the Rules of Professional Responsibility. *Sindel* also did not require disclosure of the substance of attorney-client communications, whereas the new

Rule *does* require such disclosures in the thirteen boxes on the LM forms. Finally, though not mentioned by DOL, the *Sindel* court actually found that some of the information the government was seeking to disclose was sufficiently confidential as to reject the government's disclosure demands.

Under the new Rule, it remains true that attorneys who disclose the information demanded by DOL will be inevitably disclosing confidential client information in violation of Rule 1.6(a) of the Arkansas Rules of Professional Conduct, and identical ethics rules around the county, which provide that a "lawyer shall not reveal information relating to the representation of a client unless the client gives informed consent." ARK. R. PROF'L COND. 1.6. 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." *Id.*

Recognizing the ethical dilemma posed by DOL's new Rule, the American Bar Association opposed the proposed version of the Rule in 2011, and the past president of the ABA recently testified in opposition to the final rule. *See* Testimony of Wm. T. (Bill) Robinson, III, House Subcommittee on Health, Employment, Labor, and Pensions (April 27, 2016), *available at* http://edworkforce.house.govhttp://edworkforce.house.gov (reiterating that disclosure of the information sought in the LM report forms 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") (last accessed May 4, 2016). The amicus brief submitted by the State Attorneys General makes a similar argument, with citations to numerous ethical opinions and case authorities. *See* ECF Doc. No. 27.

In response, DOL's Opposition unfairly minimizes the confidential information whose disclosure is compelled by the new LM forms. 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, 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." Contrary to DOL's Opposition, these matters fall within the attorney-client privilege. *Gipson v. Southwestern 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.[10]

Finally, DOL's Opposition claims that any conflicting state attorney ethics laws are somehow preempted by the LMRDA. DOL Opp. at 28–29. To the contrary, nothing in the LMRDA gives DOL power to regulate attorneys in their practice of labor law, which is traditionally a state function. The D.C. Circuit so held in the case of *ABA v. FTC*, 430 F.3d 457, 471 (D.C. Cir. 2005), holding that if Congress intended to preempt state regulation of the practice of law, then Congress must have provided a "clear statement" of its intent to do so.

[10] DOL's claim that the ABA position is foreclosed by the Congress's rejection of an even broader exclusion of attorney-client information is wrong. DOL Opp. at 25. The colloquy between Senators Goldwater, Dirksen, and Kennedy makes clear that the advice being disclosed by the new Rule was at the heart of the amendment to the bill that Kennedy accepted. As Goldwater stated: "I believe that there should be a perpetuation of the sancity of relations between attorney and client." 105 Cong. Rec. 19759 (1959). DOL's reliance on the Sixth Circuit's narrow reading of the legislative history is also wrong, not only because the Eighth Circuit rejected the *Humphreys* decision in its *Rose Law Firm* opinion, but also because *Humphreys* held only that the legislative history did not support protecting attorneys from reporting when they engaged in direct communications with employees.

Here, the opposite is true. Not only did Congress not make any clear statement of an intent to regulate attorneys in their role as business advisors, but instead Congress expressly *disclaimed* any intent to require attorney-advisors to disclose their advice, both in Section 203(c) and 204 of the Act. Under such circumstances, DOL can show no legal support for its claim that the federal government is entitled to compel employers and their attorney advisors to disclose client confidences and/or advice in response thereto, which the states uniformly have declared to be sacrosanct from disclosure.

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

DOL's Opposition maintains that the Rule is "more than adequately clear." DOL Opp. at 44. But as has already been shown, the subjective new test is inherently vague and confusing to employers and their advisors, a situation made worse by the illogical and arbitrary exceptions spread throughout the one hundred plus pages of the Rule.

DOL again relies on the older Fourth, Fifth, and Seventh Circuit decisions that upheld Section 203's disclosure requirements against vagueness challenges in the comparatively simple situation where a consultant communicated directly with employees. *Master Printers*, 751 F.2d at 710–12; *Fowler*, 372 F.2d at 33435; *Master Printers Ass'n*, 532 F. Supp. at 1152, aff'd 699 F.2d 370 (7th Cir. 1983). DOL Opp. at 46–47. Contrary to DOL's Opposition, these cases offer no support whatsoever for the "clarity" of the new Rule, which turns not on the relatively clear definition of "persuasion" but on the Rule's newly muddled definition of exempt "advice." As further noted above, the cases relied on by DOL have no precedential value in the Eighth Circuit in light of their rejection by the court of appeals in the *Rose Law Firm* case.

Also inapposite are the cases cited by DOL for the proposition that civil statutes are reviewed with less stringency than criminal laws. Unlike the new Rule, the civil statute at issue

in *Ford Motor Co. v. Tex. Dep't of Transp*., 264 F.3d 493, 507 (5th Cir. 2001), did not contain *any* criminal provisions. The LMRDA, which the new Rule purports to enforce plainly contains criminal penalties. DOL's Opposition is disingenuous in asserting that employers need not be concerned about being accused of criminal behavior because the criminal penalties require a showing of willfulness. Such a showing of deliberate intent is an essential element of most criminal laws, and DOL's enforcement of the LMRDA is subject to the same Fifth Amendment standard for vagueness as any other criminal enforcement. The Rule "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). The Rule certainly fails this test for the reasons explained above and in Plaintiffs' Memorandum, at 47–48. *See Grayned v. City of Rockford*, 408 U.S. 104, 108 (1972); *Thomas v. Collins*, 323 U.S. 516, 535 (1945).

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

Contrary to DOL's Opposition, 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. In response, DOL has disingenuously claimed that it has complied with the RFA merely by engaging in the process of analyzing the costs of the Rule and explaining its methodology. DOL Opp. at 49–50. To the contrary, the RFA requires that DOL make a good faith effort to consider all of the entities affected by the new Rule. *See Aeronautical Repair Station Assn, Inc. v. FAA*, 494 F.3d 161, 178 (D.C. Cir. 2007).

In the present case, DOL simply ignored wide swaths of businesses who will clearly be impacted by the new Rule. In particular, DOL made the false assumption that the only employers affected would be those who receive petitions for a union election. DOL has failed to contest

Plaintiffs' assertion that the number of employers potentially covered by the Rule is in the millions, not a few thousand.

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. Contrary to DOL's Opposition, Plaintiffs Have Demonstrated Irreparable Harm.

Plaintiffs have shown that their First Amendment rights are being chilled by the new Rule. Contrary to DOL's Opposition, such infringement of First Amendment rights, "standing alone," constitutes irreparable harm in this Circuit (and elsewhere). *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)). 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.

In response, DOL cites various cases where irreparable harm was not present because those plaintiffs lacked any First Amendment basis for their claims. DOL Opp. at 52–53; *see, e.g., Local Union No. 884 v. Bridgestone/Firestone*, 61 F.3d 1347, 1355 (8th Cir. 1995) (only harm alleged consisted of financial hardship); *Nat'l Ass'n of Mortgage Brokers v. Bd. of Governors of Fed. Reserve Sy.*, 773 F. Supp. 2d 151, 180–81 (D.D.C. 2011) (same). In the present case, by contrast, Plaintiffs have stated a strong claim of infringement of their First Amendment rights as to which there is no need to speculate. The chilling effect of the new Rule is imminent and certain. As indicated in Plaintiffs' original affidavits and in

additional declarations recently received and attached to this Reply, employers are already being told by their legal advisors that they will no longer be able to safely provide advice on union organizing issues because of the intrusive reports that likely will be required. *See* Affidavit of Stephen Wall, Manager of Practice at Morgan, Lewis and Bockius, attached hereto as Supplemental Exhibit A; *see also* Supplemental Affidavit of Richard Roderick (Roderick Supp. Aff.) at ¶ 8–12, attached to the Motion as Supplemental Exhibit B.

Also contrary to DOL's Opposition, Plaintiffs' affidavits are quite specific as to the chilling effect on their First Amendment rights arising from the Rule. Thus, Plaintiffs affidavits aver that their employer members will be unable to continue their regular practice of obtaining advice from the associations and/or consultants needed to communicate effectively with their employees unless they are willing to violate the Rule's disclosure requirements backed by criminal penalties. This obvious chilling effect of the Rule on the free speech rights of employers and their advisors 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 further required to disclose confidential and privileged attorney-client communications and other confidential information unless they disobey its provisions. *See* Affidavit of Jacqueline R. Scott, Founding Partner of Forney & Scott, LLC, at ¶¶ 8–14, attached to the Motion as Supplemental Exhibit C; *see also* Affidavit of Ginger D. Schröder, Founding Partner of Schröder, Joseph and Associates, LLP, at ¶¶ 9–16, attached to the Motion as Supplemental Exhibit D; *see also* Affidavit of Louis DiLorenzo, Managing Member at Bond, Schoeneck & King, attached to the Motion as Supplemental Exhibit E; *see also* Affidavit of Montine McNulty, Executive Director at Arkansas Hospitality Association, attached to the Motion as Supplemental Exhibit F; *see also* Affidavit of Randy

Zook, President & CEO at Arkansas State Chamber of Commerce/Associated Industries of Arkansas, attached to the Motion as Supplemental Exhibit G; *see also* Affidavit of Stephen J. Hirschfeld, Founding Partner at Hirschfeld Kraemer, LLP, attached to the Motion as Supplemental Exhibit H. Once a report has been submitted to DOL, the information contained in the report becomes a public record and cannot be recalled.

Also contrary to DOL's Opposition, the affidavits specifically state that 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. The absence of such advice will inevitably jeopardize the ability of such employers to communicate effectively with the employees on the subject of unionization and/or collective bargaining. *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).

Attorneys and other outside advisors who are also members of the Plaintiff associations, including Plaintiff Cross Gunter and additional affiants, have shown that they will be required to stop their regular practice of 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* Roderick Supp. Aff. ¶¶ 8–12; *see also* Roachell Aff. ¶ 4; Brubeck Aff. ¶ 8. In this regard, DOL

has failed to contest Cross Gunter's affidavit on the erroneous ground that a lawyer in a firm that is representing other parties in a lawsuit cannot testify. DOL Opp. at P. 53, n. 18. The case cited by DOL for this proposition, *DeCamp v. Douglas Cty. Franklin Grand Jury*, 752 F. Supp. 340 (D. Neb. 1990), actually stands for precisely the opposite: the *DeCamp* case holds that a lawyer in Mr. Roderick's position CAN testify. *Id*. His affidavit should therefore be considered and is indeed uncontroverted and again demonstrates the irreparable harm caused by the new Rule.

C. DOL Has Failed To Show How Maintaining The Fifty-Year Status Quo Will Harm The Agency.

Plaintiffs have contended that 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 fifty years. There is no evidence that the Department, or any employees, will be harmed as a result of this relief. DOL's Opposition again fails to address or distinguish Plaintiffs' cited cases on point, which have held in the Eighth Circuit that 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).[11]

[11] DOL's recent announcement that it is delaying enforcement of the LM-21 requirements pending the outcome of further rulemaking, further undermines DOL's claim that delay in enforcement of the new Rule will somehow harm the Department of the public. *See* U.S. Department of Labor, Office of Labor-Management Standards, Form LM-21 Special Enforcement Policy, http://www.dol.gov/olms/regs/compliance/ecr/lm21_special enforce.htm.

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

Finally, it remains true in this case that 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 collective bargaining. Moreover, the DOL's Rule violates fundamental liberties espoused in the First and Fifth Amendments to the United States Constitution. There is no imminent reason to support DOL's contention that the Rule should become effective July 1, 2016, and maintaining the status quo during the pendency of this litigation strikes the appropriate balance between DOL's interests in its Rule and the Plaintiffs' interests in exercising their First and Fifth Amendment rights.

III. CONCLUSION

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

Respectfully submitted,

/s/ J. Bruce Cross
J. Bruce Cross, Ark. Bar No. 1974028
Abtin Mehdizdegan, Ark. Bar No. 2013136
CROSS GUNTER, WITHERSPOON & GALCHUS, P.C.
500 President Clinton Ave., Suite 200
Little Rock, AR 72201
(501) 371-9999 | (501) 371-0035 (fax)
bcross@cgwg.com | abtin@cgwg.com

and

/s/ Maury Baskin
Maurice Baskin (pro hac vice)
D.C. Bar No. 248898
LITTLER MENDELSON, P.C.
815 Connecticut Ave., N.W.
Washington, D.C. 20006
(202) 772-2526
mbaskin@littler.com

CERTIFICATE OF SERVICE

The undersigned hereby certifies that the foregoing was filed with the Court via the Court's CM/ECF System, and thus served upon all parties of record on this 5th day of May, 2016.

Thomas E. Perez
Michael J. Hayes
Department of Labor
200 Constitution Avenue, N.W.
Washington, DC 20210

Jess L. Askew, III
Andrew King
Kutak Rock LLP
124 West Capitol Avenue, Suite 2000
Little Rock, AR 72201-3740

Elisabeth Layton
U.S. Department of Justice
20 Massachusetts Avenue, NW, Rm. 7110
Washington, DC 20530

Adam G. Unikowsky
Jenner & Block LLP
1099 New York Avenue, NW
Washington, DC 20001

Kate Comerford Todd
Steven P. Lehotsky
Warren Postman
U.S. Chamber Litigation Center
1615 H. Street, NW
Washington, DC 20062

Jim L. Julian
Chisenhall, Nestrud & Julian, P.A.
Regions Center
400 West Capitol Avenue, Suite 2840
Little Rock, AR 72201-3415

Lee Rudofsky
Michael Cantrell
Arkansas Attorney General's Office
Catlett-Prien Tower Building
323 Center Street, Suite 200
Little Rock, AR 72201-2610

Christopher Thyer
U.S. Attorney, Eastern District of Arkansas
425 W. Capitol Avenue, Ste. 500
Little Rock, AR 72201

Christin Lawler
Hirschfeld Kraemer LLP
505 Montgomery Street
Suite 13000
San Francisco, CA 94111

Louis P. DiLorenzo
Bond, Schoeneck & King PLLC
600 Third Avenue, Suite 2200
New York, NY 10016-1915

Anna Elento-Sneed
ES&A, Inc.
Pauahi Tower, Suite 2700
1003 Bishop Street
Honolulu, HI 96813

Kameron W. Murphy
David Shane Jones
Tueth Keeney Cooper Mohan & Jackstadt P.C.
101 West Vandalia, Suite 210
Edwardsville, IL 62025

Natasha Baker
Hirschfeld Kraemer LLP
505 Montgomery Street, Suite 13000
San Francisco, CA 94111

/s/ J. Bruce Cross