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

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| **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<br><br>**PLAINTIFFS,**<br><br>**v.**<br><br>**THOMAS E. PEREZ, et al,**<br><br>**DEFENDANTS.** | **Case No. 4:16CV-00169 (KGB)** |

# PLAINTIFFS' BRIEF IN SUPPORT OF SUMMARY JUDGMENT

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## INTRODUCTION

Pursuant to this Court's Order dated July 8, 2016 [ECF 54], Plaintiffs hereby submit their brief in support of summary judgment on the merits of their Complaint in accordance with F.R.Civ.P. 56 and the Administrative Procedure Act ("APA"), 5 U.S.C. § 706. Plaintiffs incorporate by reference all previously filed briefs and affidavits in support of their motion for preliminary injunction, which the Court has consolidated with the merits of Plaintiffs' challenge to the Department's new and unlawful "persuader advice" Rule. As the Court is also aware, DOL's new Rule has been preliminarily enjoined on a nationwide basis in *NFIB v. Perez*, 2016 U.S. Dist. LEXIS 89694 (N.D. Tex. June 27, 2016) (hereafter "*NFIB*").[1] For many of the same reasons that were cited therein, Plaintiffs ask this Court to permanently vacate the new Rule.

## STANDARD OF REVIEW

Rule 56(c) provides that summary judgment shall issue if "there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." *See Matsushita Elec. Indus. Co., Ltd. v. Zenith Radio Corp.*, 475 U.S. 574, 587 (1986); *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 252 (1986); *Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986). In cases arising under the APA, "[s]ummary judgment … serves as a mechanism for deciding, as a matter of law, whether the agency action is supported by the administrative record and is otherwise consistent with the APA standard of review." *See Newton Cnty. Wildlife Ass'n v. Rogers*, 141 F.3d 803, 807 (8th Cir. 1998) (citing *Camp v. Pitts*, 411 U.S. 138, 142 (1973)); *see also Arkansas Hospice, Inc. v. Burwell*, No. 2:13-CV-00134-KGB, 2015 WL 11090408, at *3 (E.D. Ark. Mar. 26, 2015), *aff'd*, 815 F.3d 448 (8th Cir. 2016); *see also Peterson v. U.S. Dep't of Agric.*, No. 3:13-CV-34, 2014 WL 4809398, at *5 (D.N.D. Sept. 26, 2014), *appeal dismissed*

[1] *See also Labnet, Inc. v. U.S. Dep't of Labor*, 2016 U.S. Dist. LEXIS 81884 (June 22, 2016) (finding that law firm plaintiffs were likely to succeed on the merits of their similar challenge to the Rule, but declining to issue a preliminary injunction).

(8th Cir. Feb. 13, 2015) (granting summary judgment because the agency's application of the law conflicted with the plain language of the statute).

**STATEMENT OF UNDISPUTED MATERIAL FACTS**

In light of the procedural posture of this APA challenge to a rulemaking proceeding, and following correspondence with the Court, the parties are not at this time submitting separate statements of material facts with their briefs in support of summary judgment. Plaintiffs hereby incorporate their previously filed statement of facts set forth in the Memorandum accompanying their Motion for Preliminary Injunction. [ECF 4]. The facts set forth therein are either contained in the Administrative Record or in supplemental affidavits that the Court is properly entitled to consider as explanatory of the harm caused by the new Rule. *See Newton Cty. Wildlife Ass'n v. Rogers*, 141 F.3d 803, 807 (8th Cir. 1998); *Corning Sav. & Loan Ass'n v. Fed. Home Loan Bank Bd.*, 736 F.2d 479, 481 (8th Cir. 1984); *see also Arkansas Reg'l Organ Recovery Agency, Inc. v. Shalala*, 104 F. Supp.2d 1084, 1086 (E.D. Ark. 2000).

Plaintiffs specifically incorporate by reference the following rulemaking comments that are part of the Administrative Record recently filed by DOL [ECF 55, 56]: Coalition for a Democratic Workplace (A.R. 494), American Bar Association (A.R. 523), Baker & McKenzie (A.R. 691), Sheppard Mullin (A.R. 724), Association of Corporate Counsel (A.R. 742), Associated Builders and Contractors (A.R. 823), Chamber of Commerce of the United States (A.R. 1245), Constangy Brooks (A.R. 1551), Council on Labor Law Equality (A.R. 1562), and The National Association of Manufacturers (A.R. 1602).

**SUMMARY OF RECENT DISTRICT COURT DECISIONS ADDRESSING CHALLENGES TO DOL'S NEW RULE**

Since the May 9, 2016 hearing on Plaintiffs' Motion for Preliminary Injunction [ECF 43],

two district courts have rendered decisions on the legality of DOL's new Rule, addressing a number of the issues raised by Plaintiffs' Complaint, as follows:

**1. The *NFIB* Decision**.

In the *NFIB* case, 2016 U.S. Dist. LEXIS 89694, trade associations representing employers, consultants and attorneys challenged DOL's new Rule on largely the same grounds advanced by Plaintiffs here, joined by intervening State Attorneys General seeking to protect state regulation of the practice of law. As noted above, the District Court for the Northern District of Texas preliminarily enjoined implementation of DOL's new Rule upon a finding of likelihood of success on the merits of plaintiffs' claims. The *NFIB* court correctly held the new Rule violates the Labor Management Reporting and Disclosure Act's ("LMRDA's") exemption of "advice" from any reporting requirement, summarizing its holding as follows:

> DOL's New Rule is not merely fuzzy around its edges. Rather, the New Rule is defective to its core because it entirely eliminates the LMRDA's Advice exemption. In whatever manner DOL defines "advice," it must do so consistent with the statute and therefore must actually exempt advice, including advice that has an object to persuade. The New Rule not only fails to do that, it does the exact opposite: it nullifies the exemption for advice that relates to persuasion.

*Id.* at *124.

The *NFIB* court also held that the new Rule is arbitrary and capricious because DOL never adequately explained why it abandoned its prior rule; nor did DOL indicate any cognizance that its previous policies may have "engendered serious reliance interests that must be taken into account." *Id.* at *80, citing the Supreme Court's recent decision in *Encino Motorcars, LLC v. Navarro*, 136 S. Ct. 2117, 2126 (U.S. June 20, 2016). The *NFIB* court determined that DOL's failure to explain adequately its shift in policy rendered the Rule incapable of carrying the force of law. The court further observed that Congress had taken no action to overturn the longstanding prior interpretation of the LMRDA, strongly suggesting that

the previous interpretation was consistent with the original Congressional intent. *Id*. at *82 (citing *FDA v. Brown & Williamson Co*., 529 U.S. 120, 156-58 (2000)).

The *NFIB* court also found that DOL abused its discretion because the new Rule contains reporting requirements that "undermine the attorney-client relationship and the confidentiality of that relationship," which is governed by state law. *Id.* at *82-83. Specifically, the new Rule obligates attorneys to report client information despite their ethical obligations to maintain client confidentiality, and in effect invades the states' exclusive province to regulate the practice of law. *Id.* at *83. The court in *NFIB* found that the Rule "invalidly purports to require the disclosure of a great deal of 'advice' that is actually *protected* from disclosure by the LMRDA." *Id.* at *86 (emphasis in original).

The *NFIB* court further held that DOL's new Rule "imposes content-based burdens on speech and cannot survive strict scrutiny under the First Amendment." Indeed, the court found that DOL had admitted the content-based nature of the new Rule's burdens on speech, including both the right of employers to express opinions about unions and their right to obtain legal advice to assist them in such communications. *Id*. at *87-88. The court found DOL's asserted benefits of the new Rule to be "vague and speculative." *Id.* at *90. Moreover, the court determined that the Rule is not narrowly tailored because it effectively eliminates the Advice Exemption from the LMRDA. *Id.* at *95. The court therefore held that the new Rule is overly broad and regulates a broad sweep of activities and protected speech that, for the first time in the history of the LMRDA, will be regarded as reportable persuader activity. *Id.* at *97. Ultimately, the court determined that the broad disclosure requirements under the new Rule create a substantial chilling effect on employers' First Amendment rights. *Id.* at *98.

The court also found in *NFIB* that the plaintiffs would likely succeed on their claim that the Rule is void for vagueness under the Due Process Clause of the Fifth Amendment, declaring

that DOL had replaced its long-standing, bright-line rule with a Rule that is "vague and impossible to apply." *Id.* at *99. As the court stated: "If an employer, consultant, or attorney attempts to apply his or her own understanding of exempt advice based on the plain language of the LMRDA and based on actual practice, he or she will in many instances have to choose between following the statute or following the DOL's new Rule." *Id*. at *103. The court found that the wrong choice could constitute a "willful" violation and improperly expose the employer or attorney to criminal prosecution. *Id.*

The *NFIB* court also found that the plaintiffs would likely succeed on their claim that the new Rule violates the Regulatory Flexibility Act (RFA). *Id.* at *103-108. The court observed that the agency had failed to wait for an announced revision to the LM-21 form, and the court held that DOL cannot enact a rule that "fails to consider how the likely future resolution of crucial issues will affect the rule's rationale," and that DOL had failed to consider the significant economic impact on a substantial number of businesses. *Id.* at *104.

Finally, the court in *NFIB* found ample evidence of irreparable harm caused by the new Rule. Such harm includes chilling employer speech and interference with the ability of employers to obtain advice from long time attorney practitioners in the field of labor relations. The court received testimony from such law firms that they would no longer be able to provide advice covered by the new Rule due to the increased costs and ethical violations that would inherently result. *Id*. at **108-26.

**2. The *Labnet* Decision**.

The *Labnet* case was filed by an association of law firms, with no organizations representing employers participating as plaintiffs. 2016 U.S. Dist. LEXIS 81884, at *1. The

district court for the District of Minnesota found that "DOL's new rule conflicts with Section 203(c) - at least in some of its applications - because it requires a consultant 'to file a report covering the services of such person by reason of his giving or agreeing to give advice to [an] employer….'" *Id*. at *14. Just as Plaintiffs have argued in the present case, the *Labnet* court observed: "The problem is not with the manner in which DOL formally defines 'advice.' * * * The problem is that DOL does not apply its own definition of 'advice.'" *Id*. at 15. The court further found that "at the root of DOL's problem is its insistence that persuader activity and advice are mutually exclusive categories. * * * [T]his is not what the Eighth Circuit believes…." * * * By starting with the premise that, if something is persuader activity, it cannot possibly be advice, DOL ends up struggling mightily to define as non-advice activity that any reasonable person would define as advice. And in the course of that struggle, DOL ends up drawing lines that are simply incoherent." *Id*. at *16. Accordingly, the court found that the "plaintiffs have a strong likelihood of success on their claim that the new rule conflicts with the plain language of the Act." *Id*. at *18.[2]

Unlike the *NFIB* court, however, the court in *Labnet* disagreed with the plaintiffs' claim that the new Rule unconstitutionally violates the First Amendment. The Minnesota court acknowledged that the Rule "regulates on the basis of content," and the court did not explain how its holding is consistent with the Eighth Circuit's *en banc* finding of First Amendment violations in *Minn. Citizens Concerned for Life, Inc. v. Swanson*, 692 F.3d 864, 874-75 (8th Cir. 2012) (en banc), relied on by Plaintiffs in the present case. The court in *Labnet* also did not address at all the unconstitutionally "compelled speech" component of the new Rule (forcing

[2] Though the *Labnet* court stated that "it does not hold that the word 'advice' in section 203(c) is clear in all of its applications and thus that there is no room for DOL to engage in interpretation" (Id. at *21), the court did not actually identify any applications of the term "advice" that the new Rule lawfully requires to be reported.

advisors to publicly declare themselves to be "persuaders"), which Plaintiffs have argued must independently invalidate the new Rule under such precedents as *NAM v. SEC*, 800 F.3d 518 (D.C. Cir. 2015).

The *Labnet* court also declined to hold that the new Rule is void for vagueness, despite describing DOL's line drawing redefinition of reportable "advice" as "incoherent." 2016 U.S. Dist. LEXIS 81884, at *16. The court further criticized DOL's "distinctions between activities that are materially indistinguishable" and described an "untenable divide" that DOL "has created between persuader activities and advice." *Id*. at *27-29. The court highlighted numerous commonplace examples of advisor behavior to which DOL's own attorneys could not provide clear answers as to whether reports would be required or why. *Id*. These findings cannot be reconciled with the court's subsequent holding that application of the new Rule is "straightforward" and not unduly vague. *Id*. at *29.

In further holding that the new Rule is not arbitrary or capricious, the *Labnet* court improperly ignored the inconsistencies demonstrated by the court's own opinion, which are similar to the inconsistencies highlighted by Plaintiffs here. Instead, the court focused solely on the Minnesota law firm plaintiffs' contention that DOL was required to conduct independent research and found that this one element was not arbitrary. *Id*. at *30. The court did not address at all the Supreme Court's holding in *Encino Motorcars v. Navarro*, 136 S. Ct. at 2126, relied on by the *NFIB* decision, which requires agencies to explain any inconsistencies in rulemaking and to "take cognizance of reliance interests" in longstanding policies that are suddenly reversed.

The *Labnet* court did not find sufficient evidence of irreparable harm to grant a preliminary injunction. Though irreparable harm is no longer a required element at the summary judgment stage of the present proceeding, it must be observed that the evidence of such harm presented to the *Labnet* court by the Minnesota plaintiffs consisted of a single attorney affidavit

that did not contain the specific showings of harm to employers, trade associations and law firms around the country that was presented in the instant case, or the compelling evidence of irreparable harm that was presented to the court in the *NFIB* case and in the present case.

Finally, though nowhere mentioned in the June 22 *Labnet* preliminary injunction opinion, a subsequent scheduling order setting dates for briefing on summary judgment contains a paragraph expressing Judge Schiltz's belief that he cannot find that "no set of circumstances exists" under which the new Rule would be valid or that the rule is "unconstitutional in all of its applications." Briefing Order, Case No. 16-cv-0844 (July 18, 2016) [ECF 64] (Citing *Wash. State Grange v. Wash. State Republican Party*, 552 U.S. 442, 449 (2008). As further explained below, neither of those requirements, properly applied to the new Rule, poses any obstacle to its invalidation. To the contrary, because the Rule is "defective to its core" and is premised on a definition of advice that violates the LMRDA in all its applications, the new Rule must be vacated.

## ARGUMENT

### I. THE NEW RULE VIOLATES THE PLAIN LANGUAGE OF LMRDA'S "ADVICE" EXEMPTION BY REQUIRING REPORTING OF ACTIVITY THAT CONGRESS EXPLICITLY EXEMPTED FROM ANY REPORTING REQUIREMENT.

#### A. Both The *NFIB* and *Labnet* Decisions Support Plaintiffs' Contention That DOL's New Rule Violates The Statutory Exemption Of Advice.

As the foregoing discussion makes clear, both courts that have considered the issue have found DOL's new Rule to violate the plain language of the "advice" exemption under the LMRDA. The *NFIB* court found that the new Rule is "defective to its core" and violates on its face the plain language of the LMRDA. 2016 U.S. Dist. LEXIS 89694 at *124. Just as Plaintiffs here have previously argued, the *NFIB* court held that the new Rule improperly nullifies the exemption for advice that has an object of persuasion, in direct violation of Section 203(c) of the statute. *Id*.

The *Labnet* court likewise found that the new Rule conflicts with the statutory exemption "at least in some of its applications." 2016 U.S. Dist. LEXIS 81884, at *14. As the *Labnet* court further acknowledged, the new Rule conflicts with the Eighth Circuit's holding in *Donovan v. Rose Law Firm*, 768 F.2d 964, 974–75 (1985), just as Plaintiffs have previously argued in the present case. Whereas the Eighth Circuit declared that Section 203(c)'s function is to broadly exempt activity which can be persuader in nature because it is "advice" (2016 U.S. Dist. LEXIS 81884, at **4-5), the new Rule is premised on the notion that the advice exemption merely clarifies persuader activity, and that anything persuasive in nature is no longer "advice." *Id*. at **15-16. *See also* Plaintiffs' Memorandum in support of Motion for Preliminary Injunction, at pp. 22-26; and Reply Brief in Support of Motion, at pp. 3-8 (further demonstrating that the basic premise of the new Rule is inconsistent with the Eighth Circuit's holding in *Rose Law Firm*.).

Thus, both the *NFIB* and *Labnet* rulings support Plaintiffs' complaint here that the new Rule violates the plain language and Congressional intent underlying the LMRDA.

In any event, the Eighth Circuit has held that an employer that obtains advice on labor relations issues from an attorney or other labor relations 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 Eighth Circuit 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). *Rose Law Firm*, 768 F.2d at 974–75. In addition, contrary to the new Rule, if Congress had meant to exempt only pure "legal" advice then section 203(c) would be superfluous, because section 204 of the LMRDA already exempts communications subject to the attorney-client privilege.

As Plaintiffs have previously argued, the new Rule sweeps broadly to compel disclosure of all manner of "oral or written recommendations regarding a course of conduct," if such recommendations "directly or indirectly" persuade employees.[3] By requiring a consultant's mere recommendations to be reported, even though the employer retains the final say over whether to accept or reject such advice, DOL has departed from the commonly accepted meaning of both the terms "advice" and "recommendation." This is the "defective core" of DOL's new Rule (*NFIB, supra*, at *124), and for this reason alone the new Rule must be vacated.

[3] As the *Labnet* court held (mirroring arguments previously made by the present Plaintiffs): "DOL now defines "advice" to mean "an oral or written recommendation regarding a decision or a course of conduct," which is a perfectly reasonable way to define the term. 81 Fed. Reg. 15,939. The problem is that DOL does not apply its own definition of "advice." Instead, DOL requires reporting of activity that is "advice" under any reasonable interpretation of that word – *including DOL's*." 2016 U.S. Dist. LEXIS 81884, at *15 (emphasis in original).

### B. Plaintiffs' Challenge To The New Rule Readily Satisfies The "No Set Of Circumstances" Test For Invalidating A Facially Unlawful Rule.

Because the new Rule is "defective to its core," as the *NFIB* court properly held, there is by definition no set of circumstances under which the new Rule can be found to be valid. However, the *Labnet* court's briefing order questioned whether some (unidentified) applications of the new Rule are permissible, and for that reason the court expressed doubt as to its ability to uphold a facial challenge to the new Rule under Supreme Court authority. *Labnet* Briefing Order, Case No. 16-cv-0844 (July 18, 2016) [ECF 64] (citing *Washington State Grange v. Washington State Republican Party*, 552 U.S. 442, 449 (2008)). The *Labnet* court is mistaken in its concern. To the extent that the "no set of circumstances" test applies at all to DOL's new Rule, the test is readily satisfied here. There is indeed no set of circumstances under which the new Rule's narrowing of the advice exemption can be found to be valid under the LMRDA.

At the outset, the *Washington State Grange* case cited by the *Labnet* court is inapposite, because it involved a statute, not an administrative rule. 552 U.S. at 449. In addition, the *Wash. State Grange* case involved election ballot restrictions under a statute that had not yet been enacted, as to which the harm alleged (possible voter confusion) was entirely speculative. The Court also found that the election law at issue had a "plainly legitimate sweep" that did not impose any burdens on speech, and there was no evidence of overbreadth creating First Amendment concerns. *Id*. DOL's new Rule is different in all of the above aspects and is not saved by the Supreme Court's holding in *Washington State Grange*. *See also United States v. Stevens*, 559 U.S. 460, 472-73 (2010), limiting *Washington State Grange* to its facts and invalidating a different statute because a "substantial number of its applications are unconstitutional."

It is true that the Supreme Court in *Reno v. Flores*, 507 U.S. 292 (1993) applied the "no

set of circumstances test" to a facial rulemaking challenge, citing *United States v. Salerno*, 481 U.S. 739 (1987). Courts and commentators have noted, however, that the Supreme Court in *Reno* did not overrule or modify the Court's longstanding *Chevron* doctrine. There, a class of arrested alien juveniles challenged an INS rule requiring them to be held in custody pending deportation hearings. The Court found that the regulation lawfully struck a balance between concerns over juvenile welfare and lack of resources to conduct individualized assessments. The Court did not find *any* circumstances under which the new rule violated juvenile rights (the opposite of the "no set of circumstances" test referred to in *dicta*). Properly applied, therefore, the "no set of circumstances" test does not relieve any court of the duty to invalidate an agency rule that is inconsistent with Congressional intent as expressed in a statute. *See* Marc E. Isserles, *Overcoming Overbreadth: Facial Challenges and the Valid Rule Requirement*, 48 Am. U. L. Rev. 359 (1998); Stuart Buck, *Salerno vs. Chevron: What To Do About Statutory Challenges*, 55 Admin. L. Rev. 427 (2003). *See also City of Chicago v. Morales*, 527 U.S. 41, 55, n.22 (1999) (Stevens, J., plurality) (observing that the *Salerno* formulation "has never been the decisive factor in any decision of this Court, including *Salerno* itself."); *Nat'l Mining Ass'n v. Army Corps of Eng'rs*, 145 F.3d 1399, 1408 (D.C. Cir. 1998) ("[T]he normal *Chevron* test is not transformed into an even more lenient 'no valid applications' test just because the attack is facial.").

In any event, unlike the facial challenges addressed in *Washington State Grange* and *Reno*, Plaintiffs' challenge to the new persuader advice Rule is based on an across-the-board inconsistency between the new Rule and the statutory exemption of advice, and does not depend

on mere "hypothetical" violations of the LMRDA.[4] Plaintiffs instead rely on DOL's own explanation of the new Rule's re-definition of the term advice, and the revised Forms LM-10 and LM-20 published by DOL as part of the new Rule. On its face, the new Rule declares that previously exempt advice will now lose its exempt status whenever such advice has "an object of persuasion." 81 Fed. Reg. at 15,937. The exemption is lost to employers and their advisors under all circumstances where the advice has a persuasive object, regardless of whether an employer has the ability to accept or reject the advisor's recommendations. Thus, DOL's new definition conflicts on its face with the statutory advice exemption under all circumstances relevant to Plaintiffs' Complaint, requiring that the new Rule be set aside. *See Sullivan v. Zebley*, 493 U.S. 521 (1990) (upholding facial challenge to a rule determining eligibility of disabled children for social security benefits, citing the "systemic disparity" between the statutory standard and the agency's interpretation of the statute).

The *Labnet* court observed that "DOL has identified thirteen types of conduct to which the rule applies, only some of which seem to require the reporting of advice that is exempt under Section 203(c)." 2016 U.S. Dist. LEXIS 81884, at *38.[5] The *Labnet* court expressed concern that "an order staying enforcement of the entire rule would therefore prevent DOL from requiring

[4] In citing numerous examples of inconsistency between the new Rule and the statutory exemption, even the *Labnet* court noted that its examples "did not involve exotic scenarios or outlier cases; the Court asked DOL about the sort of bread-and-butter work that lawyers perform for clients every single day." 2016 U.S. Dist. LEXIS 81884, at **19-20. The court added: "DOL's difficulty answering the Court's questions reflects not the inevitable ambiguities that arise when applying a reasonably clear principle to marginal cases, but rather the untenability of DOL's central position that persuader activity can never be advice, and advice can never be persuader activity." *Id.* at *20.

[5] The thirteen categories listed on the LM-10 and LM-20 forms are as follows: "(1) drafting, revising, or providing written materials…; (2) drafting, revising, or providing a speech…; (3) drafting, revising, or providing audiovisual or multi-media presentations…; (4) drafting, revising, or providing website content…; (5) planning or conducting individual employee meetings; (6) planning or conducting group employee meetings; (7) training supervisors or employer representatives to conduct … employee meetings; (8) coordinating or directing the activities of supervisors...; (9) establishing or facilitating employee committees; (10) developing employer personnel policies or practices; (l1) identifying employees for disciplinary action…; (12) conducting a seminar for supervisors or employer representatives; and (13) speaking with or otherwise communicating directly with employees."

disclosure of information that DOL "has the right (indeed, a statutory mandate) to obtain." *Id*. But this concern is unfounded. In reality, the only activities that DOL has the statutory *right* to require in the new LM-10 and LM-20 forms are those non-advice activities for which reporting was already required under previous, longstanding rule. Any new information concerning advice activities that is reportable, under DOL's new definition, squarely conflicts under all sets of circumstances with the statutory exemption.[6] Again, in light of DOL's mistaken core definition of advice that no longer considers the ability of employers to accept or reject their advisors' recommendations, there is no set of circumstances under which the new Rule can be valid.

It should also be noted that the "no set of circumstances" test has no application to overbreadth challenges arising under the First Amendment, such as Plaintiffs' challenge here. In such circumstances, a law or rule violating the First Amendment must be found unlawful whenever a "substantial number of its applications are unconstitutional." *United States v. Stevens*, 559 U.S. at 473. The *Labnet* court failed to apply the overbreadth test to the new Rule because the court deemed the new Rule to be constitutional under an exacting scrutiny standard, disregarding the *en banc* holding of the Eighth Circuit in *Minn. Citizens Concerned for Life, Inc. v. Swanson*, 692 F.3d 864, 874-75 (8th Cir. 2012) (en banc). As will be further discussed below, the *Labnet* court erred in failing to find the new Rule violative of the First Amendment, and for this reason as well the "no set of circumstances" test provides no justification for failing to set aside the new Rule.

[6] Of the categories of activities identified above and in the new Rule, "conducting meetings with employees" (items 5 and 6); "establishing employee committees" (item 9), and "speaking with or otherwise communicating directly with employees" have always been deemed to be reportable under the previous DOL persuader rules. They are not "new." None of the other categories listed are validly reportable under the LMRDA. Under no set of circumstances can they be deemed to be validly reportable under the new and unlawful definition of "advice" set forth in the new Rule.

Thus, for the reasons stated in the *NFIB* case, and contrary to the concerns expressed in the *Labnet* briefing order, the new Rule must be set aside because it unlawfully requires reports to be filed whenever consultants advise employers on messages that may lawfully *persuade* employees, an activity that Congress intended to exempt. 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. As the *NFIB* court properly held, the new Rule "nullifies" the advice exemption for any advice that is directly or indirectly persuasive, under all circumstances. For this reason alone, the new Rule must be set aside.

## II. THE NEW RULE MUST ALSO BE VACATED BECAUSE IT IS ARBITRARY AND CAPRICIOUS.

Plaintiffs' previous briefs amply demonstrated, and the *NFIB* opinion properly found, that the new Rule arbitrarily sets aside more than fifty years of enforcement precedent and leads to inconsistent and absurd results. (Pl. Mem. at pp. 26-28; *NFIB*, 2016 U.S. Dist. LEXIS at **79-81). Quoting from the Supreme Court's most recent holding on agency rulemaking, *Encino Motorcars, LLC v. Navarro*, 136 S. Ct. at 2126, the *NFIB* Court held: "[A]n unexplained inconsistency in agency policy is a reason for holding an interpretation to be an arbitrary and capricious change from agency practice." As described at length in Plaintiffs' Opening Memorandum (at pp. 27-28), and Reply in support of Preliminary Injunction (at pp. 8-10), such inconsistencies include the following:

- The new Rule 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

- The new Rule also does not explain why a trade association should be allowed to help employers select "off the shelf" material, but should lose the "advice" 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 somehow deprives the association of the "advice" exemption. *Id*.

- DOL's new Rule 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.

- 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/Committee. [7]

Again quoting from *Encino Motorcars*, the *NFIB* court also found that the new Rule failed to "be cognizant that longstanding policies may have engendered serious reliance interests

[7] Another inconsistency arises from DOL's claim 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). The new Rule fails to justify its new 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."

that must be taken into account." 2016 U.S. Dist. LEXIS 89694, at *80. In this regard, the court highlighted DOL's failure to accommodate or defer to longstanding state regulation of the practice of law, as a particularly arbitrary act. The Court properly held: "DOL has no authority or expertise in the regulation of attorney-client relationships. The attorney-client relationship is governed by state law." *Id*. at *83.

Here, too, Plaintiffs fully agree with the *NFIB* decision, and its reasoning should be adopted by this Court. *See* Plaintiffs' Memorandum in Support of Preliminary Injunction at pp. 43-47; Reply Memorandum at pp. 17-20. The reporting requirements of DOL's new Rule are "inconsistent with and undermine the attorney-client relationship and the confidentiality of that relationship." *NFIB,* at *83. *See also* Amicus Brief of State Attorneys General {ECF 27].

The contrary ruling of the court in *Labnet,* which failed to find that the new Rule is arbitrary and capricious, cannot withstand scrutiny. It should be noted that the sole ground apparently considered by the court in *Labnet* for an arbitrary and capricious finding, at least the sole argument acknowledged by the court, was that "DOL did not consider all relevant data because the agency did not conduct any of its own research." 2016 U.S. Dist. LEXIS 81884, at *30. While this failure by DOL should be counted as a factor contributing to an arbitrary and capricious finding, the grounds adopted by the *NFIB* court and argued by the Plaintiffs here are significantly more compelling. It simply cannot be denied that DOL's new Rule is riddled with unexplained inconsistencies as set forth above, and that DOL failed adequately to take cognizance of the reliance interests of employers and attorneys during the past 55 years of consistent enforcement of the previous "bright line" test for reporting. Finally, the new Rule's unjustified interference with state regulation of the practice of law constitutes arbitrary and capricious conduct that must be set aside, for all of the reasons set forth above and in Plaintiffs' previous briefs.

## III. THE NEW RULE MUST BE FOUND UNCONSTITUTIONALLY OVERBROAD UNDER THE FIRST AMENDMENT.

Plaintiffs' previous memoranda 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 is overbroad and 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).

The *NFIB* decision again fully supports Plaintiffs' First Amendment contentions. 2016 U.S. Dist. LEXIS 89694, at **89-98. The court there held, as Plaintiffs have argued, that the new Rule imposes "content based" burdens on speech, citing *Reed v. Town of Gilbert*, 135 S. Ct. 2218, 2227 (2015); *McCullen v. Coakley*, 134 S. Ct. 2518, 2531 (2014); *United States v. Playboy Entm't Grp., Inc*., 529 U.S. 803, 811 (2000); and *Riley v. Nat'l Fed'n of Blind,* 487 U.S. 781, 798-801 (1988) (all of which were previously cited in Plaintiffs' Memorandum, at pp. 34-35). Accordingly, the *NFIB* court found that "content-based regulations that prohibit or compel speech are subject to strict scrutiny review, requiring the government to bear the burden of proving a compelling interest that is narrowly tailored to achieve that interest, using the least restrictive means necessary. *Id.* at **88-89. The court then held that DOL failed to prove a

compelling governmental interest, and that DOL relied on "vaguely described, speculative benefits" of "transparency," unsupported by any study or causal relation.

The *NFIB* court found the result to be the same even under a lower level of "exacting scrutiny," as Plaintiffs have likewise argued, because there is no substantial relation between DOL's new disclosure requirement and any important governmental interest, nor is the new Rule narrowly tailored to that relationship. 2016 U.S. Dist. LEXIS 89694, at **94-95. That is certainly true in the Eighth Circuit, under the Court of Appeals' holding in *Minn. Concerned Citizens Concerned for Life, Inc. v. Swanson*, 692 F.3d at 874-75. As Plaintiffs have previously discussed (Pl. Mem. at 34), that case held that a governmental reporting requirement imposed on corporations violates the First Amendment: "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.

Finally, the *NFIB* court properly held that the new Rule is overbroad in its burdening and compelling speech. Quoting from *Virginia v. Hicks*, 539 U.S. 113, 118–19 (2003), previously cited in Plaintiffs' Memorandum at p. 41, the *NFIB* court held that a law which "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, until and unless a limiting construction or partial invalidation so narrows it as to remove the seeming threat or deterrence to constitutionally protected expression." (internal quotes and citations omitted).

For all of the foregoing reasons, the *NFIB* court correctly found that the new Rule violates the First Amendment in numerous ways, and the same result should be arrived at here. By contrast, the *Labnet* court erred in its analysis, most likely because the Minnesota court did

not have before it any employer plaintiffs, but considered only the First Amendment interests of the attorney plaintiffs who filed the Minnesota challenge. Nor did the *Labnet* court have before it a full record of the chilling effect of the new Rule on the First Amendment rights of both employers and attorneys.[8] But in addition, the *Labnet* court gave inadequate scrutiny to the relationship between the new Rule's overbroad requirements and the asserted interests of the government underlying the new Rule. 2016 U.S. Dist. LEXIS 81884, at **22-23.

Thus, the Minnesota district court acknowledged the Eighth Circuit's *en banc* holding in *Minn. Citizens Concerned for Life, Inc. v. Swanson*, 692 F.3d at 874-75, but nevertheless failed to adhere to it. The *Labnet* court instead accepted DOL's entirely speculative claim that employees will be "better equipped to assess an employer's union-related message if they know that the message has been scripted by a third party." *Id.* at *26. DOL has never presented any evidence to support the foregoing claim. As Plaintiffs have previously pointed out, there is nothing in the legislative history of the LMRDA supporting DOL's claim that informing employees of the source of their employers' information about unions was the governmental interest underlying the LMRDA. To the contrary, the disclosure interest identified in Congress was the goal of informing employees of the source of the persuader's employment, i.e., that the employer stood behind the persuader, not the other way around. The *Labnet* court failed to connect the newly expanded governmental interest advance by DOL to the original Congressional intent underlying the LMRDA.

The *Labnet* court further erred by failing to address the inherent flaws in DOL's "transparency" argument, discussed at length in the *NFIB* opinion. These include the fact that

[8] See Plaintiffs' Declarations attached to their Motion for Preliminary Injunction and Reply, evidencing numerous specific adverse impacts of the new Rule on the ability of Plaintiffs' employer members to obtain advice on the subject of unionization needed to communicate with their employees, as well as the chilling effect on the Plaintiff associations themselves. The *Labnet* court received no evidence on the harms imposed on employers by the new Rule.

the reports at issue will typically not be filed until after employees vote on unionization. 2016 U.S. Dist. LEXIS 89694, at *94. The *Labnet* court (at *27) also improperly relied on the Sixth Circuit's decision in *Humphreys, Hutcheson & Moseley v. Donovan*, 755 F.2d 1211, 1215 (6th Cir. 1985), whose holding the Eighth Circuit squarely rejected in *Donovan v. The Rose Law Firm*.[9] *See also 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.").

The *Labnet* court also failed to address at all the "compelled speech" aspect of the new Rule. By forcing attorneys and other consultants to identify themselves as "persuaders," a highly controversial label in the labor relations field, DOL's new Rule compels such advisors, and employers who retain such firms for the purpose of receiving indirectly persuasive advice, to publicly stigmatize themselves. *See National Association of Manufacturers v. SEC*, 800 F.3d 518 (D.C. Cir. 2015), *rehearing en banc denied*, 2015 U.S. App. LEXIS 19539 (D.C. Cir. Nov. 9, 2015) ("Requiring a company to publicly condemn itself is undoubtedly a more 'effective' way for the government to stigmatize and shape behavior than for the government to have to convey its views itself, but that makes the requirement more constitutionally offensive not less so."). *Id.* at 530.[10] As established in the Affidavits attached to Plaintiffs' Motion for Preliminary

[9] The *Labnet* court further ignored the failure of the new Rule to narrowly tailor its First Amendment burdens to meet the government's supposed objective, unlike the original persuader cases that imposed disclosure requirements only upon persuaders who communicated directly with employees. The narrow tailoring on which those courts relied, i.e., the exemption of speech that was limited to the provision of advice to employers, has been discarded under the new Rule. The new Rule applies the reporting requirements much more broadly than before, in a manner contrary to the statutory advice exemption.

[10] *See also Riley v. Nat'l Federation of the Blind of N.C., Inc*., 487 U.S. 781, 797 (1988); *Wooley v. Maynard*, 430 U.S. 705 (1977); *W.Va. State Bd. of Ed. v. Barnette*, 319 U.S. 624 (1943); *Rumsfeld v. Forum for Academic & Institutional Rights, Inc*., 547 U.S. 47, 61 (2006). The *NAM* court cited all of these cases for the principle that "freedom of speech prohibits the government from telling people what they must say."

Injunction app. 42-43nd Reply, numerous law firms have gone on record as stating that if DOL's new Rule is allowed to go into effect, they will no longer be able to give labor relations advice to employers because of the chilling effect of the new Rule's requirements.[11]

## IV. 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 noted above, the *NFIB* court found that the new Rule is arbitrary and capricious because it interferes with the attorney-client privilege and the ethical duty of confidentiality of owed by attorneys to their clients. 2016 U.S. Dist. LEXIS, at 89694, at **82-86. The *Labnet* court addressed this issue only in a footnote, rejecting without detailed analysis the contention that the new Rule violates the statutory protection of attorney-client privilege or attorney confidentiality. As pointed out in Plaintiffs' Memorandum, however, at pp. 43, the new Rule requires both employers and newly labeled persuader-advisors 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.

Under the new Rule, therefore, contrary to the *Labnet* opinion, attorneys who disclose the information demanded by DOL will be inevitably disclosing confidential client information in

[11] As further noted in Plaintiffs' Memorandum, at pp. 42-43, 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). *See also* Brubeck Affidavit on behalf of Associated Builders and Contractors, identifying specific threats, harassment and reprisals against the association and its members.

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." See also Comments filed by the American Bar Association (A.R. 523); Testimony of Wm. T. (Bill) Robinson, III, House Subcommittee on Health, Employment, Labor, and Pensions (Aprl 27, 2016), available at http://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."); and the amicus brief submitted by the State Attorneys General, with citations to numerous ethical opinions and case authorities. *See 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 (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.

As Plaintiffs have also argued previously, DOL's new Rule attempts to draw a distinction that does not exist between "pure" legal advice (protected from disclosure) and practical business advice by lawyers (whose disclosure DOL seeks to compel). To the contrary, Rule 2.1 of the Arkansas Rules of Professional Conduct states: "In rendering advice, a lawyer may refer not only to law but to other considerations such as moral, economic, social and political factors, that may be relevant to the client's situation." *See also* Comment 2, which states: "Advice couched in narrow legal terms may be of little value to a client, especially where practical considerations,

such as cots or effects on other people, are predominant. Purely technical legal advice, therefore, can sometimes be inadequate."

DOL's attempt to ignore the state law principles guiding the legal profession constitutes, in effect, an attempt to regulate the practice of law, and nothing in the LMRDA gives DOL any such power. The D.C. Circuit held in the case of *ABA v. FTC*, 430 F.3d 457, 471 (D.C. Cir. 2005), that if Congress intended to preempt state law regulating the practice of law, then Congress must have provided a "clear statement" of its intent to do so. 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, notwithstanding the ethical dilemma that such disclosure will create for many lawyers.

## V. THE RULE IS UNCONSTITUTIONALLY VAGUE UNDER THE FIFTH AMENDMENT.

The *NFIB* court properly found that DOL's new Rule 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. 2016 U.S. Dist. LEXIS 89694, at **98-103. The *Labnet* court declined to hold that the new Rule is void for vagueness, 2016 U.S. Dist. LEXIS 81884, at **27-29, yet elsewhere in the same opinion the court described DOL's line drawing between reportable and non-reportable activities as "incoherent." *Id.* at *16. The court further criticized DOL's "distinctions between activities that are materially indistinguishable" and described an "untenable divide" that DOL "has created between persuader

activities and advice." *Id*. at *27-29. The court highlighted numerous commonplace examples of advisor behavior to which *DOL's own attorneys* could not provide clear answers as to whether reports would be required or why. *Id*. These findings contradict the court's subsequent holding that application of the new Rule is "straightforward" and not unduly vague. *Id*. at *29.

As Plaintiffs have previously argued, the older circuit court decisions on which the new Rule relies were decided under DOL's previous "bright line" rule, and therefore offer no support for the new Rule as against a vagueness challenge. *See Master Printers*, 751 F.2d at 710-12; *Fowler*, 372 F.2d at 334-35; *Master Printers Ass'n*, 532 F. Supp. at 1152, aff'd 699 F.2d 370 (7th Cir. 1983). These holdings were also rejected by the Eighth Circuit in *Donovan v. The Rose Law Firm.* As further noted in Plaintiffs' previous memoranda, the LMRDA is a criminal statute, and the new Rule 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.[12] Contrary to the *Labnet* decision, the new Rule fails the vagueness test because it does not "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). *See also Grayned v. City of Rockford*, 408 U.S. 104, 108 (1972); *Thomas v. Collins*, 323 U.S. 516, 535 (1945); Plaintiffs' Memorandum at 47-48.

## VI. DOL HAS FAILED ADEQUATELY TO ANALYZE THE ADVERSE IMPACT OF THE NEW RULE ON SMALL EMPLOYERS, AS REQUIRED UNDER THE REGULATORY FLEXIBILITY ACT.

[12] As has recently been made clear by the Fifth Circuit, principles of fair notice and due process protect businesses against unduly vague government regulations, even in the absence of criminal penalties. *See Employer Solutions Staffing Group II, LLC, v. Office of the Chief Administrative Hearing Officer*, Case No. 15-60173, 2016 WL 4254370 (5th Cir. Aug. 11, 2016) ("Statutes and regulations which allow monetary penalties against those who violate them … must give a regulated party fair warning of the conduct they prohibit or require ….").

The *NFIB* decision correctly found that DOL failed to conduct a sufficient regulatory flexibility analysis that complies with the Regulatory Flexibility Act, 5 U.S.C. § 611. 2016 U.S. Dist. LEXIS 89694, at **104-108. The RFA requires that DOL make a good faith effort to consider all of the entities affected by the new Rule, which the agency plainly failed to do. *See Aeronautical Repair Station Assn, Inc. v. FAA*, 494 F.3d 161, 178 (D.C. Cir. 2007).

The *Labnet* court declined to find a violation of the RFA under a highly deferential standard. 2016 U.S. Dist. LEXIS 81884, at **32-35. Of particular significance, the Minnesota court allowed DOL to issue the new Rule without considering the costs of compliance with the closely related LM-21 form, which DOL has arbitrarily announced will be revised in a separate rulemaking. Contrary to the *Labnet* court, this action constituted a failure by the agency to "consider how the likely future resolution of crucial issues will affect the rule's rationale." *NFIB*, at *106, quoting *Nat'l Ass'n of Broadcasters v. FCC*, 740 F.2d 1190, 1210 (D.C. Cir. 1984). In addition, whereas the *Labnet* court viewed the estimates of DOL's former chief economist Diana Furchtgott-Roth as "highly inflated," the *NFIB* court had the benefit of testimony flatly contradicting DOL's grossly undervalued cost estimate of $108 per employer. *Id*. at **108-09.

Of equal importance, as Plaintiffs here have argued (Plaintiffs Memorandum at 48-50), DOL simply ignored large numbers of businesses and law firms that 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. The *Labnet* court criticized Dr. Furchtgott-Roth's estimate as to the number of employers potentially covered by the Rule, yet failed to hold DOL to account for arbitrarily limiting the reporting estimates to those employers who actually receive an election petition. The Rule must be set aside on this ground as well.

## VII. THE NEW RULE WILL HARM EMPLOYERS, THEIR ADVISORS, AND THE PUBLIC INTEREST, AND SHOULD BE VACATED.

Because this case has now reached the summary judgment stage as opposed to preliminary injunction, it is no longer necessary for Plaintiffs to establish that they will be irreparably harmed by the new Rule. Nevertheless, Plaintiffs' affidavits and numerous comments in the Administrative Record show that the 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 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.

Also, 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 their 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 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, Roachell Aff. ¶ 4; Brubeck Aff. ¶ 8. See also Affidavits of Streven Wall, Richard Roderick, Jacqueline Scott, Ginger Schroder, Louis DiLorenzo, Montine McNulty, Randy Zook, and Stephen Hirschfeld, all of which are attached to Plaintiffs' Reply brief [ECF 41, attachments A-H].

Aside from the tangible harm that is threatened by the new Rule, perhaps the greatest harm present in this case is to the rule of law. Two courts have now held that DOL's new Rule violates the plain language of the LMRDA, ignoring the will of Congress expressed over the past 55 years. In addition, the Rule violates fundamental liberties espoused in the First and Fifth Amendments to the United States Constitution. For all of these reasons, the Rule must be set aside in accordance with the Administrative Procedure Act.

**CONCLUSION**

The new Rule is in excess DOL's statutory jurisdiction, authority, and limitations, is contrary to the LMRDA, the NLRA, the RFA, the APA, and the Constitution, and is arbitrary and capricious. For all of these reasons, this Court should declare the new Rule to be unlawful, should permanently vacate it on a nationwide basis.

Respectfully submitted,

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**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 19th day of August, 2016.

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