UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF TEXAS
LUBBOCK DIVISION

NATIONAL FEDERATION OF INDEPENDENT BUSINESS, a California non-profit mutual benefit corporation, TEXAS ASSOCIATION OF BUSINESS, a Texas non-profit organization, LUBBOCK CHAMBER OF COMMERCE, a Texas non-profit organization, NATIONAL ASSOCIATION OF HOME BUILDERS, a Nevada non-profit corporation, and TEXAS ASSOCIATION OF BUILDERS, a Texas non-profit organization, Plaintiffs, v. THOMAS E. PEREZ, in his official capacity, Secretary, United States Department of Labor, MICHAEL J. HAYES, in his official capacity, Director, Office of Labor-Management Standards, United States Department of Labor, and UNITED STATES DEPARTMENT OF LABOR, Defendants.	CIVIL ACTION NO: 5:16-cv-00066-C **PLAINTIFFS' BRIEF IN SUPPORT OF THEIR APPLICATION (MOTION) FOR PRELIMINARY INJUNCTION**

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page(s)

CASES

CONSTITUTION AND STATUTES

REGULATIONS

OTHER AUTHORITIES

I. INTRODUCTION

Plaintiffs National Federation of Independent Business ("NFIB"), Texas Association of Business ("TAB"), Lubbock Chamber of Commerce ("Lubbock Chamber"), National Association of Home Builders, and Texas Association of Builders ("Plaintiffs") file this Brief in support of the Application (Motion) for Preliminary Injunction set forth in their Complaint For Declaratory Relief and Application for Preliminary Injunction and Permanent Injunction ("Complaint") filed on March 31, 2016. [Doc. 1]. As set forth below, Plaintiffs seek an order preliminarily enjoining Defendants Thomas E. Perez, in his official capacity as Secretary, United States Department of Labor; Michael Hayes, in his official capacity as Director, Office of Labor-Management Standards, United States Department of Labor; and the United States Department of Labor (collectively, "Defendants" or "DOL") from implementing and enforcing the final rule entitled "Interpretation of the 'Advice' Exemption in Section 203(c) of the Labor-Management Reporting and Disclosure Act." 81 Fed. Reg. 15924 (Mar. 24, 2016). Defendants should also be enjoined from referring both civil and criminal cases under its new interpretation to the U.S. Department of Justice. The purpose of the requested preliminary injunction is to preserve the status quo pending a final judgment in this lawsuit and to prevent irreparable harm to Plaintiffs.

This case involves a significant revision by DOL of regulations governing employers' access to advice with respect to union organizing. For over fifty years, employers have been able to obtain such advice, including legal advice, regarding the complex requirements of the National Labor Relations Act ("NLRA"), 29 U.S.C. §§ 151-169, in the course of communicating with employees about union organizing – without either employers or consultants, including attorneys, retained by employers being required to file persuader reports under Section 203 of the Labor-Management Reporting and Disclosure Act ("LMRDA"). 29 U.S.C. § 433 (2012). The Advice

Exemption enacted by Congress in Section 203(c) of the LMRDA expressly exempts the giving and receiving of advice from the statute's persuader reporting obligations. The Advice Exemption states: "Nothing in this section shall be construed to require any employer or other person to file a report covering the services of such person by reason of his giving or agreeing to give advice to such employer." 29 U.S.C. § 433(c) (2012). The LMRDA further provides: "Attorneys in good standing in any state are not required to include in any report information lawfully communicated to them by their clients in the course of a legitimate attorney-client relationship." 29 U.S.C. § 434 (2012).

For nearly the entire history of the LMRDA, DOL has applied a simple, easy-to-understand, bright-line test to allow employers and consultants, including attorneys, to identify what activity falls within or outside of the Advice Exemption. DOL's longstanding interpretation of the Advice Exemption was derived from a 1962 memorandum by President John F. Kennedy's Solicitor of Labor, Charles Donahue ("the Donahue Memo"), which declared consultant, including attorney, communications to be advice within the meaning of the Advice Exemption if:

(1) the consultant did not communicate directly with non-management/supervisory employees; and

(2) the employer was free to accept or reject the consultant's advice.

See LMRDA Interpretative Manual Entry § 265.005 (Jan. 19, 1962); 81 Fed. Reg. 15931 (March 24, 2016); *see also* 81 Fed. Reg. 15931; *International Union, United Auto., etc. v. Dole*, 869 F.2d 616 (D.C. Cir. 1989) (Ginsberg, J.).

On March 24, 2016, DOL published what it refers to as "Interpretation of the 'Advice' Exemption in Section 203(c) of the Labor-Management Reporting and Disclosure Act." 81 Fed. Reg. 15924 (March 24, 2016). DOL's new rule ("Advice Exemption Interpretation") is comprised of 127 pages, three columns per page, as published in the Federal Register. It has an effective date

of April 25, 2016, and it will apply to arrangements, agreements, and payments (including reimbursed expenses) made on or after July 1, 2016. 81 Fed. Reg. 15924 (March 24, 2016).

DOL's new and constricted Advice Exemption Interpretation[1] jettisons five decades of understanding and practice and abandons the simple and understandable two-part bright line test, described above, that DOL has utilized for more than fifty years to determine if a consultant, including an attorney, has engaged in Persuader Activity, thereby triggering reporting obligations under the LMRDA. DOL's new rule reads the Advice Exemption out of the LMRDA.

Persuader Activity is defined in DOL's new rule as "any actions, conduct, or communications that are undertaken with an object, explicitly or implicitly, directly or indirectly, to affect an employee's decisions regarding his or her representation or collective bargaining rights." *Id.* at 16027, 16043 (emphasis added). DOL's new rule provides examples of activities that, when undertaken with an object to persuade, trigger reporting obligations. These include:

- Planning, directing, or coordinating activities undertaken by supervisors, or other employer representatives, including meetings and interactions with employees;
- Providing material or communications to the employer, in oral, written, or electronic form, for dissemination or distribution to employees;
- Developing or implementing personnel policies, practices, or actions for the employer.

Id. In addition, DOL's new rule requires disclosure of "information-supplying agreements or arrangements," described as agreements or arrangements pursuant to which a consultant provides

[1] In their Complaint, Plaintiffs refer to DOL's new rule as its "new and expanded Advice Exemption Interpretation." However, as DOL's new rule expands the scope of reportable Persuader Activity and constricts the scope of the Advice Exemption, it will be referred to herein as DOL's "new and constricted Advice Exempted Interpretation."

information concerning the activities of employees or a labor organization in connection with a labor dispute. *Id.* at 16028, 16043.

Union membership has plummeted to less than 7% of the private sector workforce in the United States.[2] Objective observers identify multiple causes for the decline, including a decrease in the number of manufacturing jobs, globalization, and the increased prevalence of wage and anti-discrimination laws that may reduce employees' need for unions. *See, e.g.* E.H. "Why Trade Unions are Declining," *The Economist* (Sept. 28, 2015), available at http://www.economist.com/blogs/economist-explains/2015/09/economist-explains-19 (last visited Apr. 18, 2016). Ignoring these fact-based explanations for the decline in private sector union membership, the National Labor Relations Board ("NLRB") and DOL have taken an ideological and biased position, blaming the decline on presumed, but unproven, misconduct by employers, while assuming the decline is inherently bad and should be reversed. To this end, the NLRB recently adopted what is known as a "quickie election rule,"[3] pursuant to which an election can be held within thirteen days from a union's filing of a petition for representation. 79 Fed. Reg. 74308 (Dec. 15, 2014). The NLRB's new rule radically condenses the time period that employers have to respond to union organizing activity.[4]

[2] Union membership has steadily fallen for decades. In 1945, more than a third of non-agricultural workers were union members. Gerald Mayer, "Union Membership Trends in the United States" (CRS [Congressional Research Service] Report for Congress, August 31, 2004) at CRS-12, available at http://www.digitalcommons.ilr.cornell.edu/key_workplace/174/. In 1983, union membership was 20.1 percent. Bureau of Labor Statistics, Economic News Release. Union Members-2015 (Jan. 28, 2015), available at http://www.bls.gov/news.release/union2.nr0.htm. By 2015, the rate of union membership had plummeted to 11.1 percent as a whole and within the private sector stood at a meager 6.7 percent. *Id.*

[3] Sometimes also referred to as "ambush election rule."

[4] The latest statistics published by the NLRB show that the median number of days between the filing of a union representation petition and the NLRB holding an election dropped from 38 days during the April 14, 2014, to April 14, 2015, time period to 23 days during the April 14, 2015, to April 14, 2016, time period. Unions won 71% of the election held during the April 14, 2014, to April 14, 2015, time period and 70% of the elections held during the April 14, 2015, to April 14, 2016, time period. *See* NLRB Annual Review of Revised R-Case Rules, http://www.nlrb.gov/news-outreach/news-story/annual-review-revised-r-case-rules (April 20, 2016).

The NLRB's new "quickie election rule" and DOL's new and constricted Advice Exemption Interpretation are part of a thinly-veiled effort to reverse the decline of union membership in the United States. In its *Weekly Newsletter* of February 4, 2016, DOL proclaimed it to be beyond debate that "union membership boosts the incomes of workers . . . and helps people punch their tickets to the middle class." U.S. Dept. of Labor, Tom Perez, *Unions Matter* (2016) https://medium.com/@LaborSec/unions-m,atter-2ca77cdc5559. According to DOL, "when folks make it harder for unions to organize . . . it weakens the middle class." *Id.* DOL has stated that supporting labor unions is "one surefire way" to build a strong middle class. *Id.* DOL's new and constricted Advice Exemption Interpretation seeks to offer campaign assistance to union organizers by discrediting information supplied by employers, as explained by DOL:

> . . . [T]he premise of the rule is that with knowledge that the source of the information received is an anti-union campaign managed by an outsider, workers will be better able to assess the merits of the arguments directed at them . . . With this information, they will be able to better discern whether the views and specific arguments of their supervisors . . . reflect a scripted … antipathy towards union representation and collective bargaining. Once they have learned that a consultant has been hired to persuade them, employees will be…better able to consider the weight to attach to the common claim in representational campaigns that bringing a union, as a third party, into the workplace will be counterproductive to the employees' interests. In the context of an employer's reliance on a third party to assist it on a matter of central importance, it is possible that an employee may weigh differently any messages characterizing the union as a third party. In these instances, it is important for employees to know that if the employer claims that employees are family – a relationship will be impaired, if not destroyed, by the intrusion of a third party into family matters – it has brought a third party, the consultant, into the fold to achieve its goals.

Id. at 15926-27 (March 24, 2016).

In addition, DOL's new and constricted Advice Exemption Interpretation clearly contemplates that expanded reporting requirements will discourage employers from the use of consultants, including attorneys, when responding to union organizing activity. DOL states:

> A senator and congressman stated that employees would be stunned at the amount of money employers pay anti-union consultants . . . an example, the commenters pointed to litigation documents revealing that a company paid a prominent law firm $2.7 million in fees to prevent employees from unionizing … Further, the commenters stated that workers would "surely be interested" in knowing that management is "paying lavish fees for consultants to run" a counter-organizing campaign . . . **Another commenter suggested that . . . if provided with this information, some employers, particularly smaller employers, might decide to negotiate in good faith rather than to pay law firms that have a strong interest in opposing unions, suggesting that "the harder law firms fight the union, the more they earn."**

Id. at 15956 (emphasis added).

DOL's ostensible rationale for its new and constricted Advice Exemption Interpretation is to insure that employee-voters in union representation elections are better informed, but DOL has no experience or even jurisdiction with respect to either union organizing campaigns or NLRB elections. Those matters are regulated solely by the NLRB, a separate and independent agency. 29 U.S.C. § 153 *et. seq.* DOL's new rule does nothing to insure that employees voting in union representation elections will be better informed. Indeed, this purported justification for DOL's new rule is a pretext. LM disclosure forms required to be filed pursuant to DOL's new rule will not normally be filed and available for inspection until after employees have voted in a union representation election. The true purpose of DOL's new rule is not to provide employees with information. Rather, it is to reduce the ability of employers to obtain advice when responding to union organizing, a purpose that is contrary to the LMRDA and beyond DOL's authority.

Plaintiffs bring this lawsuit seeking declaratory and injunctive relief because DOL's new and constricted Advice Exemption Interpretation is without statutory authority, is in direct conflict with specific existing statutory provisions, is contrary to the U.S. Constitution, and usurps, without statutory authority, the right of the States to regulate the attorney-client relationship. DOL's new rule will require practicing attorneys to violate either DOL's new interpretation of federal law or state ethics rules relating to the disclosure of attorney-client information. DOL's new rule illegally interferes with the right of Plaintiffs' employer-members to obtain confidential advice, including confidential legal advice, and impedes their right to communicate with their employees about unions and workplace issues. DOL's new rule adversely impacts Plaintiffs, Plaintiffs' members, employers, and employees. Small employers are particularly adversely impacted by DOL's new rule. DOL's new rule also contradicts the LMRDA's plain language. It is arbitrary, capricious and the result of an abuse of discretion by DOL. DOL's new rule targets and restricts specific subjects of communication in direct contravention of the First Amendment. It is impermissibly vague in violation of Plaintiffs' Due Process and Equal Protection rights under the Fifth Amendment. It is also preempted by Section 8(c) of the NLRA, and it violates the Regulatory Flexibility Act ("RFA").

Pending a final judgment in this litigation, Defendants should be preliminarily enjoined from implementing and enforcing DOL's new and constricted Advice Exemption Interpretation to avoid irreparable injury to Plaintiffs and their members.[5] Defendants should also be enjoined from referring civil and criminal cases to the U.S. Department of Justice under DOL's new rule.[6]

[5] Two other lawsuits have been filed which also seek to enjoin DOL's implementation and enforcement of its new rule. Those two lawsuits are: (1) Case No. 4:16-cv-00169-KGB, *Associated Builders and Contractors of Arkansas, et al. v. Thomas E. Perez, et al.*, pending in the United States District Court for the Eastern District of Arkansas; and (2) Case No. 0:16-cv-00844-PJS-JSM, *Labmet, Inc. d/b/a Worklaw Network, et al. v. United States Department of Labor*, pending in the United States District Court for the District of Minnesota.

[6] The U.S. Department of Justice and DOL are parties to a January 18, 2005, Memorandum of Understanding Relating to the Investigation and Prosecution of Crimes and Civil Enforcement Actions Under the LMRDA, 70 Fed. Reg.

Plaintiffs incorporate by reference the detailed allegations set forth in their Complaint. [Doc. 1 ¶¶ 13-58]. Plaintiffs are not repeating those detailed allegations in this brief.

II. LEGAL STANDARD

To secure a preliminary injunction, Plaintiffs must demonstrate (1) a substantial likelihood of success on the merits of their case; (2) a substantial threat of irreparable injury; (3) that the threatened injury outweighs any damage that the injunctive order might cause the Defendants; and (4) that the order will not be adverse to the public interest. *Women's Med. Ctr. v. Bell*, 248 F.3d 411, 418–20, n.15 (5th Cir. 2001); *Dallas Cowboys Cheerleaders v. Scoreboard Posters, Inc.*, 600 F.2d 1184, 1187 (5th Cir. 1979); *Barton v. Huerta*, 2014 WL 4088582, at *1 (N.D. Tex. 2014), *aff'd*, 613 F.App'x 426 (5th Cir. 2015). "The decision to grant or deny a preliminary injunction is discretionary with the district court." *Miss. Power & Light Co. v. United Gas Pipe Line*, 760 F.2d 618, 621 (5th Cir. 1985). To preserve the status quo, federal courts regularly enjoin federal agencies, including DOL, from implementing and enforcing new regulations pending litigation challenging them. *See, e.g., Texas v. United States*, 95 F.Supp.3d 965, 983 (N.D. Tex. 2015) (granting plaintiffs' application for preliminary injunction and enjoining DOL from applying a new rule "pending a full determination of this matter on the merits"); *Bayou Lawn & Landscape Servs. v. Oates*, 713 F.3d 1080, 1083 (11th Cir. 2013) (affirming district court order granting a preliminary injunction prohibiting DOL's enforcement of certain rules during the pendency of action).

III. ARGUMENT

A. Plaintiffs will likely succeed on the merits.

In their Complaint, Plaintiffs challenge DOL's new and constricted Advice Exemption

20601 (April 20, 2005).

Interpretation based on the Administrative Procedure Act ("the APA") because the new rule is in excess of DOL's statutory authority, contrary to the plain wording of the LMRDA, and is arbitrary and capricious (First Cause of Action); based on the First Amendment to the U.S. Constitution because the new rule violates Plaintiffs' and their members' free speech rights (Second Cause of Action) [7]; based on the Fifth Amendment to the U.S. Constitution because the new rule imposes criminal sanctions but fails to define with necessary clarity what conduct is outlawed (Third Cause of Action); and based on the Regulatory Flexibility Act ("RFA"), 5 U.S.C. § 601 (2012), because DOL failed to properly account for the costs of the new rule (Fourth Cause of Action). Plaintiffs are likely to succeed on one or more of these causes of action, thereby rendering the new rule void and unenforceable.

1. Plaintiffs will likely succeed on their claim that DOL lacks statutory authority to promulgate and enforce its new and constricted Advice Exemption Interpretation.

DOL lacks authority to issue and enforce its new and constricted Advice Exemption Interpretation. The intent of Congress in passing the LMRDA is unambiguous. The language of the LMRDA itself is also unambiguous. The LMRDA clearly exempts advice, including legal advice, from its reporting requirements. "An agency must interpret its implementing legislation in a reasonable manner and may not make findings or promulgate regulations in a manner that is arbitrary or capricious in substance, or manifestly contrary to the statute." *Highland Med. Ctr. v. Leavitt*, No. 5:06-cv-082-C, 2007 WL 5434880, at *3 (N.D. Tex. 2007) (quoting *Clark Reg'l Med. Ctr. v. United States HHS*, 314 F.3d 241, 244 (6th Cir. 2002)).

When reviewing an agency's construction of a statute under the APA, courts apply the two-step analysis established by *Chevron U.S.A., Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837,

[7] DOL's new rule is also preempted by Section 8(c) of the NLRA, 29 U.S.C. § 158(c) (2012).

842–43 (1984). Under step one, where "Congress has directly spoken to the precise question at issue," courts must "give effect to the unambiguously expressed intent of Congress." *Id*. at 842–43. Courts "must reject administrative constructions which are contrary to clear congressional intent." *Highland Med. Ctr.*, 2007 WL 5434880, at *3. On the other hand, "if Congress' intent is unclear, the court must determine whether the agency's construction is based upon a permissible construction of the statute." *Id.* (internal quotation marks omitted). Pursuant to the APA, courts must "hold unlawful and set aside an action by an agency that is arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with the law." *Odessa Reg'l Hosp. v. Leavitt*, 386 F.Supp.2d 885, 890 (W.D.Tex. 2005) (quoting *Thomas Jefferson Univ. v. Shalala*, 512 U.S. 504 (1994)); 5 U.S.C. § 701 *et seq*. (2012). DOL'S new rule should be set aside because DOL "exercise[d] its authority in a manner inconsistent with the administrative structure that Congress enacted into law." *Raggsdale v. Wolverine World Wide, Inc.*, 535 U.S. 81, 91 (2002).

a. DOL's new and constricted Advice Exemption Interpretation contradicts the plain and unambiguous language of the LMRDA.

Under *Chevron* Step 1, where statutory language "has a plain and unambiguous meaning," the court need look no further. *United States v. Kay*, 359 F.3d 738, 742 (5th Cir. 2004). "If the intent of Congress is clear, - that is, the statute is unambiguous with respect to the question presented – the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress." *Khalid v. Holder*, 655 F.3d 363, 366 (5th Cir. 2011) (quoting *Chevron*, 467 U.S. at 842–43), *abrogated on other grounds by Scialabba v. Cuellar de Osorio*, 134 S.Ct. 2191 (2014). Statutory construction must begin with the language employed by Congress ***and the assumption that the ordinary meaning of that language accurately expresses the legislative purpose***. *Thompson v. Goetzmann*, 337 F.3d 489, 498 n.19 (5th Cir. 2003) (citing *Ins v. Phinpathya*, 464 U.S. 183, 189 (1984) ("noting that in all cases involving statutory construction, our starting point

must be the language employed by Congress, - and we assume that the legislative purpose is expressed by the ordinary meaning of the words used")); *Caminetti v. United* States, 242 U.S. 470, 471 (1917) ("statutory words are uniformly presumed, unless the contrary appears, to be used in their ordinary and usual sense, and with the meaning commonly attributed to them"); *White v. Black*, 190 F.3d 366, 368 (5th Cir. 1999) ("The canons of statutory construction dictate that when construing a statute, ***the court should give words their ordinary meaning*** and should not render as meaningless the language of the statute") (emphasis added). As the Supreme Court has explained, "[c]ourts must presume that a legislature says in a statute what it means and means in a statute what it says there." *Conn. Nat'l Bank v. Germain*, 503 U.S. 249, 253-54 (1992). Indeed, "[w]hen the words of a statute are unambiguous, then, this first canon is also the last: judicial inquiry is complete." *Id*. *See also Thompson*, 337 F.3d at 497 (in applying *Chevron*, court declined to consider legislative history where the statute was clear on its face, noting "we decline to find ambiguity where none exists").

DOL's new and constricted Advice Exemption Interpretation does not pass Step 1 of the *Chevron* analysis. DOL's new rule violates the APA because it is "in excess of the statutory jurisdiction, authority, or limitations, or short of statutory rights." 5 U.S.C. § 706(2)(C) (2012).

The LMRDA imposes a reporting obligation on "activities where an object thereof is, directly or indirectly … to persuade employees" regarding union organizing. 29 U.S.C. § 433(b)(1) (2012). The LMRDA creates a **specific exemption** from such obligation, *i.e*. the Advice Exemption contained in Section 203(c) of the LMRDA. The Advice Exemption provides in relevant part:

> (c) Advisory or representative services exempt from filing requirements. Nothing in this section shall be construed to require any employer or other person to file a report covering the services of such person by reason of his ***giving or agreeing to give advice*** to

> such employer or representing or agreeing to represent such employer before any court, administrative agency, or tribunal of arbitration or engaging or agreeing to engage in collective bargaining on behalf of such employer with respect to wages, hours, or other terms or conditions of employment or the negotiation of an agreement or any question arising thereunder.

29 U.S.C. § 433 (2012) (emphasis added).[8]

As explained in detail in Plaintiffs' Complaint and in the Introduction to this Brief, DOL has for decades interpreted the Advice Exemption to exclude from the LMRDA's reporting requirements an employer's engagement of a consultant, including an attorney, to assist the employer in responding to union organizing so long as the consultant has no direct contact with the employees to be persuaded and the employer is free to accept or reject the consultant's recommendations. This bright-line interpretation was consistent with the statute. Among the many activities considered for decades to fall within the Advice Exemption are an attorney's legal review of actions contemplated by the employer in response to union organizing, including the preparation of documents, speeches and even responses by an employer to questions raised by employees, for an employer's use during union organizing, the training of managers and supervisors through conferences and seminars and otherwise, and the development of personnel policies and practices.

DOL's new and constricted Advice Exemption Interpretation transforms the clear language of the LMRDA, particularly the Advice Exemption, into an onerous, confusing, burdensome, and subjective motive-based interpretation. While DOL describes the purpose of its new rule as being "to revise the Department's interpretation of Section 203 of the [LMRDA] to require reporting of

[8] The heading of the statutory provision containing the Advice Exemption states "Advisory or representative services *exempt* from filing requirements." 29 U.S.C. § 433(c) (2012) (emphasis added). *See I.N.S. v. Nat'l Center for Immigrant Rights, Inc.* 502 U.S. 183, 189 (1991) ("[T]he title of a statue or section can be used in resolving an ambiguity in a statue's text.").

'indirect' persuader activity and agreements" (81 Fed. Reg. 15925 (March 24, 2016)), DOL fundamentally distorts what constitutes indirect persuader activity under Section 203(b)(1) of the LMRDA.[9] While Section 203(b) of the LMRDA creates a reporting obligation applicable to agreements and arrangements where an employer's objective is direct or indirect Persuader Activity, **it specifically exempts advice from all reporting requirements applicable to either direct or indirect Persuader Activity.** 29 U.S.C. § 433 (2012).

DOL incorrectly reached the following conclusion in its new rule: "[I]f the consultant engages in both advice and Persuader Activities, however, the entire agreement or arrangement must be reported." *Id.* at 15937. **The LMRDA's Advice Exemption in LMRDA makes clear that "giving or agreeing to give advice" to an employer is simply not a reportable activity. It is exempt from reporting.** 29 U.S.C. § 433 (2012).

DOL's new and constricted Advice Exemption Interpretation fundamentally misconstrues the meaning of the word "advice" contained within the Advice Exemption. While DOL's new rule acknowledges that '"[a]dvice means an oral or written recommendation regarding a decision or course of conduct" (81 Fed. Reg. 16028 (March 24, 2016)), DOL erroneously considers the following activities (which necessarily encompass the giving of advice) reportable and outside the protection of the Advice Exemption:

> DOL reiterates the rule in effect for 50 years requiring direct contact with an employee to establish an engagement in Persuader Activity **and four new instances which DOL asserts establish participation by a consultant in Persuader Activity without direct employee contact under the new rule.** There are five general scenarios in which the underlying test for persuasion is to be applied, one in which the consultant engages in direct contact with employees and four in which the consultant does not engage in direct contact:

[9] In addition to misconstruing the ordinary definition of "advice," DOL fails to properly define what constitutes "indirect" persuasion. In ordinary usage, "direct" persuasion involves open and frank communication addressed to the question at issue. "Indirect" persuasion is simply comprised of subtler efforts to change a person's mind. *Davis v. Halpern*, 768 F. Supp. 968, 985 (E.D.N.Y. 1991).

> **Reporting of an agreement or arrangement is triggered when:**
>
> **(1) A consultant engages in *direct* contact or communication with any employee with an object to persuade such employee; or**
>
> **(2) A consultant who has no direct contact with employees undertakes the following activities with an object to persuade employee;**
>
> **(a) Plans, directs, or coordinates activities undertaken by supervisors or other employer representatives, including meetings and interactions with employees;**
>
> **(b) Provides material or communications to the employer, in oral, written, or electronic form, for dissemination or distribution to employees;**
>
> **(c) Conducts a seminar for supervisors or other employer representatives; or**
>
> **(d) Develops or implements personnel policies, practices, or actions for the employer;**
>
> The activity that triggers the consultant's requirement to file the Form M-20 also triggers the employer's obligation to report the agreement on the Form LM-10 . . .

Id. at 15938 (emphasis added).

DOL fails to recognize that communications such as a speech prepared to advise employees about the consequences of unionization can both contain advice and be persuasive. DOL's new rule declares such undertakings outside the scope of the Advice Exemption because they have an objective of helping an employer persuade employees to resist union organizing. However, DOL fails to give the Advice Exemption its statutory effect, because the Advice Exemption exempts advice from the LMRDA's reporting requirements. DOL's new rule is also self-contradictory. *Compare Id.* at 15927 (Advice Exemption does not apply to "revising employer-created materials . . . if the 'object' of the revisions is to enhance persuasion"), with *Id*. at 15939 ("revising an

employer created document to further dissuade employees from supporting the union will trigger reporting").

Even the dictionary definition of "advice" adopted by DOL states that advice ordinarily means a "recommendation" regarding a decision or course of conduct. 81 Fed. Reg. 15941 (March 24, 2016). According to the *Merriam-Webster Dictionary*, "recommendation" means "a suggestion about what should be done." *Recommendation, Merriam-Webster Dictionary* (11th ed. 2005). *Black's Law Dictionary* defines "advice" as "the guidance given by lawyers to their clients." Advice, *Black's Law Dictionary* (Pocket Ed. 1998). *Merriam-Webster* defines "guidance" as "help or advice that tells you what to do." *Guidance, Merriam-Webster Dictionary* (11th ed. 2005). Yet the Advice Exemption clearly states that "recommendations" and "guidance" given to employers by associations, consultants and attorneys are excluded from the LMRDA's reporting requirements. Courts have long recognized that an attorney's preparation of materials for a client is a component of providing legal advice which is protected from disclosure.[10]

[10] *See Muncy v. City of Dallas*, No. 3:99-cv-2960-P, 2001 U.S. Dist. LEXIS 18675, at *11 (N.D. Tex. Nov. 13, 2001) ("Preliminary drafts may reflect not only client confidences, but also the legal advice and opinions of attorneys, all of which is protected by the attorney-client privilege. The privilege is waived only with respect to those portions of the preliminary drafts ultimately revealed to third parties."); *Apex Mun. Fund v. N-Grp. Sec.*, 841 F. Supp. 1423, 1428 (S.D. Tex. 1993) ("[P]reliminary drafts of documents and communications made between attorney and client during the drafting process are privileged. (citation omitted) Only those parts of attorney-client documents that ultimately appear in published documents are outside of the privilege."); *Freeport-McMoran Sulphur, LLC v. Mike Mullen Energy Equip. Res., Inc*., No. 03-1496, 03-1664, 2004 U.S. Dist. LEXIS 10197, at *22 (E.D. La. June 3, 2004) (holding that drafts that contain handwritten suggestions from attorney are privileged when the suggestions are more than mere editing); *Buford v. Holladay*, 133 F.R.D. 487, 492 (S.D. Miss. 1990) ("The mere fact that the end product of an attorney-client relationship is a document that becomes part of the public record does not per se waive the privilege as to all communications that occurred prior to the publication of that document."); *Huston v. Imperial Credit Commercial Mortg. Inv. Corp.*, 179 F. Supp. 2d 1157, 1181 (C.D. Cal. 2001) ("All of the advice given to a client as to what provisions to include, or not include, in a document, and how those provision [sic] should be drafted are not stripped of any attorney-client privilege or confidentiality."); *S.E. Penn. Transp. Auth. v. CareMarkPCS Health, L.P.*, 254 F.R.D. 253, 265 (E.D. Pa. 2008) ("Preliminary drafts of [documents] are generally protected by attorney/client privilege, since they may **reflect not only client confidences, but also legal advice and opinions of attorneys**, all of which is protected by the attorney/client privilege.") (internal quotations omitted) (emphasis supplied); *McCook Metals L.L.C. v. Alcoa Inc.*, 192 F.R.D. 242, 255 (N.D. Ill. 2000) ("Although the final executed [document] is not privileged because it is communicated with an outside party, all previous drafts prepared by or commented upon by an attorney **necessarily contain legal advice from the attorney as to the wording of the [documents] for the benefit of the client, and thus are privileged**.") (emphasis supplied).

DOL's new and constricted Advice Exemption Interpretation is contrary to then-Judge Ruth B. Ginsberg's decision in *International Union, United Auto., etc.*, 869 F.2d at 619 where a union launched a frontal assault on DOL's bright-line definition of "advice." The union sought to redefine the Advice Exemption in the same way that now DOL seeks to do so through its new rule. Agreeing with DOL's position in 1989 (a position that DOL now disavows with its new rule), Justice Ginsberg held: **"The very purpose of section 203's exemption prescription . . . is to remove from the section's coverage certain activity that otherwise would have been reportable."** *Id.* at 619 (majority opinion by Ginsberg, J.) (emphasis added). Justice Ginsberg rejected further stated:

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

Id. at 61 n.4 (emphasis added). If scripting a closing and annual meeting is advice, scripting an employer's message to its employees must also be advice if the employer can accept or reject the recommendation given.

For more than fifty years, the plain meaning of "advice" as used in the Advice Exemption has been settled among government officials, associations, employers, unions, consultants, attorneys, and the courts. After the passage of the LMRDA in 1959, the Donahue Memo promulgated a bright-line two-part test (described s*upra*) for exempt advice in 1962. Shortly thereafter, the DOL assimilated the conclusions of the Donahue Memo into its Interpretive Guidance.

In support of its new and constricted Advice Exemption Interpretation, DOL will likely rely on the Fifth Circuit's decision in *Price v. Wirtz*, 412 F.2d 647 (5th Cir. 1969). DOL's reliance

on *Price v. Wirtz* would be misplaced. The Fifth Circuit was presented with a simple issue in *Price v. Wirtz, i.e.*, whether a law firm that actively engaged in persuader activities by directly interacting with employees during union organizing must report all labor relations client relationships, regardless of the persuasive nature of the services provided. *Id.* at 651. The Fifth Circuit's holding in that case was premised on DOL's fifty plus year bright-line test to determine whether a consultant had engaged in Persuader Activity that would trigger reporting obligations under the LMRDA. *Price v. Wirtz's* rationale for upholding Form LM-21's reporting obligations under the bright-line test does not apply to Plaintiffs' challenge to DOL's new rule. DOL's new rule abandons the bright-line test. In fact, the Fifth Circuit's decision in *Price v. Wirtz* supports Plaintiffs' position in this case. The Fifth Circuit held as follows in *Price v. Wirtz*:

> [S]weeping as is § [203](b), the purpose of §203(c) [(the Advice Exemption)] was "to make explicit what was already implicit in §203(b), to guard against misconstruction of §203(b) . . . . and **§203(c) the Advice Exemption was inserted . . . . to remove from coverage of §203(b) those grey areas where the giving of advice and participation in legal proceedings and collective bargaining could possibly be characterized as exerting indirect persuasion . . .**
>
> > 'An attorney or consultant who confines himself to giving legal advice, taking part in collective bargaining, and appearing in court or administrative proceedings would not be included among those required to file reports under this subsection (§ (b)). Specific exemption for persons giving this type of advice is contained in subsection (c) of section 103.' And, from the succeeding portion set out in *Fowler*, Part V, it was made doubly clear. The 'committee did not intend to have the reporting requirements of the bill apply to attorneys . . . [who] do not engage in activities of the type listed in section 103(b) [now 203(b)]).' 372 F.2d at 327.
> >
> > Nor does the single excerpt from the Senate report relied on by the majority in *Fowler*, Part VII, 372 F.2d at 334, require a contrary conclusion. In full context the descriptive phrase "a report covering" does not diminish the persuader's duty to report non-persuader fees and disbursements.'
>
> It boils down to this. As long as the attorney limits himself to the activities set forth in § 203(c), he need not report. Engaging in such advice or collective bargaining

> does not give rise to a duty to report. No report is set in motion 'by reason of' his doing those things. What sets the reporting in motion is performing persuader activities. Once that duty arises, § 203(c) does not insulate from reporting the matters in § 203(b) for non-persuader clients.

Id. at 650-51 (emphasis added).

Not only is DOL's new and constricted Advice Exemption Interpretation inconsistent with Congressional intent as evidenced by the LMRDA's plain wording, it creates "grey areas" which the Fifth Circuit specifically held in *Price v. Wirtz* that the Advice Exemption was intended to eliminate. DOL's new rule is also illogical for many reasons, as illustrated by the following examples:

- Associations and consultants, including attorneys, who advise employers about legal requirements have no reporting obligation, but if they do so while at the same time revising an employer communication to employees to increase the persuasiveness of the communication (a traditional role of consultants, including attorneys), it is reportable under DOL's new rule. 81 Fed. Reg. 15937-38.

- Associations and consultants, including attorneys, who make a presentation at seminars have engaged in reportable persuader activity under DOL's new rule if they develop or assist attending employers in the development of anti-union tactics and strategies, but not if they simply describe what the law provides. 81 Fed. Reg. 15937-38.

- While DOL's new rule provides that an association or consultant's helping an employer to develop personnel policies, and actions to "merely" improve pay, benefits and working conditions, even if their help could "subtly" affect or influence employee attitudes and views is not reportable, reporting is required if the development or implementation of personnel policies or attitudes was done with an object to persuade employees, directly or indirectly, about unionization. 81 Fed. Reg. 15938-39.

- While an association or consultant, including an attorney, can under DOL's new rule counsel an employer about what it can lawfully say to employees, what needs to be done to ensure compliance with the law, and provide guidance with respect to employer personnel policies, best practices, and NLRB related issues without incurring a reporting obligation, if the counseling about these matters is indirectly persuasive to employees it becomes reportable. 81 Fed. Reg. 15939.

- DOL's new rule deems a consultant, including an attorney, to have engaged in Persuader Activity if the consultant "drafts, revises or selects persuader materials" while advising the employer, even if the employer can decide whether to disseminate, revise further, or distribute the materials to employees. 81 Fed. Reg. 15938, 15940.

- Under DOL's new rule, a consultant, including an attorney, may exclusively counsel an employer with regard to whether something is "lawful," and no reporting obligation is incurred. The consultant can also provide or revise examples or descriptions of statements found by the NLRB to be lawful, without incurring reporting obligation. But, if the revision is intended to increase the persuasiveness of the materials, apparently even if "lawfully persuasive," then a reporting requirement is triggered. 81 Fed. Reg. 15939.

- DOL's new rule allows consultants, including attorneys, to provide "off the shelf" materials to employers without reporting; but if they actually advise employers by helping them select the right materials, then the consultants lose the "advice" exemption under DOL's new rule; unless the consultant is a trade association, which is allowed to help select such material, but only so long as the association staff do not advise the employer how to tailor the material to the employer's particular needs. 81 Fed. Reg. 15937-40.

- DOL's new rule provides that consultants, including attorneys, can make presentations about union organizing at seminars attended by employers without reporting, unless they 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. Associations can sponsor seminars, without reporting, but if the associations' own staff present at the seminar, a reporting obligation is created. Employers can attend union organizing seminars and receive advice, without themselves filing reports. But the consultant and/or the association staff member who presents at such a program is required to file reports, under DOL's new rule. 81 Fed. Reg. 15938-40.

- Reporting under DOL's new rule is required if a consultant, including an attorney, develops or implements personnel policies or actions with the object to persuade employees. But no reporting is required if the policies only "subtly" affect or influence the attitudes or views of employees. 81 Fed. Reg. 15939.

- Under DOL's new rule, if a consultant, including an attorney, engages in collective bargaining with a union on behalf of an employer, he has not engaged in a reportable activity, but if the same consultant recommends to the employer that it express the same views stated in bargaining directly to employees not at the bargaining table, or assists the employer in drafting such communications, he has engaged in reportable Persuader Activity. 81

Fed. Reg. 15939.

The Secretary does not have any broadly delegated power to issue regulations expanding the general reporting requirements of Section 203 of the LMRDA. The only legislative authority given to DOL by Congress is contained in Section 208 of the LMRDA. Section 208 authorizes the Secretary to "issue, amend, and rescind rules and regulations prescribing the form and publication of reports required to be filed under this title and such other reasonable rules and regulations . . . as he may find necessary to prevent the circumvention or evasion of such reporting requirements." 29 U.S.C. § 438 (2012). DOL's new and constricted Advice Exemption exceeds the rulemaking authority granted by Congress in Section 208.

b. DOL's new and constricted Advice Exemption Interpretation is arbitrary, capricious, and an abuse of discretion.

If the Court engages in *Chevron's* Step 2 analysis, it is fully justified in attaching great weight to DOL's bright-line interpretation of the Advice Exemption that was in effect for more than fifty years prior to DOL's promulgation of its new rule. *See, e.g., Good Samaritan Hospital v. Shalala*, 508 U.S. 411, 414 and 417 (1993) ("Of particular relevance is the agency's contemporaneous construction which 'we have allowed . . . to carry the day against doubts that might exist from a reading of the bare words of a statute". . . . "[T]he consistency of an agency's position is a factor in assessing the weight that position is due."); *MCI Communications v. AT&T*, 512 U.S. 218, 229 (1994).

If the LMRDA's Advice Exemption is found to be somehow ambiguous, which it is not, DOL's implementation and enforcement of its new rule should nevertheless be enjoined because it is arbitrary, capricious, and an abuse of discretion pursuant to 5 U.S.C. § 706 (2012). An administrative action is arbitrary and capricious if the promulgating agency fails to "examine the relevant data and articulate a satisfactory explanation for its action." *FCC v. Fox Television*

Stations, Inc., 556 U.S. 502, 513 (2009).

DOL admits that it has failed to conduct any studies or independent analysis. *See* 81 Fed. Reg. 15962 (March 24, 2016). DOL should be enjoined from enforcing its new rule on that basis alone. DOL supports its new rule by primarily relying on a study prepared by two researchers, Kaufman and Stephan, in 1995, entitled, "*The Role of Management Attorneys in Union Organizing Campaigns*, and cited by the *British Journal of Industrial Relations* in a 2006 article review. *Id.* at 15931. DOL concludes that its new rule is justified because, according to these studies, "the work of consultants in helping employers oppose union representation remains undisclosed to employees." *Id.* Quoting from a 2002 article entitled *Union Free Movement*, DOL lists a number of indirect activities, not including bribes or an exchange of money, which it claims have interfered with the ability of unions to organize employees. *Id.* DOL then concludes, with no supporting evidence, that employer retained consultants indirectly manipulate employee opinion by conducting supervisor training and by engaging in interactions that "impedes employees' exercise of their protected rights to organize and bargain collectively and disrupts labor-management relations." *Id.* at 15935. DOL relies on House Subcommittee Reports from **1980** and **1984** to support its claim that a concern exists over inadequate enforcement of LMRDA consultant reporting requirements. *Id.* at 15933, 15963. Thus, the concern relied on by DOL was expressed more than thirty years ago.[11]

DOL's reliance on the above old reports is entitled to no deference in light of DOL's adherence of more than fifty years to the bright-line test described above. In fact, Congress' silence and failure to amend the LMRDA to modify DOL's more than fifty year use of the bright-line test

[11] Without any evidence whatsoever, DOL states that "employees are often unaware that their employer has hired a consultant to manage its campaign, including scripting the employer's message in speeches, letters, and other documents . . . ." 81 Fed. Reg. 15983 (March 24, 2016).

constitutes Congressional approval of the Advice Exemption interpretation that DOL's new rule sets aside. *See FDA v. Brown & Williams Co*., 529 U.S. 120, 156-58 (2000) (Congressional decades-long silence over interpretation by FDA constitutes ratification of rule); *NLRB v. Bell Aerospace*, 416 U.S. 267, 274 (1974). DOL's new and constricted Advice Exemption Interpretation is arbitrary, capricious, and an abuse of discretion. DOL has exceeded its rulemaking authority.

DOL's new and constricted Advice Exemption Interpretation is also arbitrary, capricious, and an abuse of discretion because it conflicts with and attempts to usurp state rules governing the practice of law.[12] Referred to in paragraph 51 of Plaintiffs' Complaint is a letter dated September 21, 2011, sent by Wm. T. (Bill) Robinson III, President of the American Bar Association, to the Office of Labor-Management Standards, U.S. Department of Labor, in opposition to what was then DOL's proposed new rule. A copy of Mr. Robinson's letter is a part of the administrative record. *See* https://www.regulations.gov/#!documentDetail;D=LMSO-2011-0002-5577. [13] It is attached to this brief as Exhibit A. Mr. Robinson's letter describes how DOL's new rule improperly seeks to usurp state rules governing the practice of law.

Under 1.05 of the Texas Disciplinary Rules of Professional Conduct, confidential client information that an attorney is barred from disclosing includes both privileged and not privileged information. Specifically, it includes "all information relating to a client or furnished by the client . . . acquired by the lawyer during the course of or by reason of the representation of the client." Rule 1.05(a). Under Texas Rule 1.05, a lawyer may not "[r]eveal confidential information of a

[12] DOL's new and constricted Advice Exemption Interpretation also conflicts with Section 203(c) of the LMRDA which states: "Nothing in this section shall be construed to require any employer or other person to file a report covering the services of such person by reason of his giving or agreeing to give legal advice to such employer." 29 U.S.C. § 433(c) (2012).

[13] All comments opposing DOL's rule are contained in the Administrative Record (A.R.). The A.R. is available electronically and accessible through https://www.regulations.gov/#!docketDetail;D=LMSO-2011-0002.

client or a former client to . . . anyone else, other than the client, the client's representatives, or the members, associates, or employees of the lawyer's law firm" without the client's permission or in other specifically defined circumstances not applicable in this lawsuit. Tex. Disciplinary Rules Prof'l Conduct 1.05(b)(1)(ii). DOL's new and constricted Advice Exemption Interpretation is contrary to an attorney's ethical obligation to maintain client confidences.

The Texas Disciplinary Rules of Professional Conduct recognize the following:

> Both the fiduciary relationship existing between lawyer and client and the proper functioning of the legal system require the preservation by the lawyer of confidential information of one who has employed or sought to employ the lawyer. Free discussion should prevail between lawyer and client in order for the lawyer to be fully informed and for the client to obtain the full benefit of the legal system. The ethical obligation of the lawyer to protect the confidential information of the client not only facilitates the proper representation of the client but also encourages potential clients to seek early legal assistance.

Tex. Disciplinary Rule of Prof'l Conduct 1.05, cmt. 1.

Moreover, DOL's new and constricted Advice Exemption Interpretation conflicts with Section 204 of the LMRDA which describes a privilege against disclosure of "any information which was lawfully communicated to such attorney by any of his clients in the course of a legitimate attorney-client relationship." 29 U.S.C. § 434 (2012). DOL's new rule contains reporting requirements that are inconsistent with and undermine the attorney-client relationship and the confidentiality of that relationship.

DOL relies on *Humphreys, Hutcheson & Moseley v. Donovan*, 755 F.2d 1211 (6th Cir. 1985). *Humphreys*, however, supports Plaintiffs' position by stating that "the majority of courts . . . [have found] the purpose of Section 203(c) to clarify what is implicit in Section 203(b) [of the LMRDA] – that attorneys engaged in the usual practice of labor law are not obligated to report under Section 203(b)." The court in *Humphreys* also noted that the legislative history of the LMRDA confirms Congress' intent to protect the sanctity of the attorney-client privilege. *Id.* at

1219.

DOL states that "[i]n the Department's view, none of the information required to be reported under the revised interpretation is protected as a general rule by the attorney-client privilege." 81 Fed. Reg. 15992 (March 24, 2016). DOL is incorrect. DOL has no authority or expertise in the regulation of attorney-client relationships. The attorney-client relationship is governed by state law.[14] DOL fails to recognize that both client confidentiality and the attorney-client relationship itself enjoy legal protection under state rules regulating the legal profession. *See* discussion of Texas Disciplinary Rule of Professional Conduct 1.05 discussed at paragraphs 52-54 of Plaintiffs' Complaint. *See also* Tex. Eth. Op. 479, 1993 WL 840538 (1991) (disclosure of clients' names and amounts of fees owed is prohibited by Texas DR 1.05).

The plain text of the LMRDA, along with the statute's legislative history, show that Congress was not concerned about the influence of attorneys when it passed the LMRDA. Rather, it "sought to counterbalance the tyranny of the all-powerful Labor boss … while guaranteeing the right of union members to participate effectively in the internal affairs of their unions." J. Ralph Beaird and Mack Allen Player, *Free Speech and the Landrum-Griffin Act*, 25 Ab. L. Rev. 577 (1973). Congress specifically noted that the attorney-client relationship is "sacred and protected by law in every state in the union." S. Rep. 187, S. Rep. 86-187 (1959 at 2406-2407.

Faced with potential discipline under state bar rules if they comply with DOL's new and constricted Advice Exemption Interpretation, or criminal and civil liability under the LMRDA if they do not comply, the ABA and others have predicted that many attorneys will no longer be available and/or willing to offer legal advice to employers. *See* paragraph 51 of Plaintiffs'

[14] *See, e.g., In re Dow*, 481 S.W.3d 215, n. 48 (Tex. 2015) ("[T]he authority to regulate the practice of law in Texas belongs exclusively to this Court."); Tex. Gov't Code § 81.011(c) ("The Supreme Court of Texas, on behalf of the judicial department, shall exercise administrative control over the state bar.").

Complaint. *See* also Exhibit A attached hereto. This prediction seemingly conforms to DOL's real objective as is shown by DOL's arrogant suggestion that attorneys resolve the ethical dilemma presented by its new rule by either refusing to advise clients or by otherwise limiting their practice of law. Specifically, DOL states the following:

> [T]he Department disagrees with the suggestion that this rule will pose an ethical dilemma for attorneys. As with all aspects of legal practice, however, attorneys who have an ethical reservation about their obligations under the rule to report information about their clients always have the option to choose to decline to provide persuader services to clients who refuse to provide consent to disclose the required information and limit services to legal services, which do not trigger reporting in any event.

81 Fed. Reg. 15998 n. 93 (March 24, 2016).

2. Plaintiffs will likely succeed on their claim that DOL's new and constricted Advice Exemption Interpretation violates free speech, expression and association rights protected by the First Amendment.

a. DOL's new and constricted Advice Exemption Interpretation imposes content-based burdens on free speech rights.

It is well settled that employers have a right under the First Amendment to express opinions regarding union organizing. *See Southwire Co. v. N. L. R. B.*, 383 F.2d 235, 240 (5th Cir. 1967) ("The Supreme Court has made it clear that both sides have the right in a labor dispute to express opinions … These cases envision free discussion in labor relations including opinions as to the advantages and disadvantages of unions.").

In *Thomas v. Collins*, the Supreme Court held that a labor organizer could not be required to register before engaging in truthful, non-coercive speech urging employees to join a union. According to the Court, "employers' attempts to persuade to action with respect to joining or not joining unions are within the First Amendment's guaranty." 323 U.S. 516, 537 (1945). Near the end of his opinion in *Thomas*, Justice Rutledge addressed an argument that a simple registration requirement is not a very heavy burden for a labor organizer to bear by stating:

> If the exercise of the rights of free speech and free assembly cannot be made a crime, we do not think this can be accomplished by the device of requiring previous registration as a condition for exercising them and making such a condition the foundation for restraining in advance their exercise and for imposing a penalty for violating such a restraining order. So long as no more is involved than exercise of the rights of free speech and free assembly, it is immune to such a restriction . . .

Id. at 540. The Court in *Thomas* also made clear that the imposition of small burdens on speech are improper:

> The restraint is not small when it is considered what was restrained. The right is a national right, federally guaranteed. **There is some modicum of freedom of thought, speech and assembly which all citizens of the Republic may exercise throughout its length and breadth, which no State, nor all together, nor the Nation itself, can prohibit, restrain or impede.** If the restraint were smaller than it is, it is from petty tyrannies that large ones take root and grow. This fact can be no more plain than when they are imposed on the most basic rights of all. Seedlings planted in that soil grow great and, growing, break down the foundations of liberty.

Id. at 543 (emphasis supplied). [15]

In addition, there is a long-recognized First Amendment right to hire and consult an attorney. *See, e.g., Mothershed v. Justices of the Supreme Court*, 410 F.3d 602, 611 (9th Cir. 2005) ("[W]e recognize . . . the 'right to hire and consult an attorney is protected by the First Amendment's guarantee of freedom of speech, association and petition.'" (quoting *Denius v. Dunlap*, 209 F.3d 944, 953 (7th Cir. 2000)): *see also DeLoach v. Bevers*, 922 F.2d 618, 620 (10th Cir. 1990) ("The right to retain and consult an attorney . . . implicates . . . clearly established First Amendment rights of association and free speech."). Indeed, a lawyer's right to speak on behalf of a client "is almost always grounded in the rights of the client, rather than any independent rights of the attorney." *Eng v. Cooley*, 552 F.3d 1062, 1068 (9th Cir. 2009) (quoting *Mezibov v. Allen*, 411 F.3d 712, 717-18, 720 (6th Cir. 2005)).

[15] *See also Thomas*, 323 U.S. at 544 (Douglas, concurring) **("as long as [an employer] does no more than speak he has the same unfettered right, no matter what side of an issue he espouses.")**.

Significantly, the burden on free speech caused by DOL's new rule is entirely content-based. "Government regulation of speech is content-based if a law applies to particular speech because of the topic discussed or the idea or message expressed." *Reed v. Town of Gilbert*, 135 S. Ct. 2218, 227 (2015). A regulation is content-based "if it require[s] 'enforcement authorities' to 'examine the content of the message that is conveyed to determine whether' a violation has occurred." *McCullen v. Coakley*, 134 S. Ct. 2518, 2531 (2014) (citing *FCC v. League of Women Voters of Cal.*, 468 U.S. 364, 383 (1964)).

DOL's new and constricted Advice Exemption Interpretation is clearly a content-based regulation of speech because it imposes a new reporting obligation that only applies to speech that has "***an object to persuade"*** employees with respect to their exercise of rights regarding union organizing. *See* 81 Fed. Reg. 15938 (March 24, 2016). Under DOL's prior long-standing bright-line test, applicability of the LMRDA's reporting obligation turned on the speaker's audience. *See* 81 Fed. Reg. at 15925 (explaining that the prior rule "shield[ed] employers and their consultants from reporting agreements in which the consultant has no face-to-face contact with employees"). By contrast, under DOL's new rule, for the first time the LMRDA's reporting obligation turns on what a consultant says to an employer.

b. DOL's new and constricted Advice Exemption cannot satisfy the strict scrutiny standard necessary for the regulation of content-based speech.

"[T]he Constitution demands that content-based restrictions on speech be presumed invalid . . . and that the Government bears the burden of showing their constitutionality." *United States v. Alvarez*, 132 S.Ct. 2537, 2543-44 (2012) (quoting *Ashcroft v. American Civil Liberties Union,* 542 U.S. 656, 660 (2004)). Indeed, "[i]t is rare that a regulation restricting speech because of its content will ever be permissible." *United States v. Playboy Entm't Grp., Inc.*, 529 U.S. 803, 818 (2000). Thus, content-based regulations that prohibit or compel speech are subject to strict scrutiny review.

See Playboy, 529 U.S. at 813 ("Since § 505 is a content-based speech restriction, it can stand only if it satisfies strict scrutiny.")

Strict scrutiny review requires the Government to prove that the restriction furthers a "compelling interest" and is "narrowly tailored" to achieve that interest. *See, e.g*,, *Playboy*, 529 U.S. at 813 ("If a statute regulates speech based on its content, it must be narrowly tailored to promote a compelling Government interest."). [16] In addition, strict scrutiny requires the Government to show that it has used the *least restrictive* means of advancing that allegedly compelling interest. *See Id*. at 813 ("If a less restrictive alternative would serve the Government's purpose, the legislature must use that alternative."); *World Wide Street Preachers Fellowship v. Town of Columbia*, 245 Fed.Appx. 336, 343 (5th Cir. 2007) (unpublished) (per curiam) ("If a less restrictive alternative is available, the governmental restriction cannot survive strict scrutiny."). DOL cannot show that its new and constricted Advice Exemption Interpretation satisfies any of these requirements.[17]

DOL has not articulated a compelling governmental interest for its new and constricted Advice Exemption Interpretation. As an initial matter, the simple fact DOL has waited over fifty years to promulgate its new rule demonstrates there is no possible compelling government interest

[16] DOL understood the strict scrutiny test would apply to its new rule. *See* 81 Fed. Reg. at 15983 (asserting that the new rule serves "compelling governmental interest[s]"). Despite such understanding, DOL argues that its new rule should not be subjected to strict scrutiny. *See* 81 Fed. Reg. at 15989-90. DOL's argument lacks merit because the new rule is based on the identity of the speaker and the content of his speech.

[17] DOL's new and constricted Advice Exemption Interpretation is distinguishable from cases that have upheld disclosure requirements in other contexts, such as campaign finance or advertising, because those cases involved content-neutral disclosure laws that were subject to lesser levels of scrutiny. *See, e.g., Citizens United v. Federal Election Commission*, 558 U.S. 310, 366 (2010) (applying "exacting scrutiny" to campaign finance disclosure law and requiring a "substantial relation" between the disclosure requirement and a "sufficiently important" governmental interest); *Buckley v. Valeo*, 424 U.S. 1, 39, 64 (1976) (same); *Minnesota Citizens Concerns for Life, Inc. v. Swanson*, 692 F.3d 864, 875–76 (8th Cir. 2012) (en banc) (noting that "exacting scrutiny" was "possibly less rigorous than strict scrutiny."); *Zauderer v. Office of Disciplinary Counsel*, 471 U.S. 626 (1985) (applying intermediate scrutiny to content-neutral disclosure requirement of commercial speech). As explained above, the strict scrutiny standard applies in this case because the burden imposed by DOL's new and constricted Advice Exemption Interpretation is content-based.

at stake. DOL has not identified, and cannot identify, any changed circumstances that mandate government action at this time. DOL's primary purported rationale for its new rule is that it will provide employees with "essential information regarding the underlying source of the views and materials being directed at them." 81 Fed. Reg. at 15926, 16001 (March 24, 2016). DOL asserts: "Transparency promotes worker rights by creating a more informed electorate." 81 Fed. Reg. at 15932. The Supreme Court rejected the same justification in *McIntyre v. Ohio Elections Commission*, 514 U.S. 334 (1995). In *McIntyre*, the Supreme Court invalidated reporting requirements under a state law that are comparable to those made mandatory by DOL's new rule. Ohio tried to enact a law that prohibited anonymous political pamphleting based on a premise that voters should know who was providing the information. The Supreme Court struck down the law, holding, "[t]he simple interest in providing voters with additional relevant information does not justify a state requirement that a writer make statements or disclosures she would otherwise omit." *Id.* at 348. For the same reasons, DOL has not articulated a compelling governmental interest for its new rule.

DOL's purported rationale for its new and constricted Advice Exemption Interpretation is also disingenuous and apparently pretextual. The LM-20 Form is due thirty days after an employer enters an agreement with a consultant/attorney. Forms LM-10 and LM-21 are due ninety days after the close of the filer's fiscal year. However, union elections occur within approximately twenty-one days of the filing days of a union representation petition. Under the NLRB's new "quickie election" rule, by the time any LM forms are filed, a union representation election is normally concluded, the union has lost (or won), and the employees are no more informed than they would have been under DOL's prior bright-line rule.

The First Amendment does not tolerate the degree of governmental control over private speech mandated by DOL's new rule. The most fundamental concept of constitutional supremacy is that reduction of constitutional rights cannot be accomplished either by Congressional action or executive fiat. *Clark v. Board of Education of Little Rock School District*, 374 F.2d 569 (8th Cir.1967); *Brubaker v. Board of Education, School District No. 149, Cook County, Illinois*, 502 F.2d 973 (7th Cir. 1974), *cert. denied*, 421 U.S. 965, *clarified*, 527 F.2d 611 (7th Cir. 1975). *See also United States v. Brignoni-Ponce*, 422 U.S. 873, (1975). "[W]hen fundamental constitutional guarantees are involved, Executive Branch regulations must give way to enforcement of constitutional rights." *United States v. Narciso*, 446 F.Supp. 252, 270 (E.D. Mich. 1977).

DOL's new and constricted Advice Exemption Interpretation is not narrowly tailored. DOL's new rule, including its revision of reporting requirements under Forms LM-10 and LM-20,[18] effectively eliminates the Advice Exemption from the LMRDA. Many activities that are ordinarily performed by an employer's attorneys, such as drafting documents and communications that an employer may decide to provide to its employees, the training of supervisory employees, and the drafting of employment policies will for the first time be regarded as Persuader Activities triggering reporting obligations. DOL's revised Form LM-10 requires employers to disclose "each activity performed or to be performed," the "[p]eriod during which performed," and the "[e]xtent performed," and it lists thirteen categories of activities that trigger reporting obligations, including the category of "other." *See* 81 Fed. Reg. 16038 (March 24, 2016). DOL's revised Form LM-20 contains similar reporting obligations. *See* 81 Fed. Reg. 16051 (March 24, 2016).

Form LM-21 requires that all consultants, including attorneys, law firms, and associations who engage in a Persuader Activity must (a) "[r]eport all receipts from employers **in connection**

[18] Forms LM-10 and LM-20 are described in paragraphs 43-46 of Plaintiffs' Complaint.

with labor relations advice or services regardless of the purposes of the advice or services" and (b) "[r]eport all disbursements [to officers and employees of the consultant] made . . . in connection with labor relations advice or services rendered to the employers listed [as receiving receipts]."[19] (emphasis added). Form LM-21 is overly broad and vague when read along with DOL's new rule. If a consultant, including an attorney, engages in Persuader Activity under DOL's new rule, the consultant will not only be required to report all receipts from the hiring employer. He will also be required to report receipts from employers and disbursements to the consultant's officers and employees **resulting from "labor relations advice or services" performed by the consultant for <u>all</u> employers during the applicable fiscal year, "regardless of the purposes of the advice or services" and even if such "labor relations advice or services"**

[19] Form LM-21 is described in paragraphs 45-46 of Plaintiffs' Complaint. As explained in n.2 of Plaintiffs' Complaint, DOL excluded revision of Form LM-21 from its new rule, stating that Form LM-21 would be the subject of subsequent rulemaking. According to DOL, "issues arising from the reporting requirements of the LM-21 are not appropriate for consideration under this rule." 81 Fed. Reg. 15992-93 (March 24, 2016). DOL knew that because of its longstanding bright-line interpretation of the Advice Exemption, attorneys and law firms have not historically filed Form LM-21 reports and, therefore, they have never had to determine the meaning of "labor relations advice or services" as used on that form. In an obvious ploy to improve its tactical position in litigation, DOL announced a "Special Enforcement Policy" on April 13, 2016. In pertinent part, DOL's Special Enforcement Policy states:

> In light of changes to the LM-20 and potential changes in Form LM-21 reporting obligations that may be proposed in the upcoming rulemaking, OLMS has determined that a special enforcement policy should apply. Those filers of Form LM-20 who must also file a Form LM-21 will not be required to complete two parts of the LM-21. Specifically, OLMS will not take enforcement action based upon a failure to complete the following Parts of Form LM-21.
>
> • Part B (Statement of Receipts), which ordinarily requires the filer to report all receipts from employers in connection with labor relations advice or services regardless of the purposes of the advice or services, and/or
>
> • Part C (Statement of Disbursements), which ordinarily requires the filer to report all disbursements made by the reporting organization in connection with labor relations advice or services rendered to the employers listed in Part B .
>
> • • •
>
> This special enforcement policy is effective immediately. It will remain in effect until further notice, which will be provided no less than 90 days prior to any change.

If and when DOL exercises its unfettered discretion to resume enforcement with respect to all aspects of Form LM-21, attorneys and law firms are at risk of criminal jeopardy while having to guess at the scope of "labor relations advice or services." Office of Labor-Management Standards (OLMS), Form LM-21 Special Enforcement Policy, available at http://www.dol.gov/olms/regs/compliance/ecr/lm21_specialenforce.htm.

are unrelated to Persuader Activity. Accordingly, under DOL's new rule, attorneys and law firms will be required to file reports which contain confidential information pertaining to clients *unrelated* to the employer who engaged the attorney or law firm to perform Persuader Activities. This information will open to public inspection. DOL's new rule cannot be considered a "narrowly tailored" restriction on speech.

DOL cannot show that it has used the *least restrictive* means of advancing its purported interest. DOL has for decades interpreted the Advice Exemption to exclude from the LMRDA's reporting requirements an employer's engagement of a consultant, including an attorney, to assist the employer when responding to union organizing so long as the consultant has no direct contact with the employees to be persuaded and the employer is free to accept or reject the consultant's recommendations. Clearly, DOL's prior interpretation was less restrictive than its new interpretation. "When a plausible, less restrictive alternative is offered to a content-based speech restriction, it is the Government's obligation to prove that the alternative will be ineffective to achieve its goals." *Playboy*, 529 U.S. at 816.

c. DOL's new and constricted Advice Exemption is overly broad under the First Amendment.

Laws that inhibit or burden the exercise of First Amendment rights can be invalidated under the overbreadth doctrine. *Broadrick v. Oklahoma*, 413 U.S. 601 (1973). This is true even if the Government has not directly restricted speech. *See generally Am. Commc'ns Ass'n, C.I.O. v. Douds*, 339 U.S. 382, 399 (1950) (recognizing regulation that results in indirect abridgment of speech may run afoul of the First Amendment). Under the overbreadth doctrine, "[t]he showing that a law punishes a 'substantial' amount of protected free speech, 'judged in relation to the statute's plainly legitimate sweep,' suffices to invalidate *all* enforcement of that law, 'until and unless a limiting construction or partial invalidation so narrows it as to remove the seeming threat

or deterrence to constitutionally protected expression.'" *Virginia v. Hicks*, 539 U.S. 113, 118–19 (2003) (internal quotations omitted).

The Supreme Court "provided this expansive remedy [*i.e.*, suspending all enforcement of an overbroad law] out of concern that the threat of enforcement of an overbroad law may deter or 'chill' constitutionally protected speech—especially when the overbroad statute imposes criminal sanctions." *Id*. As noted by the Court, "[m]any persons, rather than undertake the considerable burden (and sometimes risk) of vindicating their rights through case-by-case litigation, will choose simply to abstain from protected speech." *Id*. "Overbreadth adjudication, by suspending *all* enforcement of an overinclusive law, reduces these social costs caused by the withholding of protected speech." *Id*.

d. DOL's new and constricted Advice Exemption Interpretation violates Plaintiffs' freedom of association rights.

Plaintiffs' "freedom to engage in association for the advancement of beliefs and ideas is an inseparable aspect of the . . . freedom of speech." *NAACP v. Alabama*, 357 U.S. 449, 460 (1958). "Compelled disclosure of affiliation with groups engaged in advocacy may constitute as effective a restraint on freedom of association" as direct interference. *Id*. at 462 . Thus, a "vital relationship" exists "between freedom to associate and privacy in one's associations." *Id*. Should government invade an association's privacy, its members might be induced to withdraw and they may dissuade others from joining it because of a fear their beliefs may be exposed through their associations. The invasion of privacy or belief may be as great when the information sought concerns the giving and spending of money as when it concerns the joining of an organization because financial transactions can reveal much about one's activities, associations, and beliefs. *See Buckley*, 424 U.S. at 66. The right to hire and consult an attorney is protected by the First Amendment's

guarantee of freedom of speech, association, and petition. *See Mothershed*, 410 F.3d at 611; *Denius*, 209 F.3d at 953; *DeLoach*, 922 F.2d at 620.

DOL's new and constricted Advice Exemption Interpretation targets and restricts speech by punishing employers who seek specific services from an association or a consultant, including an attorney. As a result, it will, in practice, substantially hinder or inhibit associations like Plaintiffs, their members and employers from hiring, consulting, and obtaining the advice of attorneys, when, among other things, formulating and delivering their views to employees on the topic of unionization. DOL's new rule impermissibly violates the right of freedom of association guaranteed by the First Amendment.

e. DOL's new and constricted Advice Exemption Interpretation is preempted by Section 8(c) of the NLRA.

"Congress implicitly mandated two types of pre-emption as necessary to implement federal labor policy." *Chamber of Commerce v. Brown*, 554 U.S. 60, 65 (2008). "The second, known as *Machinists* pre-emption, forbids both the National Labor Relations Board (NLRB) and States to regulate conduct that Congress intended 'be unregulated because [it should be] left to be controlled by the free play of economic forces.'" *Id.* (quoting *Machinists v. Wisconsin Employment Relations Comm'n.*, 427 U.S. 132, 140 (1976))[20]. "*Machinists* pre-emption is based on the premise that "Congress struck a balance of protection, prohibition, and laissez-faire in respect to union organization, collective bargaining, and labor disputes.'" *Id. Machinists* preemption "prevent[s] *any* government action—certainly any action by a government entity other than the NLRB interpreting the NLRA—that is predicated upon (implicitly or explicitly) a substantive policy view as to the appropriate balance of bargaining power between organized labor and management and

[20] The first, known as *Garmon* pre-emption, "forbids States to 'regulate activity that the NLRA protects, prohibits, or arguably protects or prohibits.'" *Id.*

that attempts to promote a governmental objective by a generic shift in that balance." *Chamber of Commerce of U.S. v. Reich*, 83 F.3d 439, 440 (D.C. Cir. 1996).

The Supreme Court has "characterized *Machinists* pre-emption as 'creat[ing] a zone free from all regulations, whether state or federal.'" *Brown*, 554 U.S. at 74 (quoting *Building & Constr. Trades Council v. Associated Builders & Contractors of Massachusetts/Rhode Island*, 507 U.S. 218, 226 (1993)). Thus, "*Machinists* 'pre-emption' applies to federal as well as state action." *Chamber of Commerce of U.S. v. Reich*, 74 F.3d 1322, 1334, 1339 (D.C. Cir. 1996) (holding that NLRA provision guaranteeing management's right to hire permanent replacements during labor strikes preempted Executive Order barring federal government from contracting with employers who hire permanent replacements during a strike).

Section 8(c) of the NLRA provides that "[t]he expressing of any views, argument, or opinion [with respect to unionization], or the dissemination thereof, whether in written, printed, graphic, or visual form, shall not constitute or be evidence of an unfair labor practice under any of the provisions of this Act [subchapter], if such expression contains no threat of reprisal or force or promise of benefit." 29 U.S.C. § 158(c). In *Brown*, the Court held that Section 8(c) **preempted** two provisions of a California statute ("Assembly Bill 1889" or "AB 1889") that purported to prohibit employers who received state funds from using the funds "to assist, promote, or deter union organizing" because those provisions "regulate[d] within 'a zone protected and reserved for market freedom.'" *Brown*, 554 U.S. at 62, 66.

The Court in *Brown* explained that the enactment of Section 8(c) "manifested a 'congressional intent to encourage free debate on issues dividing labor and management.'" *Id*. at 67.[21] The Court "characterized this policy judgment, which [it noted] suffuses the NLRA as a

[21] As a result, the Court observed that Section 8(c) goes beyond "merely implement[ing] the First Amendment." *Id.*

whole, as 'favoring uninhibited, robust, and wide-open debate in labor disputes,' stressing that 'freewheeling use of the written and spoken word . . . has been expressly fostered by Congress and approved by the NLRB.'" *Id*. at 68 (internal quotations omitted). Thus, the Court determined that "the addition of § 8(c) **expressly precludes regulation of speech about unionization** 'so long as the communications do not contain a 'threat of reprisal or force or promise of benefit.'" *Id.* (emphasis added). The Court found that "California's policy judgment that partisan employer speech necessarily 'interfere[s] with an employee's choice about whether to join or to be represented by a labor union,' is the same policy judgment that the NLRB advanced under the Wagner Act, and that Congress renounced in the Taft–Hartley Act. *Id.* at 69.[22] Consequently, the Court held that AB 1889 was "unequivocally pre-empted." *Id*.[23]

The Court rejected the Court of Appeals' rationale that AB 1889 did not regulate speech, but only applied to and restricted the *use* of state funds. *Id.* at 69-73. First, the Court observed, "[i]n NLRA pre-emption cases, 'judicial concern has necessarily focused on the *nature* of the activities which the States have sought to regulate, rather than on the *method* of regulation adopted.'" *Id.* at 69 (emphasis added). Thus, because California "plainly could not directly regulate noncoercive speech about unionization by means of an express prohibition," it also could "not indirectly regulate such conduct by imposing spending restrictions on the use of state funds." *Id.* In this instance, the Court found that "the legislative purpose" of the statute was "the furtherance of a labor policy." *Id.* at 70.[24]

[22] "As enacted in 1935, the NLRA, which was commonly known as the Wagner Act, did not include any provision that specifically addressed the intersection between employee organizational rights and employer speech rights." *Id.* at 66. In 1947, the Taft–Hartley Act amended the NLRA by, among other things, adding § 8(c). *Id.* at 67.

[23] The Court declined to address arguments "that AB 1889 imposes less onerous recordkeeping restrictions on governmental subsidies than do federal restrictions that have been found not to violate the First Amendment," reasoning that the question "is not whether AB 1889 violates the First Amendment, but whether it 'stands as an obstacle to the accomplishment and execution of the full purposes and objectives' of the NLRA." *Id.* at 73.

[24] Specifically, the Court noted, "AB 1889 imposes a targeted negative restriction on employer speech about

Next, the Court noted that the statute imposed "deterrent litigation risks," in that "[v]iolators are liable to the State for three times the amount of state funds deemed spent on union organizing." *Id*. at 72. "Consequently, a trivial violation of the statute could give rise to substantial liability." *Id*. "Finally, even if an employer were confident that it had satisfied the recordkeeping and segregation requirements, it would still bear the costs of defending itself against unions in court, as well as the risk of a mistaken adverse finding by the factfinder." *Id*. Thus, by coupling its "use" restriction with "compliance costs and litigations risks . . . calculated to make union-related advocacy prohibitively expensive for employers that receive state funds," "AB 1889's enforcement mechanisms put considerable pressure on an employer either to forgo his 'free speech right to communicate his views to his employees,' or else to refuse the receipt of any state funds." *Id*. at 71, 73. "In so doing," the Court held, "the statute impermissibly 'predicat[es] benefits on refraining from conduct protected by federal labor law,' and chills one side of 'the robust debate which has been protected under the NLRA.'" *Id*. at 73.

Like the rule preempted in *Brown*, DOL's new and constricted Advice Exemption Interpretation expressly and impermissibly seeks to regulate "noncoercive speech about unionization"[25] based on "a substantive policy view as to the appropriate balance of bargaining power between organized labor and management." *See Reich*, 83 F.3d at 440.[26] As explained in

unionization." *Id*. at 71. "Furthermore, the statute does not even apply this constraint uniformly." *Id*. "Instead of forbidding the use of state funds for *all* employer advocacy regarding unionization, AB 1889 permits use of state funds for *select* employer advocacy activities that promote unions" by "exempt[ing] expenses incurred in connection with, *inter alia*, giving unions access to the workplace, and voluntarily recognizing unions without a secret ballot election." *Id*.

[25] *Brown*, 554 U.S. at 69.

[26] As the "Executive Summary" of DOL's new rule states, "the final rule expands reporting of persuader agreements and provides employees with information about the use of labor relations consultants by employers, both openly and behind the scenes, to shape how employees exercise their union representation and collective bargaining rights." 81 Fed. Reg. 15924 (March 24, 2016). Regarding the rationale for the expansion, the Executive Summary states: "[b]y knowing that a third party—the consultant hired by their employer—is the source of the information, employees will be better able to assess the merits of the arguments directed at them and make an informed choice about how to

Brown, such attempts to regulate employer speech, whether directly or indirectly, are expressly precluded by NLRA Section 8(c).[27] Moreover, similar to *Brown*, DOL's new rule couples an indirect regulation on employer speech (i.e., a "disclosure" requirement) with significant "compliance costs and litigations risks." *See Brown*, 554 U.S. at 71, 73. As discussed in Plaintiffs' Complaint and later in this Brief, total compliance costs for affected businesses will be in the *billions* of dollars. Further, employers and consultants, including attorneys, who do not comply with the new rule's vague disclosure requirements face the threat of substantial *criminal* liability, which will likely have the effect of reducing the availability of advice to employers. Consequently, DOL's "enforcement mechanisms" will "put considerable pressure on an employer either to forgo his free speech right to communicate his views to his employees," incur substantial costs, or else expose the employer to potential *criminal* penalties. *See Brown*, 554 U.S. at 73. "In so doing," the new Advice Exemption Interpretation "impermissibly [burdens] conduct protected by federal labor law, and chills one side of 'the robust debate which has been protected under the NLRA.'" *See Id*. DOL's new rule is preempted and barred by Section 8(c)[28].

3. Plaintiffs will likely succeed on their claim that DOL's new and constricted Advice Exemption Interpretation is unconstitutionally vague in violation of the due process and equal protection clauses of the Fifth Amendment.

exercise their rights." *Id*.

[27] The LMRDA does not displace Section 8(c). Section 203(f) of the LMRDA provides that "nothing contained in this section shall be construed as an amendment to, or modification of the rights protected by, section 8(c) of the National Labor Relations Act, as amended." 29 U.S.C. § 433(f) (2012).

[28] There is no possible argument that Congress, in adopting the LMRDA, implicitly authorized DOL to regulate within the sphere otherwise covered by *Machinists* preemption. *Cf. Brown*, 554 U.S. at 75 ("A federal statute will counteract the pre-emptive scope of the NLRA if it demonstrates that Congress has decided to tolerate a substantial measure of diversity in the particular regulatory sphere."). To the contrary, when Congress enacted the LMRDA, it *expressly provided* that **"[n]othing, contained in this section shall be construed as an amendment to, or modification of the rights protected by [Section 8(c)]"**. 29 U.S.C. § 433(f) (2012). Thus, the LMRDA expressly incorporates the principle of *Machinists* preemption embodied in Section 8(c). *Brown*, 554 U.S. at 67-68 (Congress's enactment of Section 8(c) "manifested a congressional intent to encourage free debate on issues dividing labor and management.").

DOL's new and constricted Advice Exemption Interpretation abandons DOL's prior objective, bright-line test. DOL's prior rule was in effect for more than fifty years. It held that the Advice Exemption protects advice received by an employer from a consultant, including an attorney, from the LMRDA's reporting requirements provided (a) the employer was free to accept or reject the advice and (b) the consultant did not engage in direct contact and communication with employees subject to persuasion. DOL's new rule creates a subjective, vague, open-ended, burdensome, confusing, and overly broad standard that fails to provide fair notice of what conduct could result in criminal penalties. Consequently, it deprives Plaintiffs, Plaintiffs' members, and all employers of due process rights guaranteed under the Fifth Amendment.

"It is a basic principle of due process that an enactment is void for vagueness if its prohibitions are not clearly defined." *Grayned v. City of Rockford*, 408 U.S. 104, 108 (1972). Thus, regulations must "give the person of ordinary intelligence a reasonable opportunity to know what is prohibited, so that he may act accordingly." *Id.* Further, "if arbitrary and discriminatory enforcement is to be prevented, laws must provide explicit standards for those who apply them." *Id.* "This requirement of clarity in regulation is essential to the protections provided by the Due Process Clause of the Fifth Amendment." *FCC v. Fox Television Stations, Inc.*, 132 S. Ct. 2307, 2317 (2012).

Accordingly, "the void-for-vagueness doctrine requires that a penal statute 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). Moreover, "[w]hen speech is involved, *rigorous* adherence to those requirements is necessary to ensure that ambiguity does not chill protected speech." *FCC*, 132 S.Ct. at 2317 (emphasis added). *Accord Vill. Of Hoffman Estates v. Flipside*,

455 U.S. 489, 499 (1982) ("perhaps the most important factor affecting the clarity that the Constitution demands of a law is whether it threatens to inhibit the exercise of constitutionally protected rights. **If, for example, the law interferes with the right of free speech or of association, a more stringent vagueness test should apply.")** (emphasis added).

Here, DOL replaced a long-standing and easily understandable bright-line rule with one that is vague and impossible to apply. In pertinent part, DOL's new rule provides:

> **Reporting of an agreement or arrangement is triggered when:**
>
> **(3)** A consultant engages in *direct* contact or communication with any employee with an object to persuade such employee; or
>
> **(4)** **A consultant *who has no direct contact with employees* undertakes the following activities *with an object to persuade employee*;**
>
> **(a)** **Plans, directs, or coordinates activities undertaken by supervisors or other employer representatives, including meetings and interactions with employees;**
>
> **(b)** **Provides material or communications to the employer, in oral, written, or electronic form, for dissemination or distribution to employees;**
>
> **(c)** **Conducts a seminar for supervisors or other employer representatives; or**
>
> **(d)** **Develops or implements personnel policies, practices, or actions for the employer;**
>
> The activity that triggers the consultant's requirement to file the Form M-20 also triggers the employer's obligation to report the agreement on the Form LM-10…

81 Fed. Reg. 15938 (March 24, 2016) (emphasis added). DOL defines **"object to persuade"** as communications with supervisors, preparation of materials, speeches, and development of personnel policies that "explicitly or ***implicitly***" reference unions and "***affect*** employees' exercise of their rights." 81 Fed. Reg. 15970 (March 24, 2016) (emphasis added).

Revised Forms LM-10 and LM-20 are attached to DOL's new and constricted Advice Exemption Interpretation. Among the "Persuader Activities" specifically described in DOL's revised Forms LM-10 and LM-20 which trigger reporting obligations are the following:

A. Drafting, revising, or providing written materials for presentation, dissemination, or distribution to employees;

B. Drafting, revising, or providing a speech for presentation to employees;

C. Drafting, revising, or providing audiovisual or multi-media presentations for presentation, dissemination, or distribution to employees;

D. Drafting, revising, or providing website content for employees;

E. Planning or conducting individual or group employee meetings;

F. Planning or conducting group employee meetings;

G. Training supervisors or employer representatives to conduct individual or group employee meetings;

H. Coordinating or directing the activities of supervisors or employer representatives;

I. Establishing or facilitating employee committees;

J. Developing personnel policies or practices;

K. Identifying employees for disciplinary action, reward, or other targeting action;

L. Speaking with or otherwise communicating directly with employees;

M. Other.

81 Fed. Reg. 16038 (March 24, 2016).

Use of words like "implicit" and "affect" are too broad to produce any certainty or consistency in application of the "object to persuade" standard that triggers the reporting obligations under DOL's new rule. Further, many activities that are ordinarily performed by an employer's attorneys, such as drafting documents and communications on behalf of an employer

that an employer may decide to provide to employees, the training of supervisory employees, and the drafting of employment policies can easily for the first time be regarded as Persuader Activity triggering reporting obligations.

Under DOL's new rule, associations, employers and consultants, including attorneys, cannot determine with certainty whether their actions require reporting. For example, does an attorney's counseling of an employer on how to draft a lawful no-solicitation/no-distribution rule trigger the reporting requirement? What if the attorney supplies an employer-client with a sample personnel policy that lawfully restricts employee solicitation and distribution? Is a reporting obligation triggered when an attorney advises an employer regarding how to communicate with employees concerning the employer's right to hire temporary or permanent replacements during a labor dispute? Would an attorney be required to report guidance to a client on how to communicate with employees about collective bargaining negotiations in response to a certified union's collective bargaining proposals? Would an attorney be required to report guidance to a client on the process of decertification of a union or in response to a rumored employee decertification petition?

Under DOL's long-standing prior bright-line test, "advice" bore its ordinary meaning, and so long as consultants, including attorneys, were advising an employer, they could be confident that they were not also involved in a Persuader Activity requiring reporting. Under DOL's new rule, whether an activity constitutes "advice" will depend on the "object" or motive that a court may later impute to the consultant's speech—taking account of "the agreement, any accompanying communication, the timing, or other circumstances relevant to the undertaking." 81 Fed. Reg. 15973 (March 24, 2016). Consultants, including attorneys, will understandably balk at the

prospect of having their speech parsed under DOL's new rule and will avoid stepping near the line thereby chilling protected speech. DOL's new rule is too vague to pass constitutional muster.

DOL's new and constricted Advice Exemption Interpretation also violates Plaintiffs' and Plaintiffs' members' rights under the Equal Protection Clause of the Fifth Amendment. A violation of equal protection occurs when the government treats someone differently than others similarly situated. *Brennan v. Stewart*, 834 F.3d 1248, 1258 (5th Cir. 1988). In this case, DOL's new rule applies to employers who hire outside consultants, including attorneys, to assist in responding to union organizing while not affecting employers with full-time in-house labor relations and/or legal personnel who serve a similar function. Labor unions have no similar reporting requirements.

4. Plaintiffs will likely succeed on their claim that DOL's new and constricted Advice Exemption Interpretation violates the Regulatory Flexibility Act (RFA).

The RFA requires an agency that has proposed a rule to prepare and make available for public comment an initial and final regulatory flexibility analysis. The initial flexibility analysis "shall describe the impact of the proposed rule on small entities." 5 U.S.C. § 603(a) (2012). The final regulatory flexibility analysis, which is provided in connection with the promulgation of a final rule, requires a description of (i) the reasons why action by the agency is being considered, (ii) a succinct statement of the objectives of, and legal basis for, the proposed rule, (iii) a description of and, where feasible, an estimate of the number of small entities to which the proposed rule will apply, and (iv) a description of any significant alternatives to the proposed rule which accomplish the stated objectives of applicable statutes and which minimize any significant economic impact of the proposed rule on small businesses. *Id*.

An agency can avoid performing these analyses if the head of the agency certifies that the rule will not have a significant economic impact on a substantial number of small entities. The

certification must include a statement providing the factual basis for the agency's determination that the rule will not significantly impact small entities. 5 U.S.C. § 605 (2012).

DOL certified that its new and constricted Advice Exemption Interpretation would not have a significant economic impact on a substantial number of small entities. 81 Fed. Reg. 16015 (March 24, 2016). In making this certification, DOL understated the economic impact of its new rule. It also failed to provide an adequate factual basis for its cost estimates. DOL failed to meaningfully consider and address the weight of the comments and cost estimates submitted in response to proposed rulemaking.

As indicated above and in Plaintiffs' Complaint, the LMRDA imposes three separate reporting requirements. First, a consultant, including an attorney, who is engaged by an employer to engage in Persuader Activity must file a Form LM-20 report within thirty days of entering into such a relationship. 29 U.S.C. § 433(b) (2012). Second, an employer who engages in any such arrangements must file a Form LM-10 year-end report covering all such activities for the past year. *Id.* § 433(a). Third, a consultant who has engaged in any covered activities must also file a year-end Form LM-21 report, which must detail his receipts and disbursements in connection with his work. *Id.* § 433(b).

DOL's new rule changes what associations, employers, and consultants, including attorneys, must report. DOL failed to consider the ramifications that its new rule would have on consultants, including attorneys, who are required to complete and file Form LM-21. Instead, DOL left such concerns to a separate rulemaking, which it estimates will give rise to a new proposed rule concerning Form LM-21 in September 2016. 81 Fed. Reg. 15992 & n.88 (March 24, 2016).

A Form LM-21 must be filed if a person engages in Persuader Activities under the LMRDA. *See* 29 U.S.C. § 433(b). DOL's new and constricted Advice Exemption Interpretation greatly expands the number of consultants, including attorneys, who will be required to complete and file a Form LM-21. DOL refused to consider forceful objections to expanding the range of persons subject to this reporting requirement. Instead, DOL faults "the ABA and multiple other commenters" for "fail[ing] to note that this rulemaking focuses exclusively on the Form LM-20, not the Form LM-21." 81 Fed. Reg. 16000 (March 24, 2016).

Agencies may not enact "a rule that utterly fails to consider how the likely future resolution of crucial issues will affect the rule's rationale." *Nat'l Ass'n of Broadcasters v. F.C.C.*, 740 F.2d 1190, 1210 (D.C. Cir. 1984). Further, "an agency does not act rationally when it chooses and implements one policy and decides to consider the merits of a potentially inconsistent policy in the very near future." *ITT World Commc'ns, Inc. v. F.C.C.*, 725 F.2d 732, 754 (D.C. Cir. 1984).

Here, there are only two possibilities. The first is that DOL will reconsider the scope of the Advice Exemption in good faith during the course of its Form LM-21 rulemaking. This seems very unlikely.[29] *See Id.* 754. The second possibility is that DOL has already determined the scope of the Advice Exemption through *this* rulemaking, but is artificially excluding important costs of its implementation from consideration (i.e., the increased cost of complying with Form LM-21's requirements under the new rule) by deferring consideration of such costs until such time as it engages in Form LM-21 rulemaking. DOL has structured its decision-making in such a way that it "entirely failed to consider an important aspect of the problem." *Nat'l Ass'n of Home Builders v. Defs. of Wildlife*, 551 U.S. 644, 658 (2007) (quoting *Motor Vehicle Mfrs. Ass'n of United States, Inc. v. State Farm Mut. Automobile Ins. Co.*, 463 U.S. 29, 43 (1983)).

[29] *See* n.19 for a description of the temporary action taken by DOL on April 13, 2016, with respect to the completion of Form LM-21.

DOL calculated that the average cost of employer compliance with its new and constricted Advice Exemption Interpretation is $107.68. DOL states that the total cost of its new rule is an insignificant 0.24% "of a consultant's average annual gross revenue." 81 FR 16018 (March 24, 2016). DOL's *guestimates* of costs cannot withstand fact-specific studies that demonstrate compliance with the new rule is much more costly. In its comments, the U.S. Chamber of Commerce estimated that total compliance costs for all affected U.S. businesses are between $910.1 million to $2.2 billion in the first year under DOL's new rule and $285.9 million to $793.1 million each year thereafter.[30] A more recent study performed by the former Chief Economist for the Department of Labor estimated that the total burden for the first year would be between $7.5 billion and $10.6 billion, with subsequent annual costs amounting to between $4.3 billion and $6.5 billion. The total cost over a ten-year period could be $60 billion.[31] DOL failed to meaningfully address these validated figures, choosing to push through the adoption of its new rule through an inadequate analytical process.

It is obvious that DOL's new rule will impose a significant economic impact on a substantial number of small businesses. DOL failed to conduct a proper regulatory flexibility analyses. Pursuant to 5 U.S.C. § 611(a)(4) (2012), the Court should enjoin enforcement of DOL's new rule.

B. Plaintiffs have a substantial threat of irreparable injury, the threatened injury outweighs any damage that an injunction would cause Defendants, and injunctive relief would not be adverse to the public interest.

[30] *See* A. R., comment by Chamber of Commerce of the United States dated September 21, 2011, at p. 17, available at http://www.regulations.gov/#!docketDetail;D=LMSO-2011-0002.

[31] *See* Diana Furchtgott-Roth, *The High Costs of Proposed New Labor-Law Regulations*, MANHATTAN INSTITUTE (Jan. 27, 2016), available at http://www.manhattan-institute.org/html/high-costs-proposed-new-labor-law-regulations-5715.html (last accessed April 7, 2016).

From the above, it is obvious that Plaintiffs have a substantial likelihood of success on the merits of this case. Plaintiffs also clearly have a substantial threat of irreparable injury,[32] the threatened injury outweighs any damage to Defendants,[33] and the granting of the injunctive relief prayed for herein would not be adverse to the public interest.[34]

IV. PRAYER FOR RELIEF

For the reasons stated in their Complaint and in this Brief, Plaintiffs pray that the status quo will be preserved and that Defendants will be preliminary enjoined from implementing and enforcing DOL's new and constricted Advice Exemption Interpretation. Plaintiffs also pray that Defendants will be enjoined from referring civil and criminal cases under DOL's new rule to the U.S. Department of Justice. Plaintiffs pray for all other relief, in law or in equity, to which they are justly entitled.

[32] Once First Amendment rights are impeded, there is no effective remedy. A person who fails to comply with DOL's new rule will be subject to criminal prosecution and imprisonment. Injunctive relief is essential to prevent irreparable harm. The chilling effect of DOL's new rule will deter many employers from seeking counsel and exercising their free speech rights. Attorneys will be deterred from advising employers. Under DOL's new rule, businesses and consultants, including attorneys, will be required to publicly disclose confidential and privileged information which once disclosed, cannot be taken back. The chilling of speech protected by the First Amendment is in and of itself an irreparable injury. *See Henry v. Lake Charles American Press, L.L.C.*, 566 F.3d 164, 180 (5th Cir. 2009) ("[T]he loss of First Amendment freedoms, for even minimal periods time, unquestionably constitutes irreparable injury.") (quoting *Elrod v. Burns*, 427 U.S. 347, 373, (1976)); *Wilson v. Thompson*, 593 F.2d 1375, 1383 (5th Cir. 1979) ("When a significant chilling effect on free speech is created by a bad faith prosecution, the prosecution will thus as a matter of law cause irreparable injury regardless of its outcome, and the federal courts cannot abstain from issuing an injunction.").

[33] Injunctive relief will simply preserve the status quo.

[34] The promotion of debate about unionization, the free exercise of constitutional rights, and enjoining DOL from acting in a manner inconsistent with the law is in the public interest.

Respectfully submitted,

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CERTIFICATE OF SERVICE

This is to certify that the above Brief has been served on counsel for Defendants on this 22nd day of April, 2016.

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