HONORABLE KATE S. VAUGHAN

UNITED STATES DISTRICT COURT

FOR THE WESTERN DISTRICT OF WASHINGTON

JULIE K. SU, Acting Secretary of Labor, United States Department of Labor,
Petitioner

v.

AMAZON.COM SERVICES, LLC,

Respondent.

Case No. 2:23-MC-00084-JCC-SKV

AMAZON'S OPPOSITION TO PETITION TO ENFORCE SUBPOENA DUCES TECUM AND REQUEST FOR PROTECTIVE ORDER

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I. PRELIMINARY STATEMENT

Amazon opposes the Department of Labor's petition to enforce the investigatory subpoena served on Amazon by the Department's Office of Labor-Management Standards (OLMS). The subpoena reflects the increasing belief among modern administrative agencies that they are empowered to make law, rather than merely enforce it, with no regard for the relevant statutory language or the rules governing their authority.

The subpoena relates to a disclosure statute, the Labor-Management Reporting and Disclosure Act (LMRDA). The LMRDA requires employers to publicly disclose certain payments by filing a Form LM-10 with OLMS. The agency then publishes the LM-10 on its own website. Flouting the statutory language and relevant legislative history, ignoring its own public interpretative guidance, and abruptly abandoning 60+ years of consistent enforcement policy and practice, OLMS suddenly asserts the LMRDA requires employers to disclose certain payments to their own supervisors, even though it has never before taken this position at any time since the LMRDA was enacted in 1959. Worse, this arbitrary and capricious change in direction was accomplished without following any of the procedures required by the Administrative Procedure Act. OLMS simply implemented it.

The payments in question are reimbursements for supervisors' travel expenses incurred when the supervisor heads out on the road to persuade employees on the subject of unionization. In response to the subpoena, Amazon forthrightly informed OLMS that it has reimbursed supervisors for travel expenses in these circumstances, but the LMRDA does not require (and OLMS has never previously claimed it requires) the disclosure of these payments on an LM-10. Accordingly, Amazon is not obligated to disclose the details of these payments to OLMS in response to a subpoena, any more than it is obligated to disclose them on an LM-10. Given the clarity of Amazon's position, the proper method

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for resolving this dispute is for the Department to institute an enforcement proceeding under 29 U.S.C. § 440. The Department would ask the court to order Amazon to include the payments on an amended LM-10. Amazon would oppose that request. And the court would decide who is correct, on the merits. The Department already has all the information it needs if it wishes to proceed with an enforcement action.

Instead, the Department petitioned for enforcement of a subpoena that seeks the very information in dispute—attempting an end-run around its obligation to demonstrate that the statute requires its disclosure in the first place. Because the subpoena seeks information that could not establish a violation of the LMRDA in the first place, and because OLMS already possesses all the information it needs to conclude its illegitimate investigation in any event, the Court should deny the Department's petition.

II. STATEMENT OF FACTS

A. The LMRDA.

In 1959, the LMRDA was enacted following an investigation by the U.S. Senate Select Committee on Improper Activities into union racketeering and corruption, which found numerous instances of financial impropriety and abuse in the administration of union health and welfare funds. *See* Russell A. Smith, *The Labor-Management Reporting and Disclosure Act of 1959*, 46 Va. L. Rev. 195, 195 (1960). Congress passed the LMRDA with the primary intention of combating union corruption by regulating internal union affairs and providing union members with increased participation rights. *See* Michael J. Nelson, *Slowing Union Corruption: Reforming the Landrum-Griffin Act to Better Combat Union Embezzlement*, 8 Geo. Mason L. Rev. 527, 528 (2000). The drafters of the LMRDA, however, also included provisions requiring employers to submit reports reflecting monies spent on certain activities.

Pertinent to this matter, Sections 203(a)(2) and (a)(3) of the LMRDA require employers to file reports with the Secretary of Labor disclosing the following types of payments:

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> (2) any payment (including reimbursed expenses) to any of [the employer's] employees, or any group or committee of such employees, for the purpose of causing such employee or group or committee of employees to persuade other employees to exercise or not to exercise, or as the manner of exercising, the right to organize and bargain collectively through representatives of their own choosing unless such payments were contemporaneously or previously disclosed to such other employees; [or] (3) any expenditure . . . where an object thereof, directly or indirectly, is to interfere with, restrain, or coerce employees in the exercise of the right to organize and bargain collectively through representatives of their own choosing [*i.e.*, where an object thereof is to violate Section 8(a)(1) of the National Labor Relations Act (NLRA), 29 U.S.C. § 158(a)(1)] . . . .

29 U.S.C. § 433(a)(2), (3).

Section 203(e) of the LMRDA, however, excludes from the foregoing reporting requirements any payment made to "any regular officer, supervisor, or employee of an employer as compensation for service as a regular officer, supervisor, or employee of such employer." 29 U.S.C. § 433(e).

This exclusion reflects the fact that the LMRDA is merely a disclosure statute designed to shine a light on the motivations of "middlemen" who attempt to blend in with the employee population and work discretely to thwart or disrupt union organizing. *See* S. Rep. No. 86-187 (1959), *as reprinted in* 1959 U.S.C.C.A.N. 2318, 2327 ("In some cases [the middlemen] work directly on employees or through committees to discourage legitimate organizational drives or set up company-dominated unions. These middlemen have been known to negotiate sweetheart contracts. They have been involved in bribery and corruption as well as unfair labor practices."); *see* James R. Beaird, *Reporting Requirements for Employers and Labor Relations Consultants in the Labor-Management Reporting and*

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Disclosure Act of 1959, 53 Geo. L.J. 267, 269-70 (1965). Given that statutory objective, there is obviously no need to disclose the fact that officers, managers, or other supervisors are paid wages or salaries by the employer or that they are reimbursed for travel expenses incurred when they travel for work. Employees surely understand all this without any government-mandated disclosures.

Indeed, as the D.C. Circuit has recognized: "The legislative history [of the LMRDA] confirms a prime congressional concern to uncover employer-expenditures for anti-union persuasion carried out, often surreptitiously, ***not by employers or supervisors***, but by consultants or middlemen." *Auto Workers v. Dole*, 869 F.2d 616, 619 n. 5 (D.C. Cir. 1989) (emphasis added).

Similarly, consistent with the statutory language and evident statutory purpose, the OLMS Interpretative Manual explains that while disclosure obligations may also flow from secretive arrangements with non-supervisory employees, no such obligations flow from the activities of management:

> For example, where an employer prepares a message to his employees which attempts to persuade employees as to the manner of exercising their right to organize, and the employer then has the message conveyed to all plant employees through his labor relations director who is a regular staff member, no report would be due under section 203(a)(2) because the director would be performing as a regular employee within the meaning of section 203(e). However, if the employer called in one of his old and trusted employees who was a drill press operator for example, and asked him (without disclosing the assignment to other employees) to persuade his fellow employees as to their right to organize, then a report would be due from the employer under 203(a)(2).

See OLMS Interpretative Manual § 254.100 (2022).

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C. Form LM-10 and the Secretary of Labor's Investigative Authority.

If payments must be reported under Section 203(a) of the LMRDA, then the employer is obligated to complete and submit a Form LM-10 to OLMS. Form LM-10 requires, in relevant part, that the employer identify the specific type of activity requiring a report (Box 8), along with the name of the person(s) having received the payment(s), the specific amount of the payment(s), when the employer made the payment(s), and the specific circumstances of the payment(s) that must be reported (Boxes 9-12).

The Secretary of Labor is authorized by Section 610 of the LMRDA to investigate whether an employer has violated Section 203 of the LMRDA by not submitting or not accurately completing a required LM-10. *See* 29 U.S.C. § 521. In turn, if the Secretary concludes that an employer failed to submit or inaccurately completed a required LM-10 and is unable to secure voluntary compliance, the Secretary may seek injunctive relief from a district court under Section 210 of the LMRDA. *See* 29 U.S.C. § 440.

D. OLMS Adopts an Unprecedented Interpretation of the LMRDA.

Within the last two years or so, OLMS has begun investigating employers for alleged non-compliance with the LMRDA based on unprecedented interpretations of the statute. Relevant to this case, OLMS now appears to assert that employers must include on a Form LM-10 any payments made to their own supervisors to reimburse the supervisors for travel expenses if, while traveling: (1) the supervisor engages with employees to persuade them on the subject of unionization or (2) the supervisor makes a statement that constitutes an unfair labor practice under Section 8(a)(1) of the NLRA, 29 U.S.C. § 158(a)(1).

The Court surely may take judicial notice of the following obvious facts: (1) supervisory employees who travel out of town for work have long been routinely reimbursed for their travel expenses; (2) supervisory employees have long traveled out of town to try to persuade employees on the subject of unionization; and (3) decades of

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National Labor Relations Board (NLRB) decisions are replete with findings that supervisory employees have made statements in violation of Section 8(a)(1) of the NLRA while on the road. Yet before the past couple of years, OLMS could not have identified a single instance of its having investigated an employer's failure to disclose reimbursement of travel expenses to supervisory employees or brought an enforcement action to compel disclosure of that information. Over 60+ years of the LMRDA's existence, no Secretary of Labor or OLMS Director (throughout multiple Democratic and Republican administrations) ever seems to have taken the position that the statute required such reporting, until now.

E. The Parties and Circumstances Leading Up to This Proceeding.

1. The Alleged Unfair Labor Practice.

On January 30, 2023, an NLRB Administrative Law Judge (ALJ) issued a decision and recommended order, concluding that Eric Warrior made a single statement on March 15, 2021, to employees at Amazon's JFK8 fulfillment center in Staten Island, New York, that constituted a violation of Section 8(a)(1) of the NLRA. (Dkt. 1-4 at p.2 of 37, n.2; pp. 17-18, 33 of 37.) Amazon filed exceptions to this conclusion with the NLRB, contending that Warrior's statement did not violate the NLRA. Stolzenbach Decl., ¶ 2. Those exceptions remain pending; there has been no finding by the NLRB that Warrior's statement violated the statute. *Id*.

2. The Organizing Campaigns.

In 2021 and 2022, the Amazon Labor Union (ALU) attempted to organize Amazon employees at JFK8 and a nearby sort center known as LDJ5. (Dkt. 1-3 at p.3.) During the organizing campaigns, Amazon supervisors exercised Amazon's right under the First Amendment and Section 8(c) of the NLRA, 29 U.S.C. § 158(c), to express the company's views on unionization to employees at both locations. (*Id*. at p.3; Dkt 1-4 at p.7.)

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3. The OLMS Subpoena.

In a nutshell, the OLMS subpoena seeks documents as part of an investigation into whether Warrior and other Amazon supervisors who engaged in persuasion of employees at JFK8 and LDJ5 traveled to those two sites from other locations and had their travel expenses reimbursed by Amazon.

Notwithstanding Amazon's position (which was shared by OLMS for 60+ years) that employers need not report such expenses on a Form LM-10, meaning the subpoena is seeking entirely irrelevant information, Amazon tried to reach a compromise with OLMS over the subpoena. Amazon expressed its concern that OLMS was investigating issues outside its statutory authority but nevertheless communicated its willingness to provide OLMS with all the information necessary to determine whether to pursue an enforcement action under 29 U.S.C. § 440 based on the fact that Amazon did not report payments to its own supervisors for travel expense reimbursement on its LM-10s in 2022 and 2023.

For example, on September 29, 2023, Amazon provided the Department of Labor with an outline of proposed factual stipulations, including the following:

> 1. The Company will provide the job titles and job descriptions for the individuals identified in Request No. 1.
>
> 2. The Company will provide the job titles and job descriptions of the officers, managers and supervisors whose primary work site was not JFK8 or LDJ5 and who traveled from their primary work site to Amazon's JFK8 and LDJ5 locations to communicate to employees regarding, among other things: the Amazon Labor Union, the union election process, Amazon's opposition to the union, and other aspects of Amazon's response to the union organizing drives at JFK8 & LDJ5.
>
> 3. The Company will stipulate that it paid for the travel related expenses (e.g., airline tickets, hotel accommodations, car rentals, per diem or other

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> approved expenses) for the activities of the officers, managers and supervisors described in Nos. 1-2 during FY 2021 and 2022.

Stolzenbach Decl. ¶ 4, Ex. A.

On October 20, 2023, the Department of Labor explained that OLMS insists on production of the actual names of those Amazon supervisors who traveled to JFK8 and LDJ5, as well as documentation reflecting the details of their travel expenses and reimbursement, "(i.e., payment dates, amounts, payees, expense types, names of employees who incurred the expense, methods of payment or reimbursement, information that would be contained in expense reports and on airline, hotel, and car rental receipts, and information regarding per diem and reimbursed expenses)." *Id.* ¶ 5, Ex. B. The Department of Labor further explained that the agency could not guarantee protection of this information from public disclosure if Amazon agreed to produce it in response to the subpoena. *Id.*

Amazon responded by letter dated November 3, 2023, expressing, again, its willingness to stipulate to the factual information OLMS needed to determine whether Amazon did not include travel expense reimbursements on its LM-10s. Amazon offered to stipulate to descriptions of its reimbursement policy, confirmation that it paid for some of the travel-related expenses incurred by supervisory employees who traveled to JFK8 and LDJ5, job descriptions and titles of the people who traveled, and confirmation that these individuals traveled to those facilities "to communicate to employees regarding, among other things: the Amazon Labor Union, the NLRB representation election process, Amazon's opposition to unionization, and other aspects of Amazon's response to the union organizing drives at JFK8 and LDJ5." *Id.* ¶ 6, Ex. C.

In the same letter, however, Amazon re-emphasized its objection to producing the names of the traveling managers and the specific dollar amounts related to their travel expenses. *Id.* In addition to the simple fact that OLMS is exceeding its statutory authority,

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Amazon stressed its practical concerns about privacy, in light of the ALU's history of online doxing:

> Amazon is entirely justified in its concern that this information may be misused by others to harass, intimidate, or attempt to embarrass Amazon employees. We understand the Amazon Labor Union (ALU) lodged the complaint that commenced this investigation, and the ALU has a history of using its highly visible social media accounts to harass frontline employees and members of management. For example, in this post and this post, ALU President Christian Smalls set up his nearly 200,000 Twitter followers to harass an Amazon corporate communications representative, simply because that representative distributed information about a small ALU demonstration to reporters. The posts drew insulting remarks and re-posts from Smalls' followers. Absent a clearly established legal obligation to publicly report the identities and personal information of Amazon managers and supervisors, they should not be exposed to such potential for harassment, and Amazon will not provide specific and personal information at this investigatory stage.

Id.

Notwithstanding Amazon's willingness to provide OLMS with all the information it needs to determine that Amazon reimbursed supervisors for travel expenses when they traveled to persuade employees at JFK8 and LDJ5, including, in Warrior's case, when he *allegedly* committed an unfair labor practice while engaged in that activity, the Department of Labor filed the instant petition to enforce its subpoena.

III. LEGAL STANDARD

An agency seeking to enforce an investigatory subpoena generally must show that: (1) Congress has granted authority to investigate; (2) the procedural requirements have

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been followed; and (3) the evidence sought is relevant and material to the investigation. *EEOC v. Fed. Exp. Corp.*, 558 F.3d 842, 848 (9th Cir. 2009). If the agency satisfies those *prima facie* elements, however, enforcement still should be denied if the subpoena was issued for an "illegitimate purpose." *McLane Co., Inc. v. EEOC*, 581 U.S. 72, 77 (2017).

Citing *United States v. Morton Salt Co.*, 338 U.S. 632 (1950), the Department of Labor argues that judicial review of administrative subpoenas is ordinarily relatively narrow, and this is true as a general matter. Even so, "[t]he salutary policies of judicial and administrative efficiency that underlie the *Morton Salt* rule do not . . . require that the courts limit their scrutiny of agency subpoena requests in every case." *FEC v. Fla. for Kennedy Comm.*, 681 F.2d 1281, 1284 (11th Cir. 1982). Indeed, as the Supreme Court itself observed in *Morton Salt*, "a governmental investigation into corporate matters may be of such a sweeping nature and so unrelated to the matter properly under inquiry as to exceed the investigatory power." 338 U.S. at 652.

> [W]here the [agency] seeks judicial enforcement of a sweeping subpoena, issued pursuant to an ***unprecedented investigation*** which intrudes upon centrally important ***first amendment associational and advocacy interests***, and where the [agency's] assertion of jurisdiction to conduct the investigation rests ***solely upon a legal interpretation of a statute without any need for additional facts***, then it is essential for a court to assure itself affirmatively that the investigation is within the subject matter jurisdiction of the [agency] before lending its authority to enforcement of a subpoena.

FEC v. Machinists Non-Partisan Pol. League, 655 F.2d 380, 390 (D.C. Cir. 1981) (emphasis added); *accord FEC v. Fla. for Kennedy Comm.*, 681 F.2d at 1284.

As discussed below, the question of whether the information sought by OLMS is relevant to a lawful statutory purpose—*i.e.*, whether the information could possibly support a potential violation of the LMRDA—is a question of ordinary statutory

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interpretation that can be resolved without further factual development. Consequently, the Court need not defer to the agency and should review the statutory language to determine the legitimacy of the investigation giving rise to the subpoena. *See Machinists*, 655 F.2d at 390 n.19 (collecting cases for the proposition that "restricting litigation of jurisdictional issues in subpoena enforcement proceedings will be relaxed where 'the issue involved is a strictly legal one not involving the agency's expertise or any factual determinations.'").

In addition, there is no dispute that OLMS has adopted an unprecedented view of the LMRDA, contrary to its consistent interpretation of the statute for the past 60+ years and its own official written guidance, which should lead the Court to review the agency's actions more closely. *See Machinists,* 55 F.2d at 386-87 (more stringent judicial review warranted where the agency "failed to show us a single prior instance where it sought to conduct an investigation" similar to the one at issue).

Finally, the OLMS subpoena threatens to chill the constitutionally-protected speech of Amazon and other employers, and their management teams, given the intrusive investigations that OLMS threatens to conduct under its newfound interpretation of a statute enacted in the 1950s. Administrative subpoenas that implicate significant constitutional concerns warrant even closer-than-usual examination. *See, e.g.*, *Marshall v. Stevens People & Friends for Freedom*, 669 F.2d 171, 176-79 (4th Cir. 1981) (court closely scrutinizes administrative subpoena implicating First Amendment rights, notwithstanding general rule articulated in *Morton Salt*). Indeed, prior attempts by the Department of Labor to expand employers' reporting requirements beyond the LMRDA's statutory requirements have been found to violate the First Amendment, which only further reinforces the need for careful judicial review of the agency's actions in this realm. *See Nat'l Fed'n of Indep. Bus. v. Perez*, No. 5:16-cv-00066-C, 2016 WL 3766121, at *31-32 (N.D. Tex. June 27, 2016) (preliminarily enjoining DOL regulation that expanded

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reporting requirements under the LMRDA on First Amendment grounds); *see also Associated Builders & Contractors of Se. Tex. v. Rung*, No. 1:16-cv-00425, 2016 WL 8188655, at *10-11 (E.D. Tex. Oct. 24, 2016) (preliminarily enjoining DOL requirement that government contractors file reports disclosing past labor law violations on First Amendment grounds).

IV. LEGAL ARGUMENT

A. The Court Should Not Enforce the Subpoena Because the Information Sought Is Not "Material or Relevant" To Any Legitimate Investigation.

1. The Documents Sought Are Irrelevant To Any Lawful Purpose.

Documents cannot possibly be "material or relevant" if the underlying investigation lacks a lawful statutory purpose. "The documents sought must be relevant to the agency's 'investigation of possible violations' of the underlying statute." *EEOC v. Kidder Peabody, Peabody & Co. Inc.*, No. M18-304, 1992 WL 73344, at *3 (S.D.N.Y. Apr. 2, 1992) (quoting *Donovan v. Mehlenbacher*, 652 F.2d 228, 230 (2d Cir. 1981)); *Chao v. Loc. 743, Int'l Bhd. of Teamsters, AFL-CIO*, 467 F.3d 1014, 1022 (7th Cir. 2006) (subpoena must be "relevant to an inquiry into a possible violation" of underlying statute); *Shoe Works v. EEOC*, 685 F. Supp. 168, 170 (S.D. Ohio 1987) (same).

Thus, when a court is able to determine that information sought by an administrative subpoena is "not even arguably relevant" to any potential statutory violation based on a "pure issue of statutory interpretation," it should refuse enforcement. *EEOC v. Sidley Austin Brown & Wood*, 315 F.3d 696, 700 (7th Cir. 2002); *see also United States v. Union Oil Co. of Cal.*, 343 F.2d 29, 31 (9th Cir. 1965) (refusing to enforce a subpoena seeking documents related to a future transaction because governing statute authorized investigation only into "whether any person is or has been engaged in any antitrust violation" and could not extend to potential future violations); *compare EEOC v. Karuk*

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Tribe Hous. Auth., 260 F.3d 1071, 1076 (9th Cir. 2001) (court should not refuse to enforce subpoena due to "fact-based claim[s] regarding coverage or compliance with the law").

The subpoena here is predicated entirely on the notion that employers must report reimbursed travel expenses of supervisory personnel. The LMRDA, however, provides to the contrary:

> Nothing contained in this section [29 U.S.C. § 433] shall be construed to require . . . any employer . . . to file a report covering expenditures made to any regular officer, supervisor, or employee of an employer as compensation for service as a regular officer, supervisor, or employee of such employer.

29 U.S.C. § 433(e).

In this regard, there can be no legitimate dispute that "reimbursement of expenses falls within the definition of compensation." *Liberty Mut. Fire Ins. Co. v. Glick*, No. 19-cv-3138, 2021 WL 1061965, at *4 (C.D. Ill. Mar. 18, 2021), *aff'd sub nom. Liberty Mut. Fire Ins. Co. v. Clayton*, 33 F.4th 442 (7th Cir. 2022); *see also* Black's Law Dictionary (4th ed. 1968) (defining "compensation" to include "[i]ndemnification," "making whole," "giving an equivalent or substitute of equal value," "equivalent in money for a loss sustained," and "recompense in value"); Black's Law Dictionary (11th ed. 2019) (defining "compensation" as "[r]emuneration and other benefits received in return for services rendered; esp., salary or wages," with an explanatory note stating that it includes "expense reimbursement").

Under the plain language of the statute, expenditures of any kind (including reimbursed expenses) made to supervisors in connection with their services rendered to Amazon are exempt from reporting requirements. Even if all the documents sought established the facts claimed in the OLMS investigator's affidavit attached to the Department's petition (and even in the NLRB ALJ's decision with respect to Warrior),

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that still would not support any allegation that Amazon potentially violated the LMRDA by not reporting reimbursed travel expenses. Accordingly, the subpoena should not be enforced. *See Sidley Austin*, 315 F.3d at 700; *see also Union Oil*, 343 F.2d at 31.

2. The Court Should Not Defer To the Agency's Interpretation.

OLMS may argue that the Court should defer to its newly minted enforcement position and to its determination that records related to travel expenses for supervisors are relevant to the LMRDA. No deference is warranted. As an initial matter, an agency's interpretation is entitled to no deference when the statutory language is clear and unambiguous. *See Chevron USA, Inc. v. NRDC,* 467 U.S. 837 (1984); *see also City of Arlington v. FCC,* 133 S. Ct. 1863 (2013). But even if the statutory language were ambiguous, the agency's novel interpretation of the LMRDA's reporting requirements resulted from an abrupt, unreasoned, and unlawful departure from its longstanding enforcement policy and its own guidance. Such conduct is not entitled to any deference.

"An agency may not . . . depart from a prior policy *sub silentio* or simply disregard rules that are still on the books." *FCC v. Fox TV Stations, Inc.,* 556 U.S. 502, 515 (2009); *see also Peters v. United States,* 853 F.2d 692, 700 (9th Cir. 1988) (observing in the administrative subpoena context that an agency's interpretation of a statute it administers "is entitled to less weight when it represents an abrupt change from longstanding practice"). Under the Administrative Procedure Act (APA), 5 U.S.C. §§ 551–559, an agency rescinding or reversing longstanding enforcement policy must provide a satisfactory and rational basis for the change. *See Motor Vehicle Mfrs. Ass'n of the U.S., Inc. v. State Farm Mut. Auto. Ins. Co.,* 463 U.S. 29, 43 (1983). In other words, there must be a "rational connection between the facts found and the choice made." *Burlington Truck Lines, Inc. v. United States*, 371 U.S. 156, 168 (1962). Reversals of policy are unlawful when the agency has "relied on factors which Congress has not intended it to consider, entirely failed to consider an important aspect of the problem, offered an explanation for its decision that runs counter to the

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evidence before the agency, or is so implausible that it could not be ascribed to a difference in view or the product of agency expertise." *State Farm Mut. Auto. Ins. Co.*, 463 U.S. at 43. The agency must also show it has considered the regulated group's longstanding reliance interests prior to reversing enforcement policies. *Encino Motorcars, LLC. v. Navarro*, 579 U.S. 211, 222 (2016); *see also Faith Int'l Adoptions v. Pompeo,* 345 F. Supp. 3d 1314, 1327 (W.D. Wa. 2018).

Here, for many decades, ever since the LMRDA was enacted, the agency's enforcement policy has correctly recognized that the LMRDA does not require reporting of any compensation paid by an employer to regular officers, managers, and other supervisors for their services because Congress specifically exempted such payments from disclosure in Section 203(e). *See* 29 U.S.C. § 433(e); *see also* 105 Cong. Rec. 19,761 (1959) (statement of Sen. Goldwater) ("None of the reporting requirements are applicable where the services are rendered by a regular officer, supervisor, or employee of the employer."). Further, the fact that Congress reenacted the LMRDA several times (1965, 1984, 1985, and 1987) without overriding the agency's prior enforcement policy is "persuasive evidence that the [agency's prior interpretation] is the one intended by Congress." *See NLRB v. Bell Aerospace,* 416 U.S. 267, 274-75 (1974).

The sudden attempt by OLMS to expand the scope of the LMRDA's reporting requirements also runs afoul of the principle of desuetude, which is a defense to the sudden enforcement of a statute that had a long history of nonuse. *See United States v. Elliott*, 266 F. Supp. 318, 325-26 (S.D.N.Y. 1967) ("Desuetude is a civil law doctrine rendering a statute abrogated by reason of its long and continued non-use . . . A desuetudinal statute also contains the potential for abuse that rests in any over-broad administrative discretion; its selective enforcement raises equal protection problems.").

In any event, even if OLMS had the authority to re-interpret the statute to contradict the statute's own words, the agency's own Interpretative Manual, and the agency's

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previous 60+ years of consistent contrary interpretation, the agency failed to satisfy fundamental procedural requirements under the APA. When engaged in "rulemaking," agencies must adhere to the APA's notice and comment procedures (absent limited exceptions not applicable here). *Coal. for Workforce Innovation v. Walsh,* No. 1:21-cv-130, 2022 WL 1073346, at *2 (E.D. Tex. Mar. 14, 2022) (striking down DOL reversal of policy due to inadequate notice and comment). As explained by the Supreme Court, "[t]he APA establishes the procedures federal administrative agencies use for 'rule making,' defined as the process of 'formulating, amending, or repealing a rule.'" *Perez v. Mortg. Bankers Ass'n*, 575 U.S. 92, 95 (2015) (quoting 5 U.S.C. § 551(5)). "'Rule,' in turn, is defined broadly to include 'statement[s] of general or particular applicability and future effect' that are designed to 'implement, interpret, or prescribe law or policy.'" *Id.* at 95-96 (quoting 5 U.S.C. § 551(4)); *see also Faith Int'l Adoptions v. Pompeo*, 345 F. Supp. 3d at 1328 (finding change in enforcement policy was "not a mere clarification" and therefore required notice and comment prior to implementation).

The relevance of the information sought by the subpoena in the present case depends entirely on the agency's new enforcement policy under the LMRDA, which has the force and effect of law. By not inviting comment on this new policy, and not even publicly announcing it, OLMS has shirked the limits of the LMRDA and violated the APA.

In fact, when OLMS previously tried to change its enforcement policy regarding Sections 203(a), (b), and (c) of the LMRDA concerning the scope of the "advice" exemption in Section 203(c), the agency undertook thorough public notice and comment before implementing the change. *See* Interpretation of the Advice Exemption in Section 203(c) of the Labor-Management Reporting and Disclosure Act, 81 Fed. Reg. 15,923 (Mar. 24, 2016). Even then, that rulemaking was found to violate the LMRDA and the APA, *see Nat'l Fed'n of Indep. Bus.*, 2016 WL 3766121, at *30-31, which may explain the agency's attempts to act more surreptitiously in this instance. At any rate, that the Department of

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Labor believed it necessary to conduct notice and comment rulemaking prior to changing its enforcement policy eight years ago underscores the fact that those same procedural requirements apply to the policy reversal issue here.

Owing to the Department of Labor's abrupt and unreasoned and unlawful departure from its longstanding interpretation of the LMRDA, the Court should afford no deference to its new policy and, instead, should exercise its authority to determine the meaning of the statue at issue and deny enforcement of the subpoena as inconsistent with the governing statute and the agency's own longstanding interpretation of that statute.

B. The Subpoena Has an "Illegitimate Purpose."

The illegitimate purpose of the subpoena is revealed by the agency's insistence on uncovering the names of the Amazon supervisors reimbursed and the amounts of those reimbursements. Amazon offered repeatedly to stipulate to the fact that it reimbursed the expenses of supervisors who traveled to the sites at issue to engage in persuading activity. Those facts are sufficient for OLMS to determine whether it believes those expenditures should have been reported, and if Amazon declines to amend its reports based on the agency's conclusion in that regard, then the agency is fully equipped, factually, to bring an enforcement action seeking court approval of its newly discovered reporting requirements. There is no legitimate need, at this juncture, for the agency to obtain the specific identities of those supervisors or the specific amounts paid to them.

OLMS is abusing the investigative subpoena process to obtain the very information it can properly obtain only through voluntary compliance or, in the event of an employer's refusal, upon a successful petition for injunctive relief under 29 U.S.C. § 440. Indeed, if the subpoena is enforced, Amazon will be forced to disclose to OLMS the very information at issue, depriving it of any meaningful opportunity to defend against forced disclosure under 29 U.S.C. § 440. Even if Amazon is successful in a future enforcement action, it will be a largely pyrrhic victory, as the Department of Labor will have already

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obtained the information in dispute. Notably, the Department has informed Amazon that it cannot offer any assurances that the information will not somehow be disclosed to the public from within the Department's files, even if Amazon ultimately prevails in an enforcement action. Stolzenbach Decl. ¶ 5, Ex. B.

The strategy behind the Department's approach seems clear. Unlike in an enforcement proceeding, OLMS hopes to obtain the information it seeks by taking advantage of the traditionally relaxed standards for demonstrating relevance in administrative subpoena disputes. The Court should not allow this; it should deny enforcement of the subpoena. *See McLane Co., Inc.*, 581 U.S. at 77 (enforcement should be denied if subpoena is issued for an "illegitimate purpose"). Even if the Court is unwilling in this proceeding to resolve the merits of the parties' dispute about the meaning of the LMRDA, denying enforcement of the subpoena still will leave both the Department of Labor and Amazon fully equipped with all the facts they need to contest that issue in a subsequent enforcement proceeding. OLMS has no need for any additional information, beyond what Amazon has already stated in this very opposition brief.

C. The Court Should Not Follow the *Starbucks* Decision.

OLMS relies heavily on the decision in *Su v. Starbucks Co.*, No. 23-mc-45 MJP, 2023 WL 6461146 (W.D. Wash. Oct. 4, 2023), in which the court enforced a subpoena similar to the one issued to Amazon in this case. Of course, the Court is not obligated to follow that decision, as it is not controlling precedent, and for the reasons stated in this brief, Amazon respectfully submits that the *Starbucks* case was wrongly decided. To begin with, the court in *Starbucks* appears not to have considered (as Starbucks appears not to have raised) case law describing circumstances under which a court should more closely scrutinize a subpoena, notwithstanding the general rule in *Morton Salt*.

Moreover, this case is distinguishable. There is no evidence that Starbucks offered to stipulate to all the facts necessary for the OLMS to determine whether it should seek an

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amended LM-10 from Amazon or pursue an enforcement action, if necessary. In *Morton Salt*, the Supreme Court observed that there are "limits" to an agency's subpoena power, but it also concluded that "[s]uch questions [we]re not presented by the procedure followed by respondents" in that case. 338 U.S. at 653. In particular, the Court wrote, "[b]efore the courts will hold an order seeking information reports to be arbitrarily excessive, they may expect the supplicant to have made reasonable efforts before the [agency] itself to obtain reasonable conditions. Neither respondent raised objection to the . . . sweep, nor asked any modification, clarification, or interpretation of it." *Id.* Here, Amazon ultimately sought only a modest modification to the subpoena, offering to provide almost all the information requested by the subpoena, by way of stipulation. The agency, however, remained insistent on obtaining information to which it is not entitled at this juncture and which is unnecessary to decide whether to pursue an enforcement action. On these grounds alone, *Starbucks* is distinguishable. In this case, the subpoena should not be enforced.

D. If the Court Does Enforce the Subpoena, It Should Not Simply Enforce It As Written, and It Should Issue a Protective Order.

For the reasons stated above, the Court should refuse to enforce the subpoena. But if it orders Amazon to respond, it should protect the First Amendment and privacy interests of Amazon and its employees by limiting the subpoena to include only information necessary for OLMS to determine whether a "violation" may have occurred under its new (and illegitimate) interpretation. "[W]henever it is made to appear to the court that a subpoena is too broadly or oppressively drawn or there are reasons to believe that it will be enforced capriciously or oppressively, it is the duty of the court to prevent abuse of its process." *Jackson Packing Co. v. NLRB*, 204 F.2d 842, 844 (5th Cir. 1953) (citing *NLRB v. Anchor Rome Mills*, 197 F.2d 447 (5th Cir. 1952)). "It is clear that the district court can effectively exercise its discretion so as to relieve the [subpoenaed party] from any undue

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oppression or burden without quashing the subpoenas entirely." *NLRB v. Duval Jewelry Co. of Miami*, 257 F.2d 672, 673 (5th Cir. 1958); *see also EEOC v. Royal Caribbean Cruises, Ltd.*, 771 F.3d 757, 760, 763 (11th Cir. 2014) (per curiam). Accordingly, district courts have discretion to enter a protective order in conjunction with enforcing an administrative subpoena. *See McLaughlin v. Serv. Emps. Union, AFL-CIO, Local 280*, 880 F.2d 170, 174 (9th Cir. 1989) ("We review a district court's determination to issue a protective order imposing restrictions on an administrative subpoena for abuse of discretion."). "[T]he sole criterion for determining the validity of a protective order is the statutory requirement of 'good cause.'" *In re Alexander Grant & Co. Litig.*, 820 F.2d 352, 356 (11th Cir. 1987) (per curiam) (citing, *e.g.*, *Seattle Times Co. v. Rhinehart*, 467 U.S. 20, 35 (1984) and Fed. R. Civ. P. 26(c)).

If the Court orders Amazon to comply with the subpoena, the Court should only order Amazon to provide the documents and stipulations it offered to provide in its letter to the Department of Labor dated November 3, 2023. Stolzenbach Decl. ¶ 6, Ex. C. Those documents and stipulations are more than sufficient for OLMS to complete its investigation.

If the Court orders Amazon to produce any documents reflecting the names of individuals and/or actual payment amounts in response to Request Nos. 2, 5, and/or 6, the Court should enter a protective order barring the Department of Labor from any further disclosure of records produced in response to those Requests or information contained in those records, including in public filings in a future enforcement action (if any), unless and until that same information is submitted by Amazon on a Form LM-10, in which case the disclosure should be only the disclosure of the LM-10 in the Department's ordinary course.

There is good cause for a protective order barring further disclosure of the records and information sought at Requests Nos. 2, 5, and 6. Even setting aside the fact that

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requesting travel reimbursement amounts and the names and home work location of each supervisor who traveled to LDJ5 and JFK8 is unlawful and an end-run around well-established procedures, disclosure of names presents risk of harassment to those individuals. The ALU, which filed the complaint that brought about this investigation, has a history of using its highly visible social media accounts to harass frontline employees and members of management for merely engaging in lawful activities. Stolzenbach Decl. ¶ 6, Ex. C. Absent a clearly established legal obligation to publicly report the identities and personal information of Amazon managers and supervisors, they should not be exposed to such potential for harassment. Furthermore, any disclosure of the amounts paid by Amazon or the recipients of those payments, except in a Form LM-10, would deprive Amazon of the ability to defend its position regarding required disclosures under the LMRDA in a proper enforcement proceeding.

* * *

FOR ALL THESE REASONS, the Department of Labor's subpoena should not be enforced. To the extent it is enforced at all, it should be limited to the documents and information offered by Amazon in its letter dated November 3, 2023. To the extent Amazon is ordered to produce any additional records, the Court should enter a protective order as described in Section IV.D., *supra*.

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I certify that this memorandum contains 6,562 works in accordance with the Court's Order of January 26, 2024.

Respectfully submitted this 31st day of January, 2024.

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CERTIFICATE OF SERVICE

I hereby declare that on January 31, 2024, I caused a copy of this opposition brief to be electronically filed with the Court using ECF-Filing system, which will send notification of such filing to the following:

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