IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
LUBBOCK DIVISION

NATIONAL FEDERATION OF INDEPENDENT BUSINESS *et al*.,	)	
Plaintiffs,	)	Case No. 5:16-cv-00066-C
v.	)	
THOMAS E. PEREZ, in his official capacity as Secretary, United States Department of Labor *et al*.,	)	
Defendants.	)	

DEFENDANTS' BRIEF IN OPPOSITION TO PLAINTIFFS' APPLICATION (MOTION) FOR PRELIMINARY INJUNCTION

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INTRODUCTION

Congress enacted the Labor-Management Reporting and Disclosure Act, Pub. L. No. 86-257, 73 Stat. 519 (1959) ("LMRDA" or "Act") to increase transparency and to provide sufficient information to employees to enable them to make informed choices about whether to be represented by a labor union for collective bargaining purposes. The United States Department of Labor ("Labor" or "the Department") has issued a final rule, 81 Fed. Reg. 15,924 (Mar. 24, 2016) ("the Rule"), to strengthen existing regulations implementing Congress's purposes by clarifying that the Act's disclosure provisions apply when a consultant engages in activities to persuade employees about the exercise of their right to organize and bargain collectively, even if he or she does not contact employees directly. For example, disclosure is now required if a consultant scripts conversations that supervisors will have with employees, or drafts written materials for distribution to employees.

Requiring disclosure in such circumstances is fully consistent with the governing statute, which contemplates disclosure of agreements to undertake activities with the object to persuade employees "directly or indirectly." 29 U.S.C. § 433(b). The new Rule vindicates the statute's underlying purposes of promoting transparency and ensuring that employees can make informed choices about union representation. An employee considering how to vote in a union election would reasonably want to know, for example, whether a conversation with a supervisor was scripted by a third party, and whether an employer's discussions of the benefits and costs of unionization represent the employer's insights based on circumstances at the company or the thoughts of a consultant whose job is to help to defeat unionization in every workplace. An employee would also want to place in appropriate context, for example, assertions by an employer that unionization would inject a third party into bargaining, if the employer itself is

using a third party to defeat unionization; or assertions by an employer that unionization would end up being too costly for the employer, if the employer is voluntarily expending funds on a third-party consultant to defeat unionization.

Plaintiffs, five national organizations, seek preliminary injunctive relief enjoining Labor from enforcing this rule, but Plaintiffs satisfy none of the requirements for such relief. Plaintiffs are not likely to succeed on the merits. The Act does not draw a line between reportable indirect persuader activity and non-reportable "advice," and Labor has permissibly interpreted the Act to draw such a line, consistent with the statutory text. Furthermore, the Rule does not conflict with the First Amendment because it does not restrict any activity, but only mandates disclosure of activity, and its provisions easily pass muster under First Amendment applicable to disclosure requirements. The Rule is also anything but vague, and therefore cannot be held invalid on due process grounds as Plaintiffs claim. Plaintiffs also show no significant threat of imminent irreparable harm. Therefore, Plaintiffs' motion for a preliminary injunction should be denied.

BACKGROUND

I. Relevant Provisions of the Labor-Management Reporting and Disclosure Act

Congress enacted the LMRDA in 1959. *See generally* S. Rep. No. 85-1417 (1957). Among the Act's provisions are financial reporting and disclosure requirements for labor organizations, employers, and labor relations consultants. *See* 29 U.S.C. §§ 431-436, 441. Section 203 of the Act addresses the obligations of employers and other persons to disclose information about certain financial transactions, agreements, and arrangements. 29 U.S.C. § 433. Under Section 203(a), an employer who in any fiscal year has made

> any agreement or arrangement with a labor relations consultant or other independent contractor or organization pursuant to which such person undertakes activities where an object thereof, directly or indirectly, is to persuade employees to exercise or not to exercise, or persuade employees as to the manner of

> exercising, the right to organize and bargain collectively through representatives of their own choosing . . . . shall file with the Secretary [of Labor], in a form prescribed by him, signed by its president and treasurer or corresponding principal officers showing in detail the date and amount of each such payment, loan, promise, agreement, or arrangement and the name, address, and position, if any, in any firm or labor organization of the person to whom it was made and a full explanation of the circumstances of all such payments, including the terms of any agreement or understanding pursuant to which they were made.

Id. § 433(a)(4).[1] Similarly, Section 203(b) requires in pertinent part that

> [e]very person who pursuant to any agreement or arrangement with an employer undertakes activities where an object thereof is, directly or indirectly (1) to persuade employees to exercise or not exercise, or persuade employees as to the manner of exercising, organize and bargain collectively through representatives of their own choosing; or (2) to supply an employer with information concerning the activities or employees or a labor organization in connection with a labor dispute involving such employer; shall file within thirty days after entering into such agreement or arrangement a report with the Secretary, signed by its president and treasurer or corresponding principal officers, containing the name under which such person is engaged in doing business and the address of its principal office, and a detailed statement of the terms and conditions of such agreement or arrangement.

Id. § 433(b).[2]

Section 203(c) provides in pertinent part that nothing in Section 203 "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" or similar tribunal or "engaging or agreeing to engage in collective bargaining on behalf of such employer . . ." 29 U.S.C. § 433(c) (emphasis added).

[1] Employers submit the required information to Labor using the Form LM-10, "Employer Report," *see* 29 C.F.R. part 505, while consultants use the Form LM-20, "Agreement & Activities Report." *See id*. part 406. Copies of the current Forms LM-10 and LM-20 are attached hereto as Exhibits 1 and 2.

[2] Section 203(b) also requires such persons to "file annually, with respect to each fiscal year during which payments were made as a result of such an agreement or arrangement, a report with the Secretary, signed by its president and treasurer or corresponding principal officers, containing a statement (A) of its receipts of any kind from employers on account of labor relations advice or services, designating the sources thereof, and (B) of its disbursements of any kind, in connection with such services and the purposes thereof." 29 U.S.C. § 433(b). Consultants submit this annual report to Labor using the Form LM-21, "Receipts and Disbursements Report," within 90 days of the end of the consultant's fiscal year, *see* 29 C.F.R. §§ 406.2, 406.3. This provision of Section 203(b) is not at issue here.

Section 204 exempts from the LMRDA's reporting and disclosure requirements "information which was lawfully communicated to [an] . . . attorney by any of his clients." *Id.* § 434. The Act provides the Secretary of Labor "authority to issue, amend, and rescind rules and regulations prescribing the form and publication of reports required to be filed under this subchapter and such other reasonable rules and regulations . . . as he may find necessary to prevent the circumvention or evasion of such reporting requirements." *Id.* § 438.[3]

The Act contains provisions for civil and criminal enforcement of the reporting obligations of labor organizations, employers, and consultants. Section 210 provides that Labor may commence a civil action whenever a violation has occurred. 29 U.S.C. § 440. In addition, a subset of violations may lead to criminal penalties: namely, where a person (a) "*willfully* violates" the Act; (b) "makes a false statement or representation of a material fact, *knowing* it to be false," or "*knowingly* fails to disclose a material fact" in a disclosure required by the Act; or (c) "*willfully* makes a false entry in or willfully conceals, withholds, or destroys any books, records, reports, or statements required to be kept" by the Act. 29 U.S.C. §§ 439(a), (b), (c) (emphasis added).

II. History of Labor's Interpretation of Section 203(c) of the LMRDA

In 1960, one year after passage of the Act, Labor issued its initial interpretation (the "original interpretation") of Section 203(c)'s exemption to the Act's reporting requirements. This interpretation was reflected in a technical assistance publication to guide employers. U.S. Dep't of Labor, Bureau of Labor-Management Reports,[4] *Technical Assistance Aid No. 4: Guide for Employer Reporting* (1960) (attached as Ex. 3). In this original interpretation, Labor stated

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[3] The Secretary of Labor has delegated this regulatory authority to the Director of Labor's Office of Labor-Management Standards. Secretary's Order No. 8-2009, 74 Fed. Reg. 58,835 (Nov. 13, 2009).

[4] This bureau was a predecessor agency to the Office of Labor Management Standards.

that employers were required to report any "[a]rrangement with a 'labor relations consultant' or other third party to draft speeches or written material to be delivered or disseminated to employees for the purpose of persuading such employees as to their right to organize and bargain collectively." *Id.* at 18. By contrast, employers were not required to report "[a]rrangements with a 'labor relations consultant,' or other third parties related *exclusively* to advice, representation before a court, administrative agency, or arbitration tribunal, or engaging in collective bargaining on [the employer's] behalf." *Id.* (emphasis in original). Additionally, in some opinion letters to members of the public, Labor stated that a lawyer's or consultant's revision of a document prepared by an employer constituted reportable activity. *See* 76 Fed. Reg. 36,178, 36,180 (June 21, 2011) (citation omitted). This original position is similar to that expressed in the Rule.

In 1962, Labor adopted a more limited view regarding the scope of disclosure under Section 203, choosing to construe the advice exemption of Section 203(c) more broadly by excluding from reporting the provision of materials by a third party to an employer that the employer could "accept or reject."[5] In later years, Labor reiterated this position – sometimes referred to as the "accept or reject" test – though sometimes expressing doubts regarding its soundness; Labor officials have noted that this interpretation, "when stretched to its extreme, . . . permits a consultant to prepare and orchestrate the dissemination of an entire package of persuader material while sidestepping the reporting requirement merely by using the employer's name and letterhead or avoiding direct contact with employees." *See* 76 Fed. Reg. at 36,181 (citations omitted). Additionally, in at least two instances, Labor argued in litigation that the Act

[5] *See* 81 Fed. Reg. 15,924, 15,936 (Mar. 24, 2016) (explaining that under Labor's previous "accept or reject" interpretation, "[i]n a situation where the employer [was] free to accept or reject the written material prepared for him and there [was] no indication that the middleman is operating under a deceptive arrangement with the employer, the fact that the middleman draft[ed] the material in its entirety [would] not in itself generally be sufficient to require a report.") (emphasis omitted).

requires reporting of persuader activities even where a labor relations consultant has no direct contact with employees. *See* 81 Fed. Reg. at 15,936 n.21 (citing actions filed in 1975 and 1981).

In 2001, Labor issued a revised interpretation of Section 203(c), expanding the scope of reportable activities by focusing on whether an activity has persuasion of employees as an object, rather than categorically exempting activities in which a consultant has no direct contact with employees. *See* 66 Fed. Reg. 2782 (Jan. 11, 2001). However, later that year, that interpretation was rescinded, and Labor returned to its prior view. *See* 66 Fed. Reg. 18,864 (Apr. 11, 2001).

III. The Rule

In its Fall 2009 Regulatory Agenda, Labor announced that it would revisit its interpretation of Section 203(c) via notice-and-comment rulemaking to ensure that agreements involving persuader activity were not improperly excluded from the Act's reporting requirements.[6] Labor then held a public meeting, issued a notice of proposed rulemaking inviting public comment, and received approximately 9,000 comments. *See* 75 Fed Reg. 27,366 (May 14, 2010); 76 Fed. Reg. 36,178 (June 21, 2011) ("Notice"); 81 Fed. Reg. at 15,945. On March 24, 2016, Labor issued its final rule. Labor addressed the comments it received in a detailed analysis. *See id*. at 15,945-16,000. The Rule requires employers and their consultants to report not only agreements or arrangements pursuant to which a consultant directly contacts employees, but also where a consultant orchestrates and/or creates the materials by which an employer communicates with employees in an attempt to defeat a union organizing campaign, even if the consultant does not directly contact employees. *Id*. at 15,925-26.

The Rule defines "advice," which does not give rise to a reporting obligation, as "an oral or written recommendation regarding a decision or a course of conduct." *Id*. at 15,939. The Rule thus distinguishes between advising a client on the client's proposed course of conduct,

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[6] *See* http://www.reginfo.gov/public/do/eAgendaViewRule?pubId=200910&RIN=1215-AB79.

which does not give rise to an obligation to report, and affirmatively engaging in specified activities such as drafting written materials or scripting interactions between supervisors and employees, which does give rise to a reporting obligation if the activities are undertaken with an object to persuade employees about how or whether to exercise their collective-bargaining rights.

Plaintiffs have filed suit to challenge the implementation of the Rule, and have moved the Court to enter a preliminary injunction. Pl. Br. in Supp. of Application (Mot.) for Prelim. Inj. [ECF No. 25] ("Pl. Mot."). Defendants oppose this motion because Plaintiffs have failed to satisfy the exacting standards for preliminary injunctive relief, as explained below.

ARGUMENT

Plaintiffs' Motion for a Preliminary Injunction Should Be Denied.

"A preliminary injunction is an extraordinary remedy never awarded as of right." *Winter v. Nat. Res. Def. Council*, 555 U.S. 7, 24 (2008). A party seeking a preliminary injunction must show: "(1) a substantial likelihood of success on the merits, (2) a substantial threat of irreparable injury if the injunction is not issued, (3) that the threatened injury if the injunction is denied outweighs any harm that will result if the injunction is granted, and (4) that the grant of an injunction will not disserve the public interest." *Jordan v. Fisher*, 813 F.3d 216, 220-21 (5th Cir. 2016). Due to its "extraordinary" nature, no preliminary injunction should be "granted unless the party seeking it has clearly carried the burden of persuasion on all four requirements." *Id.* at 221 (citation and internal punctuation omitted).

I. Plaintiffs Have Not Shown a Substantial Likelihood of Success on the Merits.

A. The Regulation Represents a Permissible Construction of an Ambiguous Provision of the LMRDA.

In assessing the validity of an agency's construction of a statute, "'[i]f the intent of Congress is clear, that is the end of the matter; for the court, as well as the agency, must give

effect to the unambiguously expressed intent of Congress.'" *BNSF Ry. Co. v. United States*, 775 F.3d 743, 751 (5th Cir. 2015) (quoting *Chevron U.S.A. v. Natural Res. Dev. Council*, 467 U.S. 837, 842-43 (1984)). But if "the statute is silent or ambiguous with respect to the specific issue," the Court proceeds to the second step of *Chevron* analysis, asking whether the agency's interpretation "is based on a permissible construction of the statute." *Chevron*, 467 U.S. at 843. "An agency's interpretation is permissible if it is reasonable. The question of reasonableness is not whether the agency's interpretation is the only possible interpretation or whether it is the most reasonable, merely whether it is reasonable *vel non*." *ConocoPhillips Co. v. U.S. EPA*, 612 F.3d 822, 831 (5th Cir. 2010) (citation omitted).

The Court must consider Plaintiffs' claims by proceeding to step two of the *Chevron* analysis because the Rule at issue here draws a line between employer/consultant persuader activities that must be reported and non-reportable advice provided by a consultant to an employer. *See* 29 U.S.C. §§ 433(b), (c). Nothing in the Act speaks directly to how this line should be drawn, and how to take account of situations where a consultant indirectly takes action to persuade employees but does not directly contact employees. Both the Fifth and D.C. Circuits have recognized that the Act does not make clear the precise line between reportable persuader activity and non-reportable advice. *See Wirtz v. Fowler*, 372 F.2d 315, 325-33 (5th Cir. 1966), *rev'd in part on other grounds*, 412 F.2d 647 (5th Cir. 1969)[7]; *United Auto., Aerospace & Agric. Implement Workers of Am. ("UAW") v. Dole*, 869 F.2d 616, 617-20 (D.C. Cir. 1989).

Upon analysis under *Chevron* step two, Plaintiffs' claims must be rejected. The Rule

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[7] In *Price v. Wirtz*, 412 F.2d 647 (5th Cir. 1969) (en banc), the Fifth Circuit overruled only Part VII of *Fowler*, 372 F.2d at 333-34, which held that an attorney who has engaged in persuader activities must report only on persuader activities, rather than reporting non-persuader labor relations advice and services for non-persuader clients. *See Price*, 412 F.2d at 647-51. Parts I-VI and VIII, cited here, remain good law.

reasonably construes Sections 203(b) and (c) to require reporting "when, pursuant to an arrangement or agreement, the consultant does not limit its activities to advising the employer, but engages in activities, either directly or indirectly, aimed at persuading or influencing, or attempting to persuade or influence, employees as to how to exercise their union representation and collective bargaining rights." 81 Fed. Reg. at 15,941. This is a permissible construction of the Act. Notably, Section 203(c) states that nothing in Section 203 "shall be construed" to require reporting of a consultant's services "*by reason of* his giving or agreeing to give advice" to such employer or representing or agreeing to represent such employer before any court [or similar body] or engaging or agreeing to engage in collective bargaining" on the employer's behalf. Thus, reporting may be required *by reason of* other consultant activities that do have as an object the persuasion of employees. Furthermore, Sections 203(a) and (b) specifically require reporting when a consultant undertakes activities with an object to "directly *or indirectly*" persuade employees, which indicates that activities of consultants that indirectly persuade may trigger reporting. Thus, because the Rule permissibly construes the Act, it should be upheld under *Chevron*.

Plaintiffs make two contrary sets of arguments. Initially, Plaintiffs contend that the Act is not ambiguous on the issue of whether indirect persuader activity is reportable, or where to draw the line between reportable persuader activity and non-reportable advice, and that this case is thus a *Chevron* 1 case. Pl. Mot. at 10-16. Alternatively, Plaintiffs allege that the Rule does not permissibly construe the Act. *Id*. at 16-20. Neither set of arguments has persuasive force.

1. Congress Has Not Directly Spoken on the Issue of Which Indirect Persuader Activity Is Activity Required to Be Reported Under Section 203 of the LMRDA, or Where to Draw the Line Between Reportable Persuader Activity and Non-Reportable Advice.

The first step under *Chevron* examines whether "Congress has directly spoken to the

precise question at issue." *Chevron*, 467 U.S. at 842. Section 203(b) requires employers and consultants to report agreements pursuant to which the consultant "undertakes activities where an object thereof is, directly or indirectly," to persuade employees regarding the exercise of their rights to organize and bargain collectively. Section 203(c) also states that nothing in Section 203 "shall be construed" to require a report from an employer or consultant "by reason of" the consultant's "giving or agreeing to give advice to such employer or representing or agreeing to represent such employer before any court [or similar body] or engaging or agreeing to engage in collective bargaining" on the employer's behalf. Neither section makes clear whether Section 203(c)'s reporting requirement includes situations where a consultant engages in activities, an object of which is to persuade employees, but does not directly contact these employees, though the statute's specific reference to persuading employees "indirectly" suggests that Congress contemplated that disclosure might be required in such circumstances. Nor does either section state clearly where to draw the line between reportable persuader activity under Section 203(b) and non-reportable advice under Section 203(c). [8] Congress thus has not spoken directly regarding the precise questions at issue here.

In response, Plaintiffs incorrectly contend that the Act makes clear the precise line between reportable persuader activity and non-reportable advice. Pl. Mot. at 12-16. However, both the Fifth and D.C. Circuits have determined to the contrary.

The plaintiffs in *Wirtz v. Fowler* were attorneys who engaged in direct persuader actions on behalf of their employer-clients. 372 F.2d at 317, 324. The Fifth Circuit rejected the plaintiffs' argument that the "advice" exception in Section 203(c) applied to all of their activities "because they were all things which a lawyer professionally and ethically might properly do in connection with, and in furtherance of, representation of their clients in administrative, judicial,

[8] Nor is legislative history conclusive with respect to these issues. *See* 81 Fed. Reg. at 15,930-15,931.

or collective bargaining proceedings." *Id.* at 319. The Fifth Circuit held that with regard to "the scope of the exemption[] provided by § 203(c)," "the Act is something less than a model of statutory clarity." *Id.* And following its examination of relevant legislative history, *id.* at 326-29, the Fifth Circuit explained that it was unnecessary "to ascertain the precise location of the line between reportable persuader activity and nonreportable advice, representation, and participation in collective bargaining," concluding "only that not everything which a lawyer may properly, or should, do in connection with representing his client and not every activity within the scope of the legitimate practice of labor law is on the nonreportable side of the line." *Id.* at 330-31 (footnote omitted). In so concluding, the Fifth Circuit recognized that the text of Section 203 did not identify "the precise location of the line between reportable persuader activity and nonreportable advice." *Id.* at 330.

The D.C. Circuit has held similarly. In *UAW*, a union alleged that an employer and its attorney-consultants had engaged in persuader activity that should have been reported under Section 203(b), but Labor disagreed, and the district court had agreed with the union's interpretation of the statute. 869 F.2d at 617. The D.C. Circuit reversed. *Id.* At the time of *UAW*, Labor determined reportability of a consultant's activity under the so-called "accept or reject test." *Id.* at 617, 618. The D.C. Circuit explained that "[u]nderlying the Secretary's ruling [on this issue] and the district court's opposing view is a tension between the coverage provisions of the LMRDA, and the Act's exemption for advice." *Id.* at 618. This "tension" meant that the statute was ambiguous as to where the line should be drawn between reportable persuader activity and non-reportable advice; consequently, Labor's interpretation was entitled to *Chevron* deference. *See id.* at 619 ("Given the tension Congress created, and the *deference due* the Secretary's reconciliation, we cannot call arbitrary [Labor's] view that if an activity is

properly characterized as 'advice,' reporting generally is not required. We therefore proceed to inquire whether the Secretary has reasonably delimited what constitutes advice within the meaning of section 203(c).") (emphasis added); *id*. at 617 ("We conclude that the LMRDA is silent or ambiguous with respect to the issues before us and that the Secretary [of Labor] rationally construed the statute in ruling that reporting is not required in the circumstances she addressed.") (citing *Chevron*, 467 U.S. at 842-43). The court accepted the agency's position that "where the source of written materials distributed to employees may be unclear," application of the statutory exception would "test the fringes of the definition of 'advice.'" *Id*. at 620 (brackets and quotation marks omitted). Accordingly, Plaintiffs' reliance on *UAW*, *id*. at 16, is misplaced. Though Plaintiffs correctly note that Labor's interpretation of where the line should be drawn between reportable persuader activity and non-reportable advice has changed since *UAW*, *id.*, the agency's present interpretation of this ambiguity is entitled to *Chevron* deference, as the D.C. Circuit recognized.

Thus, Plaintiffs are simply incorrect that the term "advice," as used in Section 203(c), is clear and unambiguous. Pl. Mot. at 12-15, 22 n.12. The Act does not define "advice," and as the Fifth and D.C. Circuits have recognized, the statute is ambiguous on where the line should be drawn between reportable persuader activity and non-reportable advice. Labor reasonably determined that at a certain point, when a consultant is managing a campaign to persuade employees regarding their rights to organize, its activities are not properly described as "advice." There is no basis for Plaintiffs' apparent view that any activity unambiguously qualifies as "advice" so long as it does not involve a command that the employer must follow.

Plaintiffs' specific arguments under this rubric are also mistaken. For example, Plaintiffs' assertion that the Rule is "self-contradictory," Pl. Mot. at 14-15, is premised on

Plaintiffs' truncated quotation of a line that, in its full form, displays no contradiction with the second passage Plaintiffs quote.[9] Additionally, Plaintiffs are mistaken that "the Advice Exemption [of Section 203(c)] clearly states that 'recommendations' and 'guidance' given to employers by associations, consultants, and attorneys are excluded from the LMRDA's reporting requirements." Pl. Mot. at 15. The text of Section 203(c) does not contain the words "recommendations" or "guidance."[10]

Finally, Plaintiffs incorrectly contend that the Rule impermissibly expands the reporting requirement of Section 203. Pl. Mot. at 20. The information required to be reported under the Rule falls well within Labor's regulatory authority. *See* 29 U.S.C. § 438. Congress gave Labor the broad authority to require reports from "*[e]very person* who pursuant to *any* agreement or arrangement with an employer undertakes activities where an object thereof is, directly *or indirectly*" to persuade employees regarding the exercise of the right to organize and collectively bargain. 29 U.S.C. § 433(b)(1) (emphasis added). Such persuader activities need not be the sole object of the agreement, but only "*an* object thereof." Moreover, Congress expressly included

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[9] *Compare* 81 Fed. Reg. at 15,927 ("In revising employer-created materials, including edits, additions, and translations, a consultant must report such activities only if an 'object' of the revisions is to enhance persuasion, as opposed to ensuring legality.") *with id.* at 15,939 ("However, the creation of a speech or flyer by the consultant or revising an employer created document to further dissuade employees from supporting the union, will trigger reporting.").

[10] As to Plaintiffs' contention that "[c]ourts have long recognized that an attorney's preparation of materials and documents for a client is a component of providing legal advice which is protected from disclosure," Pl. Mot. at 15 & n.10, the only document required to be disclosed is the persuader agreement itself. *See infra* I.B. Moreover, "a voluntary disclosure of information which is inconsistent with the confidential nature of the attorney client relationship waives the privilege." *Alldread v. City of Grenada*, 988 F.2d 1425, 1434 (5th Cir. 1993). Thus, if an employer voluntarily discloses to its employees (or another third party) materials prepared for the employer by an attorney, the employer would generally be deemed to have waived the protection of attorney-client privilege over these materials. This is demonstrated by some of the supporting caselaw cited by Plaintiffs, *see* Pl. Mot. at 15 n.10. *See, e.g.*, *Muncy v. City of Dallas*, No. Civ. A 3:99-CV-2960-P, 2001 WL 1795591, at *3 (N.D. Tex. Nov. 13, 2001) (though "preliminary drafts may be protected by the attorney-client privilege," that privilege is waived "with respect to those portions of the preliminary drafts ultimately revealed to third parties"); *Apex Mun. Fund v. N-Grp. Secs.*, 841 F. Supp. 1423, 1428 (S.D. Tex. 1993) (similar). The question here is whether *the fact that* the material was written by the consultant is privileged, because Labor is not seeking production of draft (or final) materials. Plaintiffs thus misplace their reliance on cases determining whether draft materials themselves were privileged, rather than the mere fact of these materials' creation.

activities undertaken with an object, "directly *or indirectly*," to persuade employees regarding their rights to organize and bargain collectively. Such "indirect[]" persuader activities include activities in which a consultant has no face-to-face contact with employees, but nevertheless engages in activities behind the scenes where an object is to persuade employees. Furthermore, "the circumvention or evasion of" statutory reporting requirements that Labor may regulate against, *see* 29 U.S.C. § 438, could occur through indirect persuader activity; employers hire consultants to engage in such indirect activity in over 70 percent of union organizing campaigns. 81 Fed. Reg. 15,926; *see also id*. (noting that Labor's prior interpretation of the reporting requirements "left workers unaware of the majority of persuader agreements" and that Labor "only receives a small number of direct persuader reports, covering only a fraction of organizing campaigns").

In sum, Congress has not spoken directly to the question of whether Section 203(b)'s reporting requirement includes persuader activity that does not involve direct consultant contact with employees, or of where to draw the line between reportable persuader activity under Section 203(b) and non-reportable "advice" under Section 203(c).

2. The Rule Is Based on a Permissible Construction of Section 203.

Where, as here, Congress's intent is not clear from the text of the statute, "the question for the court is whether the agency's answer is based on a permissible construction of the statute." *Chevron*, 467 U.S. at 843. The Rule readily satisfies that burden.

Labor's interpretation of Section 203, as expressed in its Rule, permissibly construes the statute's language. The Rule makes clear that Section 203's reporting requirement applies when, pursuant to an arrangement or agreement with an employer, such a person undertakes activities where an object is, directly or indirectly, to persuade employees regarding their right to organize

and bargain collectively, regardless of whether that person directly or indirectly contacts those employees. And Labor reasonably construed the term "advice" to mean oral or written recommendations on a course of action, and not to extend to all activities that could be accepted or rejected by the employer.

Plaintiffs' arguments that Labor has not permissibly construed the Act are not persuasive. Pl. Mot. at 16-20. First, Plaintiffs note that in the past, Labor has construed Sections 203(b) and (c) not to require reporting in situations where a consultant does not directly contact employees. Pl. Mot. at 12. But Labor's original interpretation of the statute, immediately following its enactment, required reporting in such circumstances. The regulatory history thus suggests, if anything, that Labor's original, and current, interpretation is a permissible construction of the statute, rather than that Congress had unambiguously foreclosed the interpretation that Labor adopted immediately after the statute's enactment.

Second, Plaintiffs' reliance on *Price*, Pl. Mot. at 16-18, is misplaced. The Rule faithfully implements the Fifth Circuit's guidance in *Price*. The Fifth Circuit explained, in particular, that

> "the purpose of § 203(c) was to make explicit what was already implicit in § 203(b), to guard against misconstruction of § 203(b), . . . and § 203(c) was inserted . . . to remove from the coverage of § 203(c) those grey areas where the giving of advice and participation in legal proceedings and collective bargaining could possibly be characterized as exerting indirect persuasion."

412 F.2d at 650 (ellipses in original) (citation and internal punctuation omitted). In the Rule at issue here, Labor likewise stated that Section 203(c) "make[s] explicit what sections 203(a) and (b) make implicit: That consultant activity undertaken without an object to persuade employees, such as advisory and representative services for the employer, do not trigger reporting." 81 Fed. Reg. at 15,951 (footnote omitted). And nothing in the Rule suggests that providing advice in connection with legal proceedings or engaging in collective bargaining gives rise to a duty to

report. Indeed, the Rule maintains the distinction that activities that fit the meaning of "advice," regardless of their content, do not trigger reporting, including, for example, vulnerability assessments, *id*. at 15,926; or the mere provision of off-the shelf materials that the consultant recommended to all clients, *id*. at 15,938. These activities exclusively involve recommendations regarding an employer's decision or course of conduct. By contrast, Labor has identified indirect persuader activity by a consultant as consisting of four categories of activities, all of which involve the development or implementation of such a decision or course of conduct:

- Planning, directing, or coordinating activities undertaken by supervisors or managers,
- Providing persuader materials to an employer for distribution to employees,
- Conducting a seminar for supervisors or managers, or
- Developing or implementing personnel policies, practices, or actions for the employer.

See id.

Third, Plaintiffs present a series of bullet-point arguments that they claim demonstrates the Rule to be illogical. Pl. Mot. at 18-20. These contentions do not withstand scrutiny. Under Labor's longstanding practice, and consistent with Section 203(b)'s requirement of reporting where persuasion is *an* object of the consultant's activity, if an agreement or arrangement contemplates that a consultant will engage in any persuader activity, the agreement is reportable, regardless of whether the consultant also performs non-persuader activities. Thus, it is logical that a consultant who only advises an employer about legal requirements (not a persuader activity) is not required to report. However, if the agreement or arrangement contemplates that the consultant will both advise the employer about legal requirements *and* revises an employer communication to employees to increase the communication's persuasiveness (a persuader activity), then the agreement or arrangement is reportable. *See* 81 Fed. Reg. at 15,938. For the

same reason, it is logical that if an agreement contemplates that a consultant will make a presentation at a seminar that only describes what the law provides (not a persuader activity), the agreement is not reportable. However, if during the seminar, the consultant develops or assists an attending employer to develop tactics and strategies to persuade employees on the subject of their rights to organize (a persuader activity), the agreement is reportable. *See id.* at 15,938-39.

Furthermore, Section 203(b) of the Act requires reporting if, pursuant to an agreement or arrangement with an employer, a person engages in activities "where an object thereof is, directly or indirectly, to persuade employees" regarding organizing and collective bargaining. 29 U.S.C. § 433(b). Thus, if a consultant helps an employer to develop personnel policies that have the effect of improving pay, benefits, or working conditions, the relevant question is not whether these policies or actions could possibly be characterized as subtly affecting or influencing employees' attitudes or views. Rather, the relevant question is whether the consultant developed these policies with an object to persuade employees on these topics. If so, the agreement or arrangement is reportable; if not, it is not reportable. *See* 81 Fed. Reg. at 15,939. Far from being illogical, this inquiry is consistent with the text of Section 203(b). Moreover, a consultant (including an attorney) who exclusively counsels an employer on what the employer may lawfully say to employees, ensures a client's compliance with the law, offers guidance on employer personnel policies and best practices, or provides guidance on National Labor Relations Board ("NLRB") practice or precedent is not engaged in persuader activity. *Id.* Rather, the consultant is providing "advice," which is defined as "an oral or written recommendation regarding a decision or a course of conduct." *Id.* Contrary to Plaintiffs' assertion, the relevant inquiry is not whether this counsel might be characterized as "indirectly persuasive to employees," Pl. Mot. at 18, because counsel alone does not trigger reporting.

Rather, under Section 203(b)'s text, the inquiry is whether the consultant counseled the employer with an object to persuade employees. If so, then the consultant's agreement or arrangement is reportable; if not, it is not reportable.

Additionally, some consultants hold seminars on a range of labor-management relations issues, including how to persuade employees concerning their organizing and bargaining rights. 81 Fed. Reg. at 15,928, 15,938. If, as part of a seminar, the consultant develops (or assists attending employers in developing) tactics and strategies to be used by attending employers in persuading employees on these issues, reporting is required. *Id*. This is because the consultant has acted with an object to persuade employees of the attending employers. *Id*. Furthermore, in response to comments received, Labor has modified and clarified the reporting of such seminars. *Id*. at 15,972. First, a trade association must report a seminar only if its own officials or staff members actually make a presentation at the event that includes employee persuasion as an object, as distinct from merely sponsoring or hosting the event. *Id*. Second, to reduce burden, in no case must an employer who attends such a seminar file a Form LM-10 simply for attending the seminar. *Id*. at 15,939. This change was made for practical reasons. Labor concluded that the aggregated burden associated with such reporting by large numbers of employers outweighed any marginal benefit by requiring reports of the same material from both employer-attendees and the consultants presenting the seminars. *Id*. at 15,928.

Reporting is also required if a consultant provides material to an employer for dissemination or distribution to employees, if the consultant provided the material with an object to persuade employees about organizing or collective bargaining. 81 Fed. Reg. at 15,938. Again, this is because Section 203(b) requires reporting if, under an agreement with an employer, a consultant engages in activity where an object, directly or indirectly, is to persuade

employees. In this example, because the consultant provided material to the employer, and an intent of the consultant was to persuade employees, the consultant's agreement is reportable. And as stated above, a consultant (including an attorney) who exclusively counsels an employer to ensure the employer's compliance with the law is not engaged in persuader activity. *Id*. at 15,939. As part of this counseling, the consultant may provide examples or descriptions of statements found by the NLRB to be lawful, while still not engaging in persuader activity. *Id*. at 15,938. If the consultant revises these examples or descriptions, the revision does not trigger reporting if the consultant's sole aim is to ensure legality as opposed to persuasion, or if the consultant merely corrects typographical or grammatical errors. *Id*. By contrast, if the consultant revises the examples or descriptions in order to increase their persuasiveness to employees, then reporting is triggered. *Id*. The principle here is that revising materials is treated no differently than initially creating them, in that both constitute active steps that go beyond "advice"; the only issue is whether the consultant revises the materials with an object to persuade employees. *Id*. This is consistent with Section 203(b)'s text.

As to Plaintiffs' concern about "off-the-shelf' materials" – which refers to pre-existing materials not created by a consultant for a particular employer, *see* 81 Fed. Reg. at 15,938 – if a consultant merely provides an employer with such materials selected by the employer from a library or other collection of pre-existing materials prepared by the consultant for all employer clients, then no reporting is required. *Id*. By contrast, if the consultant plays an active role in selecting particular materials to be distributed to a client's employees based on the specific circumstances faced by the client, then the consultant is acting with an object to persuade these employees. *Id*. As such, reporting is required. This reflects a difference between two distinct circumstances: a consultant providing materials that were created prior to any arrangement,

without any specific employer in mind, as opposed to a consultant entering into an arrangement with an employer and selecting particular materials aimed at persuading that employer's employees. Additionally, to reduce burden under the Rule, Labor has concluded that it is appropriate to treat trade associations somewhat differently than other entities insofar as reporting is required. *Id*. at 15,928. Consequently, trade associations generally are only required to report in two situations, and providing off-the-shelf materials to employer-members is not one of these situations. *Id*.

Furthermore, Section 203(c) states that Section 203 may not be construed to require reporting "by reason of" a person's "engaging or agreeing to engage in collective bargaining on behalf of" an employer. 29 U.S.C. § 433(c). Consequently, if a consultant merely engages in collective bargaining on behalf of an employer, reporting is not required. By contrast, if *outside* of collective bargaining, a consultant engages in activities with an object to persuade employees – such as drafting communications to employees to ask their union to modify its proposals – this exemption no longer applies, and reporting is required. Under the Act, the touchstone inquiry is not only the type of activity a consultant engages in, but whether the consultant acted with an object to persuade. In short, none of the bullet-pointed examples by Plaintiffs demonstrates that the Rule impermissibly construes the Act.

Finally, Plaintiffs err in suggesting that the fact that the agency has changed its interpretation of a statute subjects that interpretation to a more demanding level of scrutiny than that typically applied under *Chevron* step two. Pl. Mot. at 20. To the contrary, the Supreme Court has "recently clarified that federal courts must defer even to new, course-reversing agency positions when 'the new policy is permissible under the statute, . . . there are good reasons for it, and . . . the agency *believes* it to be better, which the conscious change of course adequately

indicates.'" *Entergy Mississippi, Inc. v. NLRB*, 810 F.3d 287, 293 (5th Cir. 2015) (quoting *FCC v. Fox Television Stations, Inc.*, 556 U.S. 502, 515 (2009)) (emphasis in *Fox*) (ellipses in *Entergy*). Here, as explained above, the Rule permissibly construes the LMRDA, and the agency's detailed explanation demonstrates that there are good reasons supporting its change in policy. *See* 81 Fed. Reg. at 15,924-16,000. No more is required in order to uphold the agency's interpretation under step two of *Chevron*.

The case law cited by Plaintiffs does not counsel to the contrary. The Supreme Court in *Good Samaritan Hospital v. Shalala*, 508 U.S. 402 (1993), stated that when "[c]onfronted with an ambiguous statutory provision," one factor 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." *Id*. at 414 (citations and internal punctuation omitted). Here, the agency's most contemporaneous construction of the Act would be its 1960 interpretation of the 1959 statute, to which it has returned by enacting the Rule. *See supra* Background, Part II. Furthermore, any suggestion in *Good Samaritan Hospital* that a new, course-reversing agency position is entitled to any less deference under step two of *Chevron* has been dispelled by the Supreme Court's subsequent holding to the contrary in *Fox Television Stations*. Moreover, the relevant page of *MCI Communications Corp. v. AT&T*, 512 U.S. 218 (1994), cited by Plaintiffs, stands only for the principle that "an agency's interpretation of a statute is not entitled to deference when it goes beyond the meaning that the statute can bear." *Id*. at 229. Because, as explained above, Labor's construction of the Act is consistent with the statute's text, *MCI* is inapposite here.

Furthermore, Plaintiffs are mistaken to suggest that Congress has acquiesced to Labor's prior interpretation. Pl. Mot. at 21-22. Congress has not reenacted the relevant provisions, much

less done so in circumstances that would suggest congressional approval of the interpretation that Labor has now revisited, after extensive notice and comment. And as discussed above, courts of appeals have long recognized the ambiguities in the statute. To the extent that anything can be read into Congress's inaction, the lack of congressional disapproval of those court decisions suggests that Congress intends for Labor to retain interpretive authority. *See AFL-CIO v. Brock*, 835 F.2d 912, 916 (D.C. Cir. 1987) ("To freeze an agency interpretation, Congress must give a strong affirmative indication that it wishes the present interpretation to remain in place.").[11]

In sum, the Rule permissibly construes Section 203's reporting requirement to require disclosure of activities where which a consultant acts with an object of persuading employees, but does not directly contact the employees. Therefore, under *Chevron*, Plaintiffs are not likely to prevail on their claim that Labor has impermissibly construed the Act.

B. Labor's Decision to Issue the Rule Was Not Arbitrary and Capricious.

Plaintiffs are also unlikely to succeed on their claim that the challenged rule is arbitrary and capricious. *See* Pl. Mot. at 20-25. In promulgating the Rule, Labor presented a thorough, reasoned explanation for the new rule and set forth its supporting findings in detail. Plaintiffs' objections largely reiterate arguments that Labor considered and reasonably rejected as part of the administrative process, and its other objections equally lack merit.

Under the Administrative Procedure Act, 5 U.S.C. § 701 *et seq*. ("APA"), a court may set aside agency action where such action is "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." 5 U.S.C. § 706(2)(A). "The scope of review under the

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[11] Moreover, the Supreme Court in *Food and Drug Administration v. Brown & Williamson Tobacco Corporation*, 529 U.S. 120 (2000), made clear that it was dealing with an "extraordinary case[]" in which, applying *Chevron s*tep two, "there may be reason to hesitate before concluding that Congress has intended . . . an implicit delegation" to the agency to fill in statutory gaps. *Id*. at 159. This is not such an extraordinary case. In *Brown & Williamson*, the FDA claimed that statutory authority to regulate "drugs" allowed the agency to regulate tobacco products, even though the agency's findings that tobacco products were unsafe would have compelled the agency to ban tobacco products, contrary to the clear will of Congress as expressed in tobacco-specific legislation, if the statutory scheme applicable to therapeutic "drugs" were also applicable to tobacco products. *Id*. at 126, 133-59.

'arbitrary and capricious' standard is narrow and a court is not to substitute its judgment for that of the agency." *Motor Vehicles Mfrs. Ass'n v. State Farm Mut. Ins. Co.*, 463 U.S. 29, 43 (1983); *see also Handley v. Chapman*, 587 F.3d 273, 281 (5th Cir. 2009). A reviewing court starts from "a presumption that the agency's decision is valid, and the plaintiff has the burden to overcome that presumption by showing that the decision was erroneous." *Texas Clinical Labs., Inc. v. Sebelius*, 612 F.3d 771, 775 (5th Cir. 2010). A reviewing court "will uphold an agency's actions if its reasons and policy choices satisfy minimum standards of rationality." *10 Ring Precision v. Jones*, 722 F.3d 711, 723 (5th Cir. 2013) (citation and internal punctuation omitted).

None of Plaintiffs' arguments overcomes the presumption of the Rule's validity. First, Plaintiffs contend that Labor erred in relying on pre-existing research studies cited in its notice of proposed rulemaking, rather than conducting independent research. Pl. Mot. at 21. The foundation for the Rule, however, is not research findings but the statutory language chosen by Congress to require the disclosure of persuader agreements. 81 Fed. Reg. at 15,962. Labor relies on research studies only to show that much of the conduct that Congress intended to address by requiring disclosure continues to persist. *Id.* Additionally, Plaintiffs neither present any basis for questioning the soundness of the research cited, nor cite any authority to suggest that the APA required Labor to conduct independent research in lieu of reviewing these studies. *See Perez v. Mortgage Bankers Ass'n*, 135 S. Ct. 1199, 1207 (2015) ("Beyond the APA's minimum requirements, courts lack authority to impose upon an agency its own notion of which procedures are best or most likely to further some vague, undefined public good."). Thus, Plaintiffs present no reason to question Labor's statement that "without the disclosure intended by Congress in enacting section 203, the work of consultants in helping employers oppose union representation remains undisclosed to employees," 81 Fed. Reg. at 15,931, nor that "[m]any

employers engage consultants to conduct union avoidance or counter-organizing efforts to prevent workers from successfully organizing and bargaining collectively" and that recently, "the use of law firms in particular to orchestrate such campaigns has been documented by several industrial relations scholars." *Id.* Nor do Plaintiffs cast any doubt on Labor's conclusion that "the *undisclosed* use of labor relations consultants by employers – even where their activities are undertaken in strict accordance with the law – impedes employees' exercise of their protected rights to organize and bargain collectively and disrupts labor-management relations." *Id.* at 15,935 (emphasis in original); *see also id.* at 15,957 ("When a consultant is used to indirectly persuade employees and such use is not disclosed to employees, that, per se, deprives the employees of being fully informed about all the circumstances regarding their decision on representation."). And though Plaintiffs correctly note that in the 1980s, Congress expressed concern about ineffective enforcement of the Act's reporting obligations, Pl. Mot. at 21, Labor does not rely exclusively on reports reflecting these concerns to conclude that ineffective enforcement of these requirements likely continues today.

Second, Plaintiffs incorrectly contend that the Rule is unreasonable because it unduly interferes with state law, including state regulation of attorneys. *Id.* at 22-25. Plaintiffs' contention that the Rule lacks a minimal standard of rationality because it is allegedly inconsistent with the protection that Section 204 of the LMRDA affords attorney-client communications, Pl. Mot. at 23-25, is contradicted by binding Fifth Circuit precedent. Section 204 provides that nothing in the LMRDA "shall be construed to require an attorney" to include in a required report "any information . . . lawfully communicated to such attorney by any of his clients in the course of a legitimate attorney-client relationship." 29 U.S.C. § 434. The Fifth Circuit has held that this provision "roughly parallel[s] the common-law attorney-client

privilege." *Fowler*, 372 F.2d at 332; *accord Humphreys, Hutcheson & Moseley v. Donovan*, 755 F.2d 1211, 1216, 1219 (6th Cir. 1985); *Douglas v. Wirtz*, 353 F.2d 30, 33 (4th Cir. 1966) (treating Section 204 as equivalent to the attorney-client privilege).

The Fifth Circuit has rejected an assertion by attorneys that attorney-client privilege protected "the name of their client, the receipts and disbursements pursuant to [persuader] arrangements, and the general nature of their activities on behalf of these clients" from disclosure under Section 203(b), explaining that "[t]hese activities cannot be considered as confidential information communicated from the clients to [their attorneys]." *Fowler*, 372 F.2d at 333 (footnote omitted). Furthermore, as noted in a case construing Section 204, "[i]n general, the fact of legal consultation or employment, clients' identities, attorney's fees, and the scope and nature of employment are not deemed privileged." *Humphreys*, 755 F.2d at 1219.[12] Plaintiffs' reliance on *Humphreys* to support their arguments, Pl. Mot. at 23, is misplaced. Particularly pertinent to the present discussion is the Sixth Circuit's rejection of the appellant-law firm's claim that "even if it is subject to the reporting requirements of section 203, the requested information is protected by the attorney-client privilege recognized in section 204." *Id*. The Sixth Circuit explained that "[t]he attorney-client privilege only precludes disclosure of *communications* between attorney and client and does not protect against disclosure of the facts underlying the communication." *Id*. at 1219 (emphasis in original) (citation omitted). Thus, attorney-client privilege did not protect from disclosure "the fact of legal consultation or employment, clients' identities, attorney's fees, and the scope and nature of employment" or "the

[12] *See also DeGuerin v. United States*, 214 F. Supp. 2d 726, 735-37 (S.D. Tex. 2002) (examining Fifth Circuit case law and concluding that "[t]he law has long been settled that a client's identity and fee information are not normally privileged" and "will only be considered privileged in a few, very narrow, special circumstances"); *Howell v. Jones*, 516 F.2d 53, 58 (5th Cir. 1975) ("The great weight of authority . . . refuses to extend the attorney-client privilege to the fact of consultation or employment, including the component facts of the identity of the client and the lawyer."); *Nguyen v. Excel Corp*., 197 F.3d 200, 206 (5th Cir. 1999) ("Inquiry into the general nature of the legal services provided by counsel does not necessitate an assertion of the privilege because the general nature of services is not protected by the privilege.").

amount of money paid or owed by a client to his attorney . . . except in exceptional circumstances." *Id*. Consequently, "none of the information that LMRDA section 203(b) requires to be reported runs counter to the common-law attorney-client privilege." *Id.*

Because the same is true with respect to the information required to be reported under the Rule, the same result should follow. The Rule does not conflict with Section 204 because the Rule does not require the reporting of privileged information. Rather, the information required to be reported consists of: (1) a copy of the persuader agreement between the employer and consultant; (2) the parties to the agreement; (3) a description of the agreement's terms; (4) the nature of the persuader and information-supplying activities to be undertaken pursuant to the agreement (selected from a checklist of activities; (5) a description of persuader and information-supplying activities, including when the activities were performed and the extent of their completion; and (6) the persons who performed the persuader or information-supplying activities, and the dates, amounts, and purposes of payments made under the agreement. 81 Fed. Reg. at 15,992; *see also* Ex. 1-2. The Rule "does not require the disclosure of any particular documents, apart from the persuader agreement." 81 Fed. Reg. at 15,995. "While receipt and disbursement information must be disclosed under the rule, the rule does not require that the billing, voucher, or other documents that includes this information be publicly disclosed." *Id.* Furthermore, "the only other information that is to be reported identifies only the specific persuader activity or activities provided to the employer by the lawyer or other labor relations consultant, activities that must be reported under section 203 of the Act." *Id.*; *see also* Ex. 1-2. Because none of this information required to be reported falls within the traditional confines of the attorney-client privilege, the Rule does not conflict with Section 204.

Furthermore, though Plaintiffs contend that the Rule is inconsistent with ABA Model

Rule of Professional Conduct 1.6 and Texas Disciplinary Rule of Professional Conduct 1.05, dealing with confidentiality of information, their contention is incorrect. Pl. Mot. at 22-23, 24.[13] Model Rule 1.6 prohibits an attorney from "reveal[ing] information relating to the representation of a client"; however, such disclosure is expressly permitted "to the extent the lawyer reasonably believes necessary . . . to comply with other law or a court order[.]" Model Rules Prof'l Conduct 1.6(a), (b)(6).[14] Thus, to the extent that the Rule applies, an attorney may comply with Model Rule 1.6 by making such disclosures as are necessary to comply with the Rule.

Even if the Rule were deemed to conflict with a state-law attorney ethics requirement, the Rule would prevail over the state-law requirement due to conflict preemption. *See Simmons v. Sabine River Auth. La.*, 732 F.3d 469, 473 (5th Cir. 2013) ("Conflict preemption occurs where compliance with both federal and state regulations is a physical impossibility. . . .") (citation and internal punctuation omitted). Contrary to Plaintiffs' representation, the prevalence of federal law over contrary state attorney confidentiality rules is not a novel occurrence; indeed, this issue has arisen frequently in tax reporting cases. *See, e.g.*, *United States v. Goldberger & Dubin, P.C.*, 935 F.2d 501, 502-03, 505 (2d Cir. 1991) (rejecting contention that law firm's disclosure to

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[13] In the course of Plaintiffs' argument, they refer to "the Administrative Record," Pl. Mot. at 22 & n.13. It appears, however, that Plaintiffs are actually citing to a website containing links to Labor's notice of proposed rulemaking and other documents. In any event, Plaintiffs' APA claims will be resolved on the basis of an administrative record (to the extent those claims survive preliminary motions), which Labor will designate and file as may be appropriate in due course. *See, e.g.*, *Pac. Shores Subdivision v. Army Corps of Engineers*, 448 F. Supp. 2d 1, 5 (D.D.C. 2006) (agency designation of administrative record entitled to strong presumption of regularity); *accord Malone Mortgage Co. Am. Ltd. v. Martinez*, No. 3:02-CV-1870-P, 2003 WL 23272381, at *5 (N.D. Tex. Jan. 6, 2003) (citing *Wilson v. Hodel*, 758 F.2d 1369, 1374 (10th Cir. 1985)).

[14] The Texas Rule is similarly phrased. *See* Tex. Disciplinary R. Prof'l Conduct 1.05(b)(1) ("Except as permitted by paragraphs (c) and (d), . . . a lawyer shall not knowingly . . . [r]eveal confidential information of a client or former client . . . ."); *id*. 1.05(c)(4) ("A lawyer may reveal confidential information . . . [w]hen the lawyer has reason to believe it is necessary to do so in order to comply with a court order, . . . or other law."). Notably, the notes to Texas Disciplinary Rule 1.05 clearly state: "In addition to these provisions, a lawyer *may be obligated* by other provisions of statutes or other law to *give information about a client*. Whether another provision of law supersedes Rule 1.05 is a matter of interpretation beyond the scope of these Rules, but sub-paragraph (c)(4) *protects the lawyer from discipline* who acts on reasonable belief as to the effect of such laws."). Tex. Disciplinary R. Prof'l Conduct 1.05 note (emphasis added).

IRS of names of persons making cash payments to firm exceeding $10,000 would violate attorney-client privilege under New York law, and explaining that "in actions such as the instant one, which involve violations of federal law, it is the federal common law of privilege that applies"); *United States v. Blackman*, 72 F.3d 1418, 1421, 1424-26 (9th Cir. 1995) (rejecting as "specious" attorney's claim that both attorney-client privilege and attorney's "duty to maintain client confidences and secrets" justified refusal to identify client-payors, nature of services rendered to them, and fee arrangement; court concluded that "Congress cannot have intended to allow local rules of professional ethics to carve out fifty different privileged exemptions to the reporting requirements of" the IRS form); *United States v. Leventhal*, 961 F.2d 936, 940-41 (11th Cir. 1992) (rejecting allegation that disclosure of client information on IRS form would violate Florida Bar rules of professional conduct by revealing confidential information).

In sum, Plaintiffs are not likely to succeed on the merits of their claims that the Rule is contrary to the plain text of the LMRDA, that the regulation represents an impermissible construction of that Act, or that the Rule is arbitrary and capricious.

C. Defendants Are Likely to Prevail on Plaintiffs' First Amendment Claims.

1. Courts Have Upheld the Statutory Disclosure Requirements for Persuader Activity, and the Reasoning of These Decisions Supports the Rule at Issue Here.

The Fifth Circuit, as well as the Fourth, Sixth, and Seventh Circuits, have all upheld the disclosure requirements of Section 203(b) against First Amendment challenges. *Fowler*, 372 F.2d at 334; *Master Printers of Am. v. Donovan*, 751 F.2d 700, 703-10 (4th Cir. 1984); *Humphreys*, 755 F.2d at 1219-23; *Master Printers Ass'n v. Donovan*, 699 F.2d 370, 371 (7th Cir. 1983); *see also Marshall v. Stevens People & Friends for Freedom*, 669 F.2d 171, 176-80 (4th Cir. 1981) (rejecting First Amendment challenge to Labor's subpoena power to obtain

information required to be reported under Section 203). The reasoning of these decisions demonstrates that Defendants are likely to succeed on Plaintiffs' First Amendment claims. *See* Pl. Mot. at 25-38.

In *Fowler*, the Fifth Circuit summarily rejected a claim that Section 203(b)'s reporting requirements "unconstitutionally abridge[d] [the] free-speech rights" of attorneys' clients, holding that "the reporting requirements do not infringe on any of Appellees' constitutional rights." 372 F.2d at 319, 334.[15] The Fifth Circuit held that the appellants' "free-speech, first amendment challenge is foreclosed by *United States v. Harriss*, 347 U.S. 612 (1954))." *Id.* (citation truncated). *Harriss*, which upheld disclosure requirements by federal lobbyists, remains good case law, having been cited favorably by the Supreme Court as recently as 2010. *See Citizens United v. FEC*, 558 U.S. 310, 369 (2010) (citing *Harriss* for the proposition that "the Court has upheld registration and disclosure requirements on lobbyists, even though Congress has no power to ban lobbying itself").

The plaintiff in *Master Printers* (4th Cir.) was a national trade association that published a quarterly magazine with a strong anti-union focus that was sent directly to printing-industry employees. 751 F.2d at 702. It contended that Section 203's reporting requirements "infringed its first amendment rights of speech and association." *Id.* at 703 (internal punctuation omitted). The Fourth Circuit's analysis of the association's First Amendment claims turned on four

[15] The Fifth Circuit prefaced this holding by clarifying that it applied to the reporting requirements "[a]s . . . construed" not to include the reporting of receipts and disbursements for non-persuader labor relations advice or services for non-persuader clients. 372 F.2d at 334; *cf. id.* at 333-34. The Fifth Circuit, sitting *en banc*, later held in *Price* that Section 203(b) included the reporting of such advice and services. 412 F.2d at 648-51. Five Fifth Circuit judges dissented in *Price* regarding this statutory-interpretation issue. *Id.* at 651-56 (Dyer, J., dissenting). Though no constitutional claims were raised in *Price*, the dissent opined that the majority's construction of Section 203(b) could raise constitutional concerns, including potential First Amendment issues. *See id.* at 653-56. The *Price* dissent's discussion should bear no persuasive weight here for least three reasons. First, and most importantly, the statutory construction adopted in *Price* as to which the dissent expressed concerns is not at issue here. Second, because *Price* did not involve constitutional claims, the dissent's discussion reflects, at most, a speculative concern. Third, *Price* (decided in 1969) predated the opinions of the Fourth, Sixth, and Seventh Circuits upholding Section 203(b)'s reporting requirements against First Amendment challenges, and also predated many key First Amendment decisions discussed in the text.

factors: "the degree of infringement on first amendment rights; the importance of the governmental interest protected by the [LMRDA]; whether a substantial relation exists between the governmental interest and the information required to be disclosed; and the closeness of the fit between the [statute] and the governmental interest it purports to further." *Id.* at 704 (internal punctuation omitted). Its analysis regarding these four factors is pertinent to analyzing Plaintiffs' First Amendment claims here.

As to the first factor, the Fourth Circuit explained that "[a] finding of a substantial 'chill' on protected first amendment rights requires a showing that the statutory scheme will result in threats, harassment, or reprisals to specific individuals." 751 F.2d at 704 (citations omitted). It concluded that the association's allegations did not "constitute the sort of threat of physical harm and loss of employment" that would represent such a showing because the evidence presented by the association regarding such threats and losses "was entirely speculative." *Id.* With respect to the second factor, the Fourth Circuit determined that the interests served by Section 203 were the "compelling" interests of "deter[ring] actual corruption" and "the government's power to inform itself through investigations in order to act and protect its legitimate and vital interests." *Id.* at 706, 707. These interests were "unquestionably substantially related" to Section 203's disclosure requirements because the requirements "help[ed] employees, like voters in an election, to understand the source of the information that is distributed" by consultants, and "ensure[d] that the Secretary [of Labor] ha[d] the means to gather data and detect violations" of the LMRDA. *Id.* at 707-08 (citations and internal punctuation omitted). Finally, as to the third and fourth factors, "[i]n order to deter both actual corruption and [its appearance], Congress concluded that it would be necessary to require the disclosure of a wide-ranging number of employers and activities, even if it meant reporting activities that were not improper." *Id.* at 708 (citation

omitted). The Fourth Circuit thus held that the disclosure requirements were consistent with the First Amendment. The Sixth Circuit reached the same conclusion, adopting the analytical framework adopted by the Fourth Circuit in *Master Printers*. *Humphreys*, 755 F.2d at 1219-22. Additionally, the Seventh Circuit in *Master Printers Association* rejected a First Amendment challenge to Section 203. 699 F.2d at 371 (affirming and adopting *Donovan v. Master Printers Ass'n*, 532 F. Supp. 1140 (N.D. Ill. 1981)).

The Fourth, Fifth, Sixth, and Seventh Circuit decisions upholding Section 203 of the Act against First Amendment challenges demonstrate that Plaintiffs are not likely to succeed here. In those cases, as in this one, Labor was compelling consultants to provide information designed to allow employees to make informed decisions about union representation. Employees have an interest in understanding the source of the information that is being provided, which provides important context for evaluating that information; in adopting the Rule, Labor reasonably credited comments pointing out, for example, that in the case of indirect persuasion, knowledge that a statement was scripted by a consultant "will assist workers in determining the extent to which the message directed at them reflects the genuine views of their employer, of the employees, or of the consultant." 81 Fed. Reg. at 15,957. And the information required to be reported under Section 203 – the agreement and general type of persuader activities to be undertaken – is materially the same, whether the agreement provides for direct communication by a consultant with employees or the consultant conducts an organizing campaign behind the scenes.

Applying the analytical framework used in these decisions demonstrates that Plaintiffs are not likely to succeed on their First Amendment claims. First, the courts in *Master Printers* and *Humphreys* determined that a showing of threats, harassment, or reprisals to specific persons

must be shown to prove that regulation will substantially chill First Amendment free speech and associational rights. *Master Printers*, 751 F.2d at 704 (4th Cir.); *Humphreys*, 755 F.2d at 1220. Here, as in those cases, Plaintiffs have presented no evidence of such threats, harassment, or reprisals beyond the purely speculative. *Id*. Because any potential reduction in speech that might result from the reporting requirements is speculative, it is not the sort that amounts to a "substantial[] burden" on First Amendment rights. *Humphreys*, 755 F.2d at 1221; *accord Master Printers*, 751 F.2d at 705 (4th Cir.); *Master Printers*, 532 F. Supp. at 1148 n.11 (N.D. Ill.); *see also Citizens United*, 558 U.S. at 370 ("Citizens United, however, has offered no evidence that its members may face similar threats or reprisals. To the contrary, Citizens United has been disclosing its donors for years and has identified no instance of harassment or retaliation.").

Second, the Rule advances compelling interests. The Rule promotes transparency in connection with union elections, and, in particular, allows employees to understand and put into context statements that are made by their employers. An informed electorate is essential to the integrity of the union election process, and Plaintiffs cannot seriously contend otherwise. *See Humphreys*, 755 F.2d at 1222 (reports of persuader activity "enable employees in the labor relations setting, like voters in the political arena, to understand the source of the information they are given during the course of a labor election campaign").

Third, as with the disclosure of direct persuader activities, a substantial relationship exists between these compelling government interests and the disclosure of information regarding indirect persuader activities. The Fourth Circuit concluded that "disclosure helps employees, like voters in an election, to understand the source of the information that is distributed." *Master Printers*, 751 F.2d at 707-08 (citation and internal punctuation omitted). Likewise, here, disclosing to employees when the source of persuader materials is a consultant will help

employees to evaluate that information. An employee can reasonably be expected to react differently to an informal conversation with a supervisor if the employee is aware that a consultant has been hired to script such conversations. More formal written or oral presentations from an employee are also likely to be construed differently if they are perceived not as the employer's own views based on insight and experience at the particular company, but rather as the views of a consultant hired to defeat a unionization campaign. If an employer argues that unionization would improperly bring a third party into matters that should be handled within the company, or that unionization would require the expenditure of funds that should be used for salaries and benefits, an employee cannot place those statements in appropriate context without being aware of whether the employer has hired a third party to defeat unionization. In these circumstances and others, the disclosures required by the statute and regulations promote transparency in union elections.

Fourth, the Rule is closely tailored to achieve its purpose. In rejecting a contention that the Act was not "carefully tailored to achieve its purpose," the Fourth Circuit noted that both the Act's reporting requirements and a federal election campaign disclosure requirement that had recently been upheld by the Supreme Court "implicitly recognize that if voters in an election or employees in a labor setting are to have some knowledge of where the information in a political or union election comes from," then "comprehensive disclosure requirements are essential." *Master Printers*, 751 F.2d at 709. Moreover, "courts have been loath to hold disclosure requirements overbroad with the same degree of frequency reserved for other laws that seek to restrict particular types of speech." *Id.* at 709-10. For similar reasons, here, the Rule closely aligns Section 203 with Congress's aim of informing employees about persuader activities, direct or indirect, and ensures that employees know the source of all consultant-provided materials, not

just the limited circumstances involving direct persuasion by these consultants.[16]

2. The Rule's Constitutional Validity Is Independently Supported by Case Law Sustaining Analogous Disclosure Requirements Against First Amendment Challenges.

Independently of direct precedent, the Rule's constitutional validity is also supported by Supreme Court and Fifth Circuit cases upholding disclosure requirements against First Amendment challenges. Courts have recognized that Section 203's reporting requirements have close analogues in federal election campaign law. *See*, *e.g.*, *Master Printers*, 751 F.2d at 709 (4th Cir.) (noting that "the LMRDA's disclosure scheme is 'remarkably similar' to parts of the Federal Election Campaign Act that were held constitutional by" the Supreme Court in *Buckley v. Valeo*, 424 U.S. 1 (1976) (quoting *Master Printers*, 532 F. Supp. at 1150 (N.D. Ill.)).[17] In holding that the campaign disclosure requirements in *Buckley* served "government interests sufficiently important to outweigh the possibility of infringement" of First Amendment rights, the Court noted that the requirements "provide[] the electorate with information as to where political campaign money comes from and how it is spent by the candidate in order to aid the

[16] For these reasons, Plaintiffs err in contending that the Rule is not appropriately tailored. *See* Pl. Mot. at 30-32. Additionally, any argument by Plaintiffs based on information required to be reported under the Form LM-21, *see id*. at 30-31 & n.19, is irrelevant to a motion for a preliminary injunction. As noted above, *see supra* n.2, consultants who engage in persuader activity must file a Form LM-21, "Receipts and Disbursements Report," within 90 days of the consultant's fiscal year. Labor has explained that in light of potential changes to parts B and C of that form later this year, Labor will not take enforcement action for the time being based on a failure to complete those parts. *See* Form LM-21 Special Enforcement Policy, *available at* https://www.dol.gov/olms/regs/compliance/ecr/lm21_specialenforce.htm. Furthermore, any change to this policy will be announced no less than 90 days before any change takes effect. *Id*. Consequently, Plaintiffs may not presently be heard to argue that they face imminent injury, much less imminent irreparable injury that would support preliminary injunctive relief, based on a possible future enforcement of any revised Form LM-21 that has not yet been issued.

[17] *See Buckley*, 424 U.S. at 62, 66-67 (upholding reporting obligations on political action committees and candidates receiving contributions or making expenditures above a threshold amount); *Citizens United*, 558 U.S. at 366-71 (upholding disclosure requirements for any person who spends more than a threshold amount on electioneering communications within a calendar year); *Doe v. Reed*, 561 U.S. 186, 194-201 (2010) (upholding reversal of preliminary injunction barring Washington State from making referendum petitions, including names and addresses of signers, available to the public via State public records law, and holding that disclosure of such petitions in general would not violate the First Amendment); *Justice v. Hosemann*, 771 F.3d 285, 296-301 (5th Cir. 2014) (rejecting First Amendment challenge to state disclosure requirements for ballot initiatives proposing amendments to state constitution).

voters in evaluating those who seek federal office." Similarly, the Rule's disclosure requirements "permit[] employees in a labor setting, like voters in an election, to understand the sources of the information being distributed." *Master Printers*, 532 F. Supp. at 1150 (N.D. Ill.). And in *Citizens United*, the Supreme Court upheld disclosure provisions imposed by federal election law, explaining that "disclosure permits citizens and shareholders to react to the speech of corporate entities in a proper way. This transparency enables the electorate to make informed decisions and give proper weight to different speakers and messages." 558 U.S. at 371. So too, here, requiring disclosure will allow employees to make informed decisions and afford proper weight to messages from employers by learning who, besides the employer, is actually speaking by developing the script, communication strategy, and other tools to help persuade employees. *See supra* page 33.

Labor has determined, based on its experience in administering and enforcing the LMRDA, that the hiring of a consultant by an employer, and the consultant's role in the representation campaign, are important factors to be considered by employees as they make their choices for or against union representation. 81 Fed. Reg. at 15,986. For example, "the dynamics of union elections make the use of third parties relevant to the ultimate issue of whether or not employees choose a representative for purposes of collective bargaining." *Id.* Thus, analogous case law in the campaign-finance context further demonstrates that Defendants are likely to succeed on the merits of Plaintiffs' First Amendment claims.[18]

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[18] Contrary to Plaintiffs' characterization, Pl. Mot. at 28 n.17, this line of cases is not distinguishable on the grounds that the disclosure laws upheld in these cases were allegedly "content-neutral" and thus subject to lesser scrutiny. The disclosure law upheld in *Citizens United* mandated disclosure based on the content of certain communications, requiring that "any person who spends more than $10,000 on electioneering communications within a calendar year must file a disclosure statement with the FEC." 558 U.S. at 366. Nevertheless, the disclosure law was analyzed under "exacting scrutiny," requiring a "substantial relation between the disclosure requirement and a sufficiently important governmental interest." *Id.* at 366-67 (citation and internal punctuation omitted). The remaining cases cited by Plaintiffs are to the same effect; *see Buckley*, 424 U.S. at 60-68 (analyzing under "exacting scrutiny" laws requiring reporting and registration by political committees and candidates receiving contributions or making

3. None of Plaintiffs' First Amendment Arguments Is Persuasive.

Plaintiffs fail to demonstrate that they are likely to prevail on their First Amendment claims. Pl. Mot. at 25-38.[19] First, Plaintiffs' contention that the Rule should be analyzed under strict scrutiny rather than "exacting scrutiny," *id*. at 27, runs contrary to Circuit precedent. *See Justice*, 771 F.3d at 296 ("[Plaintiffs argue] that Mississippi's disclosure requirement should be subject to strict scrutiny. We recently rejected this position, holding that disclosure and organizational requirements are subject to the lesser but still meaningful standard of exacting scrutiny.") (citing *Catholic Leadership Coal.*, 764 F.3d at 424).[20] The Act's disclosure scheme,

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expenditures above a threshold amount "for the purpose of influencing the nomination or election of any person to federal office") (internal punctuation omitted); *Minn. Citizens Concerned for Life v. Swanson*, 692 F.3d 864, 867-77 (8th Cir. 2012) (en banc) (analyzing under "exacting scrutiny" state law imposing reporting and recordkeeping requirements on associations contributing funds "to influence the nomination or election of a candidate or to defeat a ballot question").

[19] Plaintiffs mistakenly rely on *Thomas v. Collins*, 323 U.S. 516 (1945), Pl. Mot. at 25-26, in which the Supreme Court reversed a finding of criminal contempt against a union organizer who disobeyed a Texas law that required him to register with the state before addressing employees. As the Fifth Circuit recently recognized, *Thomas* "dealt with [a] registration requirement[] that took effect *before* any speech had occurred." *Catholic Leadership Coal. of Tex. v. Reisman*, 764 F.3d 409, 438 (5th Cir. 2014) (emphasis added). Here, by contrast, "[n]o external factor limits [Plaintiffs'] ability to speak," *id*. at 439; the Rule simply requires Plaintiffs to disclose some information after they engage in particular activity. *See Master Printers*, 751 F.2d at 712 n.14 (4th Cir.) (distinguishing *Thomas* because "the consequence of triggering the Texas statute was to enjoin all speech," while "[a] finding of 'persuader activity' in the LMRDA context only triggers disclosure requirements").

[20] Importantly, none of the cases cited by Plaintiffs supporting their argument in favor of strict scrutiny, *see* Pl. Mot. at 27-29, involved disclosure or reporting requirements. *See Reed v. Town of Gilbert*, 135 S. Ct. 2218, 2224-26 (2015) (analyzing town code "identify[ing] various categories of [outdoor] signs based on the type of information they convey, then subject[ing] each category to different restrictions," and "impos[ing] more stringent restrictions" on signs conveying certain messages); *McCullen v. Coakley*, 134 S. Ct. 2518, 2522 (2014) (analyzing state law criminalizing standing on a public way or sidewalk within a specified distance of a "reproductive health care facility"); *FCC v. League of Women Voters*, 468 U.S. 364, 366 (1984) (addressing federal law forbidding any "noncommercial educational broadcasting station which receives a grant from" the Corporation for Public Broadcasting from "engag[ing] in editorializing"); *United States v. Alvarez*, 132 S. Ct. 2537, 2543 (2012) (analyzing federal criminal law prohibiting any person from "falsely represent[ing] himself or herself, verbally or in writing, to have been awarded any decoration or medal authorized by Congress for the Armed Forces of the United States"); *Ashcroft v. ACLU*, 542 U.S. 656, 661-62 (2004) (addressing federal law criminalizing the knowing online posting, for commercial purposes, of material "harmful to minors"); *United States v. Playboy Entm't Grp*., 529 U.S. 803, 806 (2000) (analyzing federal law requiring cable television operators "who provide channels primarily dedicated to sexually-oriented programming either to fully scramble or otherwise fully block those channels or to limit their transmission to hours when children are unlikely to be viewing") (internal punctuation omitted); *World Wide Street Preachers Fellowship v. Town of Columbia*, 245 F. App'x 336, 345-46 (5th Cir. 2007) (analyzing state laws prohibiting resisting arrest, standing near a fire hydrant or crosswalk, and demonstrating without a permit, as applied to organization of street preachers).

as interpreted by the Rule, is "remarkably similar" to the election-disclosure provisions in *Buckley*. *Master Printers*, 751 F.2d at 709 (4th Cir.). And the standard used in *Buckley* was the same used in cases upholding the Act against First Amendment challenges: namely, that a substantial relation must exist between the disclosure law and a sufficiently important governmental interest. *Buckley*, 424 U.S. at 64; *Master Printers*, 751 F.2d at 705 (4th Cir.); *Fowler*, 372 F.2d at 334; *Humphreys*, 755 F.2d at 1220; *Master Printers*, 532 F. Supp. at 1148 (N.D. Ill.); *see also Marshall*, 669 F.2d at 177. That same standard applies here, and as explained above, *see supra* I.B.1, the Rule fully satisfies the standard. Consequently, because strict scrutiny does not apply here, the Rule does not need to utilize the least restrictive means available to further its goals, *see* Pl. Mot. at 32. *See Denver Area Educ. Telecomm. Consortium v. FCC*, 518 U.S. 727, 807 (1996).

Second, Plaintiffs' other arguments under this rubric similarly fail. Though Plaintiffs acknowledge that the Rule "only applies to speech that has 'an object to persuade' employees with respect to their exercise of rights regarding union organizing," Pl. Mot. at 27, the same is true with respect to the cases upholding Section 203 against First Amendment challenges. And contrary to Plaintiffs' contention, Pl. Mot. at 28, as explained above, the Rule here serves the important governmental interest in promoting transparency in union elections.[21]

Third, Plaintiffs also mischaracterize one of Labor's justifications for the Rule as "disingenuous and apparently pretextual" because, they contend, the required information will only be filed after a union election has concluded. Pl. Mot. at 29. This characterization is false,

[21] Moreover, Plaintiffs misplace their reliance on *McIntyre v. Ohio Elections Commission*, 514 U.S. 334 (1995). Pl. Mot. at 29. "The question presented" in *McIntyre* was a state law "prohibit[ing] the distribution of anonymous campaign literature." 514 U.S. at 336. The Court explained that "identification of the author against her will is particularly intrusive; it reveals unmistakably the content of her thoughts on a controversial issue"; by contrast, "[d]isclosure of an expenditure and its use, without more, reveals far less information." *Id.* at 355. No similar revelation is at issue here; the Rule does not involve disclosure of an individual's personal views, but rather merely the fact of a consulting relationship between an employer and a commercial entity hired to assist the employer in obtaining the employer's desired result.

and Plaintiffs are factually mistaken. Plaintiffs do correctly note that while union elections generally occur within 21 days of the filing of a union representation petition, LM-20 forms must be filed within 30 days of entering into an applicable persuader agreement or arrangement, and LM-10 forms must be filed within 90 days of the end of the filer's fiscal year. But "the rulemaking record suggests that employers engage consultants at the first signs of union organizing, *i.e.*, *before* a petition is filed." 81 Fed. Reg. at 15,961 (emphasis in original). Plaintiffs present no evidence – and Labor is aware of none – that employers only hire consultants *after* a union representation petition is filed, so it does not follow that this information will only be reported after an election.

Fourth, Plaintiffs do not present a valid First Amendment overbreadth challenge. Pl. Mot. at 32-33. "Invalidation for overbreadth is strong medicine that is not to be casually employed." *United States v. Williams*, 553 U.S. 285, 293 (2008) (internal punctuation omitted). A statute may be struck down as facially overbroad only if "a substantial number of its applications are unconstitutional, judged in relation to the statute's plainly legitimate sweep." *Wash. State Grange v. Wash. State Republican Party*, 552 U.S. 442, 449 n.6 (2008) (internal punctuation omitted). Here, Plaintiffs cannot demonstrate that the Rule is unconstitutional as applied to consultants who manage every aspect of campaigns to persuade employees regarding their organizing rights, which Labor found to be a prominent practice. Even if Plaintiffs could establish that the Rule were unconstitutional in some narrow circumstances (though they offer no such circumstances), they would not be entitled to the "strong medicine" of facial invalidation.

Fifth, for the same reasons that the Rule does not violate Plaintiffs' free speech rights, it does not violate their right to associate freely. *See* Pl. Mot. at 33-34. In analyzing First Amendment challenges to Section 203's reporting requirement, the Fourth and Sixth Circuits

addressed both free-speech and free-association claims using the same principles and analytical framework. *See Master Printers*, 751 F.2d at 704 (4th Cir.); *Humphreys*, 755 F.2d at 1219; *see also Buckley*, 424 U.S. at 60, 64-72 (same). Consequently, for the same reasons that Defendants are likely to prevail on Plaintiffs' free-speech claims, Defendants are also likely to prevail on Plaintiffs' free-association claims.

Finally, Defendants are also likely to prevail on Plaintiffs' claim that the Rule is "preempted" by Section 8(c) of the National Labor Relations Act, 29 U.S.C. § 151 *et seq*. ("NLRA").[22] There is no inconsistency between the Rule and the language of Section 8(c), which provides that the "expressing of any views, argument, or opinion, or the dissemination thereof, . . . shall not constitute or be evidence of an unfair labor practice under [the NLRA], if such expression contains no threat of reprisal or force or promise of benefit." 29 U.S.C. § 158(c). The Rule treats neither a failure to disclose persuader activities nor the fact that such activities took place as constituting either an unfair labor practice or evidence of such a practice. Consequently, there is no conflict between the Rule and the plain text of Section 8(c).

Section 8(c) embodies a broad national policy "to encourage free debate on issues dividing labor and management." *Chamber of Commerce v. Brown*, 554 U.S. 60, 67 (2008) (citation omitted). The disclosure requirement here is fully consistent with this policy because vigorous debate presupposes access to pertinent information – not just for speakers, but also for listeners. *See, e.g.*, *Cal. Saw & Knife Works*, 320 NLRB 224, 233 (1995) (requiring unions to inform newly-hired employees of certain rights before extracting mandatory dues), *enf'd. sub*

[22] Section 8(c) and the Rule are part of a complementary scheme, as contemplated by Congress, in which the LMRDA and the NLRA address generally the obligations of unions and employers to conduct labor-management relations in a manner that protects the rights of employees to exercise their right to choose whether to be represented by a union for purposes of collective bargaining. *See* 81 Fed. Reg. at 15,925. While the NLRA, enforced by the NLRB, ensures compliance with these rights by investigating and prosecuting unfair labor practice complaints, the LMRDA promotes these rights by requiring unions, employers, and consultants to publicly disclose information about certain agreements and arrangements.

nom. Int'l Ass'n of Machinists v. NLRB, 133 F.3d 1012 (7th Cir. 1998); *Nat'l Ass'n of Mfrs. v. Perez*, 103 F. Supp. 3d 7, 22-26 (D.D.C. 2015) (Section 8(c) consistent with regulations requiring federal contractors to post workplace notices informing their employees of their rights under the NLRA). As explained in the Rule, "disclosure laws unlike other types of restrictive laws actually *promote* speech by making more information available to the public, thereby bolstering the 'marketplace of ideas.'" 81 Fed. Reg. 15,988 (emphasis added) (quoting *Master Printers*, 751 F.2d at 710 (4th Cir.)). By expanding the landscape of speech to which employees in union-organizing situations may be exposed, the Rule fosters informed debate and, in so doing, directly effectuates – and does not conflict with – Section 8(c)'s policy goals. In *Brown*, the Supreme Court held that a state law may be invalid under 8(c) where it "regulate[s] conduct that Congress intended be unregulated." 554 U.S. at 65 (citation and internal punctuation omitted). But where, as here, a federal regulation carries out a congressional mandate, *Brown* has no application.

D. Defendants Are Likely to Prevail on Plaintiffs' Other Claims.

1. The Regulation Is Not Void for Vagueness.

Plaintiffs are not likely to succeed on their claim that the Rule violates the Fifth Amendment's Due Process Clause as void for vagueness. Pl. Mot. at 39-43. A law is not void for vagueness if it "give[s] the person of ordinary intelligence a reasonable opportunity to know what is prohibited, so that he may act accordingly." *Grayned v. City of Rockford*, 408 U.S. 104, 108 (1972). Instead, if it is "clear what the [regulation] as a whole prohibits," it will not be declared unconstitutionally vague. *Id.* at 110. Thus, "speculation about possible vagueness in hypothetical situations not before the Court will not support a facial attack on a statute when it is surely valid in the vast majority of its intended applications." *Hill v. Colorado*, 530 U.S. 703,

733 (2000) (citation and internal punctuation omitted).

Importantly, the persuader reporting rules are primarily subject to civil enforcement, 29 U.S.C. § 440, with criminal penalties attaching only to willful evasion or for knowingly making false statements or representations. 29 U.S.C. § 439. Civil statutes are not held to the same demanding standard as criminal statutes with respect to vagueness. "A less stringent standard is applied to civil statutes that regulate economic activity," under which "[a]n economic regulation is invalidated only if it commands compliance in terms so vague and indefinite as really to be no rule or standard at all or if it is substantially incomprehensible." *Ford Motor Co. v. Texas Dep't of Transp.*, 264 F.3d 493, 507 (5th Cir. 2001) (citations and internal punctuation omitted); *cf. Munn v. City of Ocean Springs*, 763 F.3d 437, 439 (5th Cir. 2014) (for criminal statutes or regulations, a law or regulation is not unconstitutionally vague unless it "fail[s] to provide a person of ordinary intelligence fair notice of what is prohibited, or is so standardless that it authorizes or encourages seriously discriminatory enforcement"). Here, because criminal penalties apply only in the case of willful violations, 29 U.S.C. § 439(a)-(c), filers who make inadvertent errors due to misunderstanding the Rule could face only civil penalties.

Additionally, in relying on the criminal penalties imposed under 29 U.S.C. § 439, *see* Pl. Mot. at 39, Plaintiffs are conflating two distinct principles: the reporting trigger created by Section 203 and the criminal liability standard of Section 209. Reporting is triggered by a showing that an employer and consultant have entered into an agreement or arrangement involving the consultant undertaking activities with an object to persuade. By contrast, Section 209 imposes criminal liability if an employer or consultant acts with specific intent to circumvent the requirements ("who *willfully* violates") or knowingly makes false statements or representations, or willfully makes false entries in information required to be reported under the

LMRDA. 29 U.S.C. § 439; *see United States v. Briscoe*, 65 F.3d 576, 587 (7th Cir. 1995) (defining "willful" conduct for purposes of the LMRDA's misdemeanor provisions). Plaintiffs do not allege that they plan to act with the specific intent to circumvent Section 203's reporting requirements or knowingly to make any false statements. Section 209 therefore cannot provide support for Plaintiffs' vagueness argument, which is not likely to succeed.

Analyzed under the applicable standards, the Rule is more than sufficiently clear. As discussed above, the Rule was issued in response to the widespread practice of hiring consultants to manage campaigns to persuade employees not to join unions, and its application in such circumstances is clear. Plaintiffs do not seriously contend otherwise. Rather, Plaintiffs' vagueness argument – namely, the alleged difficulty of categorizing an activity as reportable persuader activity or non-reportable advice – boils down to Plaintiffs' claimed confusion about when and how to apply the Rule in certain hypothetical indirect persuasion situations. Pl. Mot. at 41-43. But Plaintiffs do not identify specific activities in which they wish to engage as to which the Rule's application might be unclear or allege (much less provide evidence) that they do not intend to engage in activities as to which a reporting obligation clearly applies, a deficiency that alone defeats their vagueness challenge. *See Village of Hoffman Estates v. Flipside, Hoffman Estates, Inc.*, 455 U.S. 489, 495 (1982) ("A plaintiff who engages in some conduct that is clearly proscribed cannot complain of the vagueness of the law as applied to the conduct of others.").

As Labor explained in the Rule, reporting is triggered (1) when a consultant enters into an agreement or arrangement with an employer (2) pursuant to which the consultant undertakes activities (3) that have an object to persuade employees (4) about whether and how they should exercise their representation and collective bargaining rights. Furthermore, in explaining the

Rule, Labor set forth in detail the types of activities and circumstances that would or would not trigger reporting under the new Rule. *See, e.g.*, 81 Fed. Reg. at 15,924, 15,937, 15,991. Importantly, Labor identified the "five general scenarios in which the underlying test for persuasion is to be applied," describing in detail "categories of persuasion," including both direct and indirect categories. 81 Fed. Reg. at 15,938. As noted above, *see supra* I.A.2, indirect persuader activity by a consultant consists of:

- Planning, directing, or coordinating activities undertaken by supervisors or managers,
- Providing persuader materials to an employer for distribution to employees,
- Conducting a seminar for supervisors or managers, or
- Developing or implementing personnel policies, practices, or actions for the employer.

See id.; *see also Skilling v. United States*, 561 U.S. 358, 412 (2010) ("Even if the outermost boundaries of a statute are imprecise, any such uncertainty has little relevance where appellants' conduct falls squarely within the hard core of the statute's proscriptions.") (citation omitted).[23]

Much of Plaintiffs' vagueness challenge amounts not to a complaint about the Rule, but to an asserted ambiguity in the statutory provision that limits disclosure to those agreements undertaken with an "object . . . to persuade." 29 U.S.C. § 433(b). But Plaintiffs' claims do not challenge the statute on vagueness grounds, and such a claim could not succeed in any event. Plaintiffs' assertion that they "cannot determine with certainty whether their actions require reporting," Pl. Mot. at 42, ignores Section 203(b)'s requirement that activities be undertaken with an object of persuading employees with regard to if and how to exercise their collective bargaining rights. As multiple courts have recognized in analyzing that provision, far from being

[23] Labor's efforts to provide clarification and guidance to potential filers extend further. The agency currently offers an LMRDA Technical Assistance helpline, and also offers technical assistance via email. The Office of Labor-Management Standards website (and materials distributed by the Office) provide: "Contact OLMS with questions regarding Forms LM-10 and LM-20 reporting requirements at (202) 693-0123." *See* https://www.dol.gov/OLMS/regs/ compliance/ecr.htm (last visited May 9, 2016).

unconstitutionally vague, the term "persuade" has an easy-to-understand meaning, and the term "object," like similar terms such as "intent" or "purpose," is measured by objective factors that consultants and employers may take into account in guiding their actions. *See Master Printers*, 751 F.2d at 710-12 (4th Cir.); *see also Williams*, 553 U.S. at 306 ("Close cases can be imagined under virtually any statute. The problem that poses is addressed, not by the doctrine of vagueness, but by the requirement of proof beyond a reasonable doubt. What renders a statute vague is not the possibility that it will sometimes be difficult to determine whether the incriminating fact it establishes has been proved; but rather the indeterminacy of precisely what that fact is.") (internal citations omitted).

The underlying focus – examining the object of the consultant's activity – is easily articulated and applied. A mental state, such as an "object to persuade," is an objective fact. The "state of a man's mind is as much a fact as the state of his digestion." *Merck & Co. v. Reynolds*, 559 U.S. 633, 648 (2010) (quoting *Edgington v. Fitzmaurice*, 29 Ch. Div. 459, 483 (1885)). The "object to persuade" analysis looks at objective facts surrounding the consultant's activities including the written agreement with the employer, the content of materials the consultant provided to the employer to distribute to employees, and the timing and context of the consultant's agreement with the employer (*e.g.*, whether the context is a labor dispute).[24]

The Fourth Circuit has determined that the word "persuade," as used in Section 203, is not ambiguous or vague because it bears its everyday meaning of "to move by argument, entreaty, or expostulation to a belief, position, or course of action," and is commonly used in many situations where reports are required by law. *Master Printers*, 751 F.2d at 711.

[24] Moreover, even to the extent that the test, in its application, could possibly give rise to borderline situations, that does not render the Rule vague. "[P]erfect clarity and precise guidance have never been required even of regulations that restrict expressive activity." *Holder v. Humanitarian Law Project*, 561 U.S. 1, 19 (2010) (citation and internal punctuation omitted).

Additionally, the "context in which the term is placed" in Section 203 "is equally clear," in that "[p]ersuasion will trigger disclosure if it is made 'pursuant to any agreement or arrangement with an employer'; if it is aimed at an employee; and if the subject of the persuasion is the exercise of an employee's right to organize or bargain collectively." *Id.* Consequently, it held, Section 203 was not "impermissibly vague." *Id.* The Fifth Circuit, as well as the Fourth Circuit, have thus upheld Section 203's disclosure requirements against vagueness challenges. *See Fowler*, 372 F.2d at 334-35 ("In view of the fact that this is not a criminal prosecution for wilful failure to report and that Appellees' conduct clearly was that of a persuader, their contention that the reporting provisions are void for vagueness is equally meritless."); *Master Printers*, 751 F.2d at 710-12 (4th Cir.); *see also Master Printers*, 532 F. Supp. at 1152 (N.D. Ill.). Further putting to rest any concern about vagueness, the Rule includes revised versions of Forms LM-10 and LM-20, 81 Fed. Reg. at 15,936-44; provides checklists and examples to assist filers in identifying reportable activities, *id.* at 15,943; and groups the list of indirect persuader activities from the proposed rule into four specific categories, as discussed above.

Section 203(b)'s reporting requirement is no vaguer when it is applied to persuader activity where a consultant does not directly contact employees than when he or she does. Reporting under both the prior interpretation of Section 203 and under the Rule rests on whether the consultant acts with an object to persuade employees, which is determined, generally, by viewing the content of the communication and the underlying agreement with the employer. Furthermore, to provide additional clarity, the instructions for the LM-10 and LM-20 Forms define "persuader activities," set forth the four categories of indirect persuader activities, explain when reporting of an agreement or arrangement is triggered, and list specific examples of activities that either alone or in combination would trigger the reporting requirements. *See* 81

Fed. Reg. at 16027-28, 16042-43. Plaintiffs are thus not likely to succeed on their vagueness challenge.[25]

2. The Regulation Fully Complies with the Regulatory Flexibility Act.

The fourth cause of action alleges that Labor failed to comply with the Regulatory Flexibility Act, 5 U.S.C. §§ 601 *et seq*. ("RFA"), by failing to conduct properly the analysis required by the RFA. Pl. Mot. at 43-46. This claim lacks merit. The RFA generally requires an agency that "promulgates a final rule" to "prepare a final regulatory flexibility analysis." 5 U.S.C. § 604(a). If, however, the "head of the agency certifies that the rule will not . . . have a significant economic impact on a substantial number of small entities," then no final regulatory flexibility analysis need be published. *Id*. § 605(b); *see, e.g.*, *Nat'l Tel. Coop. Ass'n v. FCC*, 563 F.3d 536, 540 (D.C. Cir. 2009). Here, Labor issued the required certification in the Notice, and modified that certification when the Rule was published. *See* 76 Fed. Reg. at 36,205-06; 81 Fed. Reg. at 16,015-20.

The Court reviews agency compliance with the RFA "only to determine whether an agency has made a reasonable, good-faith effort to carry out [the RFA's] mandate," which "is a procedural rather than substantive agency mandate." *Alenco Communications Inc. v. FCC*, 201 F.3d 608, 625 (5th Cir. 2000) (citation and internal punctuation omitted). "[T]he RFA plainly does not require economic analysis, but mandates only that the agency describe the steps it took 'to minimize the significant economic impact on small entities consistent with the stated objectives of applicable statutes.'" *Id*. (quoting 5 U.S.C. § 604(a)(5)). Here, Labor considered

[25] Plaintiffs also include a single paragraph in their brief contending that the Rule raises equal protection issues. Pl. Mot. at 43. However, nowhere in the complaint do Plaintiffs assert an equal protection claim, and Plaintiffs "cannot amend [their] complaint by briefs. . . ." *Davis v. Davis*, No. Civ. A. 3:97-CV-0267, 1998 WL 51366, at *2 n.3 (N.D. Tex. Jan. 21, 1998). In any event, even had Plaintiffs pleaded an equal protection claim, it would not be likely to succeed. Plaintiffs have not shown that labor unions and employers act similarly, but are regulated differently, in connection with their use of persuaders.

the economic impact of the Rule and described the steps taken to minimize the Rule's effect on small entities, including exempting employers from filing Form LM-10 reports concerning agreements with consultants to participate in union avoidance seminars, and allowing Form LM-10 and LM-20 filers to submit reports electronically. *See* 81 Fed. Reg. at 16,018, 16,019. "The RFA requires no more." *Alenco Communications*, 201 F.3d at 625. Thus, Defendants are likely to succeed on the merits of this cause of action.

Neither of Plaintiffs' two arguments under this rubric is persuasive. First, Plaintiffs allege that although the Rule does not make any changes to the LM-21 Form, Labor was required to conduct a regulatory flexibility analysis as to this Rule to estimate the costs of complying with any changes to the LM-21 Form that Labor will make through separate rulemaking. Pl. Mot. at 44-45. Plaintiffs are incorrect, and none of the cases they cite support such a proposition. Contrary to Plaintiffs' assertion, there are many more than "two possibilities" that the LM-21 rulemaking may take, *id*. at 45, and any challenge to the new Form LM-21 that has not yet been issued is premature. Second, Plaintiffs incorrectly assert that Labor's estimates of the compliance costs fail to satisfy the RFA's mandate. Pl. Mot. at 46. In thus asserting, Plaintiffs ignore the fact that the RFA "is a procedural rather than substantive agency mandate" that "does not require economic analysis, but mandates only that the agency describe the steps it took 'to minimize the significant economic impact on small entities consistent with the stated objectives of applicable statutes.'" *Alenco Communications*, 201 F.3d at 625. Because the agency has described these steps, as explained above, the RFA's procedural mandate has been satisfied.

In short, Plaintiffs have not satisfied their burden of showing they are likely to succeed on the merits of their claims. This conclusion, standing alone, warrants denial of Plaintiffs' motion.

II. Plaintiffs Fail to Carry Their Burden to Show Irreparable Harm.

"Perhaps the single most important prerequisite for the issuance of a preliminary injunction is a demonstration that if it is not granted the applicant is likely to suffer irreparable harm before a decision on the merits can be rendered." 11A Charles Alan Wright, Arthur R. Miller & Mary Kay Kane, *Federal Practice and Procedure* § 2948.1 (3d ed. 2013). As the Supreme Court has explained, because "[a] preliminary injunction is an extraordinary remedy," a court must consider the actual "effect on each party of the granting or withholding" of relief, and do so "[i]n each case." *Winter*, 555 U.S. at 24. To show a threat of irreparable harm, a party must demonstrate "a *significant threat* of injury from the impending action, that the injury is *imminent*, and that money damages would not fully repair the harm." *Humana, Inc. v. Jacobson*, 804 F.2d 1390, 1394 (5th Cir. 1986) (emphasis added).

Plaintiffs offer no specifics to support their claim of irreparable harm, only generalized assertions in a footnote, Pl. Mot. at 47 n.32, and therefore do not meet their burden.[26] Instead, Plaintiffs make generic assertions that absent injunctive relief, (1) non-compliance with the Rule could subject a person to criminal penalties, and (2) their First Amendment rights will be impeded. Pl. Mot. at 47 n.32. Neither allegation demonstrates a significant threat of imminent irreparable harm. As to the first allegation, the LMRDA's criminal provision, 29 U.S.C. § 439, imposes criminal liability only for "willful[]" violations of the LMRDA or for "knowingly" making false representations or failing to disclose material facts, not for inadvertent non-compliance.[27] As noted above, *see supra* I.D.1, Plaintiffs do not contend that they plan to act

[26] *See, e.g., Mobile Telecomm. Tech. v. T-Mobile USA*, 78 F. Supp. 3d 634, 661 (E.D. Tex. 2015) (footnoted argument "rejected as not adequately presented or supported").

[27] The potential availability of a civil enforcement action for enforcement of the reporting requirement, 29 U.S.C. § 440, does not change this calculus, as Plaintiffs would not face irreparable harm from an enforcement action seeking to require them to comply with the requirement unless Plaintiffs could show that compliance itself would irreparably harm Plaintiffs – which Plaintiffs have failed to show.

with the specific intent to circumvent the Act's reporting requirements or knowingly to make any false statements. And though "a federal lawsuit can sometimes proceed on the basis of a merely threatened prosecution," "adjudicating whether federal law would allow an enforcement action here would require [the Court] to determine the legality of [federal] action in hypothetical situations." *Google, Inc. v. Hood*, __ F.3d __, No. 15-60205, 2016 WL 1397765, at *11 (5th Cir. Apr. 8, 2016) (citation, internal punctuation, and footnote omitted). That is not sufficient to show irreparable harm. *See id.* (reversing issuance of preliminary injunctive relief where "neither the issuance of [a] non-self-executing administrative subpoena nor the possibility of some future enforcement action created an imminent threat of irreparable injury ripe for adjudication").

Nor does Plaintiffs' bare assertion that the Rule will chill their First Amendment rights, offered with no specifics or supporting evidence, demonstrate that Plaintiffs face a significant threat of imminent, irreparable harm. While "the loss of First Amendment freedoms, for even minimal periods of time, unquestionably constitutes irreparable injury," nevertheless, "[a] preliminary injunction is not appropriate . . . unless the party seeking it can demonstrate that First Amendment interests are either threatened or in fact being impaired at the time relief is sought." *Google*, __ F.3d __, 2016 WL 1397765, at *11 (citations and internal punctuation omitted). Plaintiffs fail to identify any action they wish to take or anything other than speculation in claiming that they face First Amendment harm. Because "invocation of the First Amendment cannot substitute for the presence of an imminent, non-speculative irreparable injury," *id.*, and Plaintiffs fail to satisfy their burden of demonstrating a significant threat of imminent irreparable harm.[28]

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[28] The cases relied on by Plaintiffs do not alter this conclusion. *Henry v. Lake Charles Am. Press*, 566 F.3d 164 (5th Cir. 2009), involves the applicability of the collateral-order doctrine, not preliminary injunctive relief. And though a

III. The Balance of Harms and Public Interest Do Not Favor Entry of a Preliminary Injunction.

Though Plaintiffs also possess the burden on both the balance-of-harms and public-interest elements of preliminary injunctive relief, Plaintiffs present nothing more than *pro forma* statements that fail to satisfy that burden. Furthermore, where, as here, an injunction is sought against a regulation promulgated by a federal agency, there is "inherent harm to an agency in preventing it from enforcing regulations that Congress found it in the public interest to direct that agency to develop and enforce." *Cornish v. Dudas*, 540 F. Supp. 2d 61, 65 (D.D.C. 2008); *accord Nat'l Propane Gas Ass'n v. DHS*, 534 F. Supp. 2d 16 (D.D.C. 2008); *Hunter v. FERC*, 527 F. Supp. 2d 9, 18 (D.D.C. 2008) ("Given . . . the harm that issuing an injunction would cause to [an agency's] enforcement authority, the Court finds that the public interest would not be served by issuing an injunction at this time."). Moreover, the public interest would not be served by entry of a preliminary injunction enjoining a rule that seeks to bring greater transparency to attempts to influence employees' decisions about whether to organize and bargain collectively. As in other aspects of public life such as campaign finance or lobbying, Congress has required the public to be provided with sufficient information to enable well-informed choices to be made. Here, Labor has issued a rule tailored to the Act's requirement that persuader activity be disclosed and that supports the overall purpose of the Act. The agency's mission, and the public interest, would be thwarted if Plaintiffs' request for a preliminary injunction were granted.

CONCLUSION

For the foregoing reasons, Defendants respectfully request that the Court deny Plaintiffs' motion for a preliminary injunction.

"chilling effect on free speech" may be "created by a bad faith prosecution," *Wilson v. Thompson*, 593 F.2d 1375, 1383 (5th Cir. 1979), no plaintiff here alleges that it (or any of its members) is or is likely to be the subject of any criminal prosecution, much less a bad-faith prosecution.

Dated: May 17, 2016

Respectfully submitted,

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CERTIFICATE OF SERVICE

On May 17, 2016, I electronically submitted the foregoing document with the clerk of court for the U.S. District Court, Northern District of Texas, using the electronic case filing system of the court. I hereby certify that I have served all counsel and/or pro se parties of record electronically or by another manner authorized by Federal Rule of Civil Procedure 5(b)(2).

/s/ Daniel Riess
Daniel Riess