IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MINNESOTA

LABNET INC. D/B/A WORKLAW® NETWORK, et al.,

PLAINTIFFS,

v.

UNITED STATES DEPARTMENT OF LABOR, et al.,

DEFENDANTS.

Case No. 0:16-cv-00844-PJS-JSM

Judge Patrick Schiltz

BRIEF AMICUS CURIAE OF THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA IN SUPPORT OF PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT

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Plaintiffs allege that DOL's new rule is illegal because it is premised on an incorrect interpretation of the statutory term "advice." In its Preliminary Injunction ("PI") Order, the Court held that "Plaintiffs have a strong likelihood of success on their claim that the new rule conflicts with the plain language of the statute." PI Order, Dkt. No. 61, at 18. But the Court subsequently issued an order expressing its tentative view that the rule was not *facially* invalid because it had valid applications. Dkt. #64. The Court solicited briefing on this issue. *Id.*

In this brief, the Chamber of Commerce of the United States of America (the "Chamber")[1] argues that DOL's rule should be set aside under 5 U.S.C. § 706. DOL's rule must be set aside because, on its face, it requires an incorrect legal standard to be used in every application of the rule. The Court's PI Order posited that, in some cases, DOL's rule might be applied to activities that *could* be considered non-advice under a reasonable interpretation of "advice." But DOL did not itself offer a reasonable interpretation of "advice." Accordingly, although the DOL might be able to come up with a narrowed interpretation of "advice," upholding the rule on the basis of an interpretation that DOL never offered would violate the *Chenery* doctrine.

I. The Persuader Rule Is Facially Invalid Because It Results In The Application of an Incorrect Legal Standard in Every Case.

DOL's new rule rests on an incorrect interpretation of the LMRDA. The rule is facially invalid because every time DOL enforces its new rule, it will be applying that incorrect interpretation. The Supreme Court has held that facial invalidation is

[1] The Chamber stated its interest in this litigation in its previously filed amicus brief, Dkt. #36, as well as in its letter seeking permission to file this amicus brief.

appropriate where an agency adopts a rule that systematically requires the application of the wrong legal standard, and that is precisely what DOL's rule requires here.

As recounted in the PI Order, the LMRDA requires the reporting of so-called "persuader activity," but includes an exception for "advice" to an employer. *See* PI Order, at 3-4. In its rule interpreting those provisions, DOL concluded that "persuader activity" and "advice" are mutually exclusive categories. Thus, according to DOL, in assessing whether an activity is reportable, the *sole* inquiry is whether it is "persuader activity." If it is, that activity is automatically reportable, because the very fact that it is "persuader activity" excludes the possibility that it is "advice." *Id.* at 8.

In its PI Order, the Court held that DOL's test for distinguishing reportable from non-reportable activities is incorrect, because the categories of "persuader activity" and "advice" overlap. Thus, under any reasonable interpretation of the statute, the fact that activity is "persuader activity" is *not* sufficient to establish that it is non-advice. *Id.* at 14-18.

Thus, DOL's new rule requires employers to distinguish between reportable and non-reportable activity using the wrong test—in every single case. *Whenever* an employer decides whether to report activities, it will be forced to apply DOL's categorical rule that persuader activities are invariably non-advice. And *whenever* the agency initiates an enforcement action, it will analyze the employer's liability under that improper categorical rule. Because DOL's rule systematically requires the application of an incorrect test, the rule is facially invalid.

Supreme Court precedent confirms that when an agency enacts a rule that systematically requires application of an incorrect test, the rule is facially invalid. In *Sullivan v. Zebley*, 493 U.S. 521 (1990), the Court addressed a facial challenge to the government's method of determining whether a child is disabled and therefore eligible for social security benefits. *Id.* at 523. The statute at issue stated that a child could obtain benefits if he suffered from an impairment of "comparable severity" to an impairment that would entitle an adult to benefits. *Id.* at 529. Under the Secretary's implementing regulation, any adult or child with a disability on a specified list of impairments could obtain disability benefits; but whereas adults who did not suffer from a listed impairment could still prove their entitlement to benefits on a case-by-case benefits, children could not. *Id.* at 529-31.

In light of that disparity, the Court held that "[t]he child-disability regulations are simply inconsistent with the statutory standard of 'comparable severity.'" *Id.* at 536. Pertinent here, the Court held that the regulations were *facially* invalid, even though many children that would be denied benefits under the Secretary's regulations would also be denied benefits under a standard that complied with the statute. The Court rejected the Secretary's argument that a child could "make their case before the Secretary, and take the case to court if their claims are rejected." *Id.* at 536 n.18 (quotation marks omitted). It stated:

> We fail to see why each child denied benefits because his impairment falls within the several categories of impairments that meet the statutory standard but do not qualify under the Secretary's listings-only approach should be compelled to raise a separate, as-applied challenge to the regulations, or

> why a facial challenge is not a proper response to the systemic disparity between the statutory standard and the Secretary's approach to child-disability claims.

Id. *Sullivan* is on all fours with this case. As in *Sullivan*, there is a "systemic disparity between the statutory standard" and DOL's interpretation. DOL's rule is therefore facially invalid.

Justice Scalia has stated this point colorfully:

> Suppose a statute that prohibits "premeditated killing of a human being," and an implementing regulation that prohibits "killing a human being." A facial challenge to the regulation would not be rejected on the ground that, after all, it *could* be applied to a killing that happened to be premeditated. It *could not* be applied to such a killing, because it does not require the factfinder to find premeditation, as the statute requires.

Babbitt v. Sweet Home Chapter of Communities for a Great Oregon, 515 U.S. 687, 731 (1995) (Scalia, J., dissenting). Here, as in Justice Scalia's hypothetical, DOL's regulation *could not* be applied in any case, because it wrongfully interprets the statutory term "advice" *whenever* it is applied.

II. The Chamber's Analysis Comports with *Salerno* Because Under *Chenery*, Agency Action Based on Incorrect Reasoning is Always Invalid

In its recent order, the Court suggested it may be powerless to grant facial relief under the *Salerno* principle: that a rule or statute should not be facially invalidated unless "no set of circumstances exist" in which it would be valid. Dkt. #64; *see also United States v. Salerno*, 481 U.S. 739, 745 (1987). The Court referred back to its determination in the PI Order that "the rule plainly has multiple valid applications." PI Order, at 33.

But the Court's PI Order did not suggest that there any circumstances in which the *criteria* applied by DOL are valid. PI Order, at 33. Rather, it stated:

> DOL has identified thirteen types of conduct to which the rule applies, only some of which seem to require the reporting of advice that is exempt under § 203(c). An order staying enforcement of the entire rule would therefore prevent DOL from requiring disclosure of information that it has the right (indeed, a statutory mandate) to obtain.

Id. Thus, the Court concluded that the new rule would be applied to a class of persuader activities which DOL is statutorily authorized to regulate under § 203(c)—that is, a class of persuader activities that in fact do not constitute "advice" under a reasonable interpretation of that term. The court concluded that those "valid applications" weighed against granting preliminary injunctive relief.

At the summary judgment stage, however, a ruling declining to vacate the rule based on those purportedly "valid applications" would be inconsistent with *Sullivan*. In *Sullivan*, the government contended that because *some* children who were denied benefits under the agency's incorrect rule would also be denied benefits under the correct test, the rule should be subject to as-applied rather than facial challenges. The district court granted summary judgment for the government on that basis, 493 U.S. at 527, but the Court rejected that argument, holding that the systemic disparity between the rule and the statute rendered it facially invalid. So too here.

The *Sullivan* principle is not an exception to *Salerno*; it is an application of *Salerno*. *Salerno* requires a rule to be upheld if there are any valid applications, but in this case, as in *Sullivan*, there *are* no valid applications of DOL's rule. If DOL applies its

incorrect interpretation of "advice" to a class of activities that could theoretically have been regulated under a correct interpretation of "advice," it is still engaging in unreasonable agency action.

The reason is *Chenery*. Under the *Chenery* doctrine, "a court may uphold agency action only on the grounds that the agency invoked when it took the action." *Michigan v. EPA*, 135 S. Ct. 2699, 2710 (2015) (citing *SEC v. Chenery Corp.*, 318 U.S. 87 (1943)). Thus, in deciding whether an application of a rule is valid, the Court must look to the legal standard the agency actually applied, not a different legal standard the agency hypothetically could have used.

As applied here, if DOL enforces its new rule with respect to a category of activities that happen in fact to be non-advice under a reasonable interpretation of the term "advice," it would still be engaging in illegal agency action which would be vacated in court. That is because DOL would be applying the test it announced in its new rule, which is an incorrect test—and *Chenery* precludes the court from considering whether the agency might have achieved the same result based on an alternative test.

The Supreme Court took this position in *NLRB v. Kentucky River Communicate Care, Inc.*, 532 U.S. 706 (2001). In that case, the NLRB had issued an order holding that nurses were not "supervisors" under the NLRA, based on its statutory interpretation that employees who exercise "ordinary professional or technical judgment in directing less-skilled employees to deliver services in accordance with employer-specified standards" were categorically not "supervisors." *Id.* at 713 (quotation marks omitted). The Court held that this interpretation was impermissible because it "insert[s] a startling categorical

exclusion into statutory text that does not suggest its existence." *Id.* at 714. Pertinent here, it further held that "the Board's error in interpreting [the NLRA] precludes us from enforcing its order," because under *Chenery*, "[w]e may not enforce the Board's order by applying a legal standard the Board did not adopt." *Id.* at 721. Thus, whether the nurses were *in fact* "supervisors" was irrelevant; because the agency applied an improper categorical rule, its order was invalid. Likewise here, even in cases where persuader activities are *in fact* non-advice, the application of DOL's improper categorical rule would suffice to render enforcement of the rule invalid.

Another way to analyze the issue is in terms of severability. The *Salerno* test ordinarily requires valid applications to be severed from invalid applications. But in this case, severability cannot occur because the agency did not offer two sets of justifications, one for the invalid applications and one for the valid applications; its faulty categorical reasoning permeated the new rule in its entirety. Thus, if that reasoning is incorrect, *Chenery* requires the rule to be invalidated with respect to all of its applications.

The *Chenery* doctrine applies only when a court is reviewing "an exercise of judgment in an area which Congress has entrusted to the agency." 318 U.S. at 94. But DOL's new rule meets that description. The D.C. Circuit previously found DOL's prior interpretation, in which only direct communications to employees were reportable activities, to be permissible—and DOL's rulemaking concedes that it was. *Int'l Union v. Dole*, 869 F.2d 616, 620 (D.C. Cir. 1989) (R.B. Ginsburg, J.); 81 Fed. Reg. 15,924, 15,941 (2016). Thus, DOL's rule is subject to *Chenery*.

This case implicates one of the central concerns of the *Chenery* doctrine—that courts should not engage in rulemaking when that task lies with the agency. Indeed, it is far from clear that DOL, if it were required to go back to the drawing board, would exercise its discretion to expand its regulatory authority beyond the scope of its prior rule. The PI Order noted that *some* persuader activities that were previously unregulated could reasonably be considered to be non-advice, and perhaps that is so. But the line between advice and non-advice is obscure and will lead to difficult questions about whether "persuader" activities are advice in particular cases, not to mention the prospect of content-based speech distinctions that are anathema to the First Amendment.

In its new rule, DOL attempted to avoid those difficult questions by declaring that persuader activities were invariably non-advice. But the Court's order rejected that statutory interpretation. Thus, the Court held that *if* the agency seeks to regulate persuader activities that are not direct communications to employees, *then* the agency will have no choice but to confront the difficult question of distinguishing advice from non-advice for the activities in that category. It is not clear that the agency will want to undertake this challenge. It would certainly be reasonable for the agency to return to its former interpretation of the LMRDA, which is easily administrable, has been in force for decades, and has already withstood judicial review. Under *Chenery*, that is a decision for the agency. Until the agency makes that decision, any enforcement action it initiates under its incorrect criteria is invalid.

One additional point follows from *Chenery*: if the Court vacates DOL's rule, such an order would not "prevent DOL from requiring disclosure of information that it has the

right (indeed, a statutory mandate) to obtain." PI Order at 33. Rather, such an order would prevent DOL from requiring disclosure only *under the criteria set forth in DOL's order*. DOL would be free to revert to its prior interpretation of "advice" or adopt a different interpretation, under which it could require disclosure of additional reportable activities, even if those activities overlapped with the thirteen new categories of reportable activities identified in the new rule. That result follows directly from *Chenery*: because the court's substantive authority is limited to examining the agency's reasoning, its remedial authority is limited to preventing agency action based on that reasoning. *FEC v. Akins*, 524 U.S. 11, 23 (1998) ("If a reviewing court agrees that the agency misinterpreted the law, it will set aside the agency's action and remand the case—even though the agency … might later, in the exercise of its lawful discretion, reach the same result for a different reason.") (citing *Chenery*). Thus, the Court need not be concerned that vacating the rule would permanently bar the agency from exercising its regulatory authority over persuader activities that could reasonably be considered to be non-advice.

III. Under the Chamber's Analysis, Regulations Would Be Facially Invalidated Only in a Limited Category of Cases.

The Chamber does not suggest that regulations that violate a statute should *always* be facially invalidated. For instance, a regulation might be challenged not on the ground that it misinterprets a statute, but instead on the ground that in some class of cases, the application of the regulation will result in a specific statutory violation. In such a case, *Salerno* would require a reviewing court to deny a facial challenge, because the regulation would indeed be valid in most of its applications.

Reno v. Flores, 507 U.S. 292 (1993), also written by Justice Scalia, provides an example of such a case. That case presented a facial challenge to a regulation, which required the detention of undocumented alien juveniles who were not accompanied by related adults. The juveniles argued that the regulation was invalid, because both the Constitution and federal immigration law required the government to release unaccompanied children into the custody of unrelated "responsible adults." *Id.* at 294.

Applying the *Salerno* standard, *id.* at 301, the Court rejected the aliens' challenges. The Court held that the government's detention criteria were *generally* valid; that is, that under the Constitution and federal immigration law, the government could categorically refuse to release unaccompanied juvenile aliens into the custody of unrelated adults, and there was no statutory or constitutional requirement for "particularization and individuation" in the government's detention decisions. *Id.* at 314. It then rejected the aliens' argument that the regulation was invalid because it could lead the government "to hold the juvenile in detention indefinitely," in violation of applicable statutory requirements, *in specific cases*, holding that there was no proof that "excessive delay" would result in the "typical case." *Id.* at 314-15 & n.10.

Flores establishes that if the criteria applied by the agency generally reflect a correct interpretation of the statute, but only particular applications of the regulation may result in statutory violations, a facial challenge is inappropriate. Thus, *Flores* is a straightforward application of *Salerno*: if a rule has valid applications, it should not be facially invalidated. *Accord Babbitt*, 515 U.S. at 699-700, 703-04 (declining to invalidate

regulation because, in the majority's view, agency's interpretation reflected a reasonable interpretation of the statute under some factual circumstances).

Justice Scalia's analysis in *Flores*—that facial challenges to regulations are subject to a *Salerno* analysis—is perfectly compatible with Justice Scalia's analysis in *Babbitt*—that rules that misinterpret a governing statute are facially invalid. That is because when a rule misinterprets a governing statute, there are no valid applications of the rule, and *Salerno* therefore requires the rule to be invalidated. Here, because DOL's rule requires the application of a legal framework, which systematically deviates from statutory requirements, it should be facially invalidated.[2]

CONCLUSION

For the foregoing reasons, the Court should set aside DOL's final rule and remand to the agency.

[2] *See also Salerno v. Chevron: What to Do About Statutory Challenges*, 55 Admin. L. Rev. 427, 464 (2003) (adopting a similar analysis of the relationship between *Chevron* and *Salerno*).

Dated: September 16, 2016

Respectfully submitted,

By: /s/ Aaron D. Van Oort

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CERTIFICATE OF SERVICE

I hereby certify that on September 16, 2016, I filed this document with the Clerk of Court through the Court's CM/ECF system, which will serve a true and correct copy of the foregoing by electronic notification to all other parties through their counsel of record.

/s/ Aaron D. Van Oort