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

ASSOCIATED BUILDERS AND CONTRACTORS OF ARKANSAS; ASSOCIATED BUILDERS AND CONTRACTORS, INC.; ARKANSAS STATE CHAMBER OF COMMERCE/ASSOCIATED INDUSTRIES OF ARKANSAS; THE ARKANSAS HOSPITALITY ASSOCIATION; COALITION FOR A DEMOCRATIC WORKPLACE; THE NATIONAL ASSOCIATION OF MANUFACTURERS; and **CROSS, GUNTER, WITHERSPOON & GALCHUS, P.C.,** on behalf of themselves and their membership and clients

PLAINTIFFS,

v.

THOMAS E. PEREZ, in his official capacity as Secretary of Labor, U.S. Department of Labor, **MICHAEL J. HAYES,** in his official capacity as Director, Office of Labor-Management Standards, U.S. Department of Labor, and the **U.S. DEPARTMENT OF LABOR**

DEFENDANTS.

Case No. 4:16CV169-KGB

This case assigned to District Judge Baker
and to Magistrate Judge Ray

COMPLAINT FOR INJUNCTIVE AND DECLARATORY RELIEF

Plaintiffs Associated Builders and Contractors of Arkansas ("ABC Arkansas"), Associated Builders and Contractors, Inc. ("ABC National") (collectively referred to as "ABC"), Arkansas State Chamber of Commerce/Associated Industries of Arkansas (the "Chamber/AIA"), The Arkansas Hospitality Association ("AHA"), the Coalition for a Democratic Workplace ("CDW"), The National Association of Manufacturers ("NAM"), and the law firm of Cross,

Gunter, Witherspoon & Galchus, P.C. ("Cross Gunter") (collectively referred to as "Plaintiffs"), by and through their undersigned attorneys, bring this Complaint against the above-named Defendants, their employees, agents, delegates, and successors in office, and in support thereof allege the following:

I. PRELIMINARY STATEMENT

1. Plaintiffs bring this action seeking declaratory and injunctive relief on behalf of themselves and their clients under the United States Constitution, the Labor Management Reporting and Disclosure Act (LMRDA), and the Administrative Procedure Act, to have declared unlawful and set aside the Final Rule promulgated by the United States Department of Labor ("DOL") on March 24, 2016 entitled "Labor-Management Reporting and Disclosure Act, Interpretation of the Advice Exemption," (hereafter the "new Rule" or simply "the Rule"), 81 Fed. Reg. 15924, which, unless enjoined by this Court, will impair Plaintiffs' constitutional and statutory rights. The new Rule, unless enjoined, will go into effect on April 25, 2016. A copy of the Rule is attached hereto as Exhibit A.

2. The new Rule purports to revise DOL's interpretation of the "advice" exemption set forth in Section 203(c) of the Labor-Management Reporting and Disclosure Act of 1959 ("LMRDA"), 29 U.S.C. § 433(c), by limiting the definition of what activities constitute "advice" under the exemption, thus expanding those circumstances under which public reporting is required of so-called "persuader" agreements, in a manner exceeding DOL's statutory authority. In addition, the Rule requires more detailed reporting of persuader agreements between employers and consultants in a manner that is inconsistent with the LMRDA.

3. As explained further below, DOL's new Rule upsets more than 50 years of settled law regarding the meaning of "advice" and departs from the plain language and stated intent of

Congress to broadly exempt such advice from the reporting requirements of the LMRDA. The challenged Rule infringes on the right of employers (including the Plaintiff associations and many more employers represented by them) to communicate with and receive advice from expert advisors on labor relations issues, including trade associations, attorneys, and other third party consultants. The challenged Rule equally infringes on the right of those who seek to give labor relations advice to employers, including the Plaintiff associations, attorneys, and other third party consultants (who are also included among and are represented by the Plaintiffs), to render such advice without fear of criminal penalties for failing to file the reports newly required by the Rule.

4. The Rule further violates Plaintiffs' and their members' First Amendment rights of Freedom of Speech and Freedom of Association. The new Rule is also void for vagueness and is, therefore, prohibited by the Fifth Amendment's due process clause. The Rule further infringes on the confidentiality of Plaintiffs' attorney-client communications and impermissibly invades the attorney-client relationship, which is supposed to be protected by Section 203(c) and Section 204 of the LMRDA. Finally, DOL has failed to properly acknowledge the significant regulatory burdens associated with the challenged Rule and has violated the laws dealing with such burdens. In sum, the new Rule is arbitrary and capricious, an abuse of agency discretion, and in violation of law, which must be set aside. Preliminary and permanent injunctive relief is necessary to protect the constitutional rights of Plaintiffs and their members and clients.

II. PARTIES

5. Plaintiff ABC Arkansas, which is located at 22 Collins Industrial Place, North Little Rock, AR 72113, is a trade association representing hundreds of construction contractors and related employers in Arkansas who share the view that construction work should be awarded and performed based upon merit, regardless of labor affiliation. ABC is affiliated with the

national trade association, Plaintiff ABC National, located at 440 1st St., N.W., Washington, D.C. 20001, which represents nearly 21,000 construction industry employers sharing the same merit shop philosophy around the country.

6. ABC Arkansas and ABC National have for many years advised their members with regard to labor relations issues, including advising members as to lawful responses to union organizing efforts under the National Labor Relations Act ("NLRA"). These entities also include in their membership many law firms, human resource consulting firms, labor relations consulting firms, public relations consulting firms, and benefits consulting firms who regularly advise employers on labor relations matters, including advice on how such employers can best communicate with their employees on the subject of union organizing. The advice regularly offered by these firms has previously been considered exempt from reporting under the LMRDA, but the new Rule now appears to require most if not all such advice to be publically reported as "indirect" persuader activity. ABC Arkansas and ABC National bring this action on behalf of their members and themselves as further discussed below.

7. Plaintiffs Arkansas Chamber/AIA, located at 1200 West Capitol Avenue, Little Rock, AR 72201, are the leading voice for business at the State Capitol and serve as the primary business advocate on all issues affecting Arkansas employers. Their mission is to promote a pro-business, free-enterprise agenda and prevent anti-business legislation, regulations, and rules. The Arkansas Chamber/AIA have likewise advised their members with regard to labor relations issues, including lawful responses to union organizing efforts. The Arkansas Chamber/AIA also include in their membership many law firms and consulting firms of the types referenced above who regularly advise employers on labor relations matters in a manner previously (but no longer) treated as exempt from reporting under the LMRDA. The Arkansas Chamber/AIA bring this

action on behalf of themselves and their members.

8. Plaintiff CDW, located at 440 1st St., N.W., Washington, DC 20001, represents millions of businesses of all sizes from every industry and every region of the country. The CDW's membership includes hundreds of employer associations as well as individual employers and other organizations. CDW brings this action on behalf of itself and its clients.

9. Plaintiff AHA, located at 603 S. Pulaski Street, Little Rock, AR 72201, represents numerous Arkansas employers and trade associations in the hospitality industry, including hotels, lodges, resorts, restaurants, and bars. AHA's membership includes hundreds of employers, law firms and consulting firms, who regularly advise employers on labor relations matters in a manner previously (but no longer) treated as exempt from reporting under the LMRDA. AHA brings this action on behalf of itself and its clients.

10. Plaintiff The NAM, located at 733 10th Street NW, Suite 700, Washington, DC 20001, is the leading advocate for the U.S. manufacturing community. The NAM represents thousands of businesses of all sizes from every industry and every region of the country. The NAM's membership includes several employer associations as well as individual employers. The NAM and its members regularly advise employers on labor relations matters. The NAM brings this action on behalf of itself and its members.

11. As a result of the new Rule, Plaintiffs ABC, the Arkansas Chamber/AIA, AHA, CDW, NAM, and their employer and employer-advisor members will be irreparably harmed in their ability to speak out on labor relations issues, which includes both receiving and providing labor relations advice necessary for employer members to communicate lawfully and effectively with their employees. Such harm will be caused by the unavoidable risk of being compelled to file burdensome and intrusive public reports regarding the nature and cost of the advice obtained,

under threat of criminal penalties imposed by the new Rule. Plaintiffs and their employer and advisor members will also be irreparably harmed by being compelled to file the reports themselves stating (inaccurately) that they have requested or engaged in persuader activity, as opposed to lawful advice.

12. In addition to having standing in their own right, Plaintiffs ABC, Arkansas Chamber/AIA, AHA, CDW, and NAM, as trade associations representing thousands of employer and consultant members, have standing to pursue this action on behalf of their members under the three-part test of *Hunt v. Washington State Apple Advertising Commission*, 432 U.S. 333, 343 (1977), because (1) Plaintiffs' members would otherwise have standing to sue in their own right; (2) the interests at stake in this case are germane to Plaintiffs' organizational purposes; and (3) neither the claims asserted nor the relief requested requires the participation of Plaintiffs' individual members.

13. Plaintiff Cross Gunter, located at 500 President Clinton Avenue, Suite 200, Little Rock, AR 72201, is a law firm representing many employers in a variety of industries. Cross Gunter is regularly called upon to give advice to its clients on labor relations matters, including advice regarding lawful responses to union organizing attempts. Cross Gunter does not and never has engaged in persuader activity as that term has been consistently enforced over the last 50 years. However, Cross Gunter does provide lawful advice to employers of the types that the new Rule has improperly identified for the first time as potentially "persuader" activity. As a result of the challenged Rule, Cross Gunter will be irreparably harmed in its ability to provide such lawful labor relations advice to employer clients, due to the unavoidable risk of being compelled to file burdensome and intrusive public reports regarding the nature and cost of the advice provided. In addition, Cross Gunter will be forced by the new Rule to breach its ethical duty of confidentiality

to clients who seek advice of the type described above and will be compelled to file reports inaccurately stating that they have engaged in persuader activity, as opposed to lawful advice. Cross Gunter brings this action on behalf of itself and its clients.

14. Defendant Thomas E. Perez is the U.S. Secretary of Labor with his office located at 200 Constitution Avenue, Washington, DC 20210. Pursuant to 5 U.S.C. § 703, he is being sued in his official capacity as head of DOL, along with DOL itself, which promulgated the challenged Rule. The Secretary delegated his authority under the LMRDA to Defendant Hayes, who shares the same business address, to promulgate the Rule as DOL's Director of the Office of Labor-Management Standards. *See* 81 Fed. Reg. at 15924, *citing* Secretary's Order 8-2009, 74 FR 58835 (Nov. 13, 2009). Defendants are sued in their official capacity.

III. JURISDICTION AND VENUE

15. This Court has federal question jurisdiction over this action pursuant to 28 U.S.C. § 1331. This action alleges violations of the provisions of the LMRDA, 29 U.S.C. § 433, the Administrative Procedure Act, 5 U.S.C. § 703 *et seq.* (APA), and the First and Fifth Amendments to the U.S. Constitution. The Court is authorized to award declaratory and injunctive relief under the APA, 5 U.S.C. §§ 701-706, and the Declaratory Judgment Act, 28 U.S.C. §§ 2201-2202, by Rules 57 and 65 of the Federal Rules of Civil Procedure, and by the general legal and equitable powers of this Court.

16. Venue is proper in this district under 28 U.S.C. § 1391(e) because several of the Plaintiffs are based in Little Rock, Arkansas, within the judicial district of this Court.

IV. FACTUAL ALLEGATIONS

A. LMRDA Reporting Requirements Prior to the New Rule

17. Since 1959, Section 203(a) of the LMRDA has required employers to disclose: "Any agreement or arrangement with a labor relations consultant or any 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 . . . ." 29 U.S.C. § 433(a). The Act further requires employers to disclose any payments made by them pursuant to such agreements or arrangements.

18. To the same effect is Section 203(b), 29 U.S.C. § 433(b), which requires consultants who engage in the above described "persuader" activity to file reports as well. These include both a thirty-day report stating the terms and conditions of the persuader agreement or arrangement, and an annual report of receipts and disbursements of any kind "on account of labor relations advice and services."

19. Pursuant to the foregoing provisions, DOL has for more than 50 years required employers to report persuader agreements or arrangements on Form LM-10 within 90 days of the end of the employer's fiscal year in which the agreement or arrangement was entered into. DOL has further required consultants to file a Form LM-20 "Agreement and Activities Report" within 30 days of entering into a reportable agreement or arrangement. DOL has also required consultants who file the Form LM-20 to file an additional, annual Form LM-21 "Receipts and Disbursements Report," identifying all labor relations advice or services provided to employers within 90 days of the end of the persuader's fiscal year.

20. When Congress enacted the LMRDA, it expressly included a broad exemption

from reporting "advice" in Section 203(c), 29 U.S.C. § 433(c), as follows:

> Nothing in this section shall be construed to require any employer or other person to file a report covering the services of such person by reason of his giving or agreeing to give advice to such employer or representing or agreeing to represent such employer before any court, administrative agency, or tribunal of arbitration or engaging or agreeing to engage in collective bargaining on behalf of such employer with respect to wages, hours, or other terms or conditions of employment or the negotiation of an agreement or any question arising thereunder.

21. Congress further limited the scope of the reporting requirements of Section 203 by including subsection (f), 29 U.S.C. § 433(f), which states that "nothing contained in this section shall be construed as an amendment to, or modification of the rights protected by, section 8(c) of the National Labor Relations Act." Section 8(c), 29 U.S.C. § 158(c) of the NLRA, in turn, protects the right of employers to communicate freely to their employees on the subject of union organizing. The U.S. Supreme Court has held that Section 8(c) precludes all regulation of non-coercive speech about unionization. *Chamber of Commerce v. Brown,* 554 U.S. 60, 67–68 (2008).

22. Finally, Congress added an additional exemption from reporting specifically for lawyers in Section 204 of the LMRDA, 29 U.S.C. § 434, as follows:

> Nothing contained in this chapter shall be construed to require an attorney who is a member in good standing of the bar of any State, to include in any report required to be filed pursuant to the provisions of this chapter any information which was lawfully communicated to such attorney by any of his clients in the course of a legitimate attorney-client relationship.

23. It is clear from the plain language of these provisions and from the legislative history of their enactment that Congress intended to grant broad scope to the term "advice." The Congressional Conference Report stated as much, as follows: "Subsection (c) of section 203 . . . grants a broad exemption from the [reporting] requirements of the section with respect to the

giving of advice." H.R. CONF. REP. No. 1147, 86th Cong., 1st Sess. 33 (1959), *reprinted in* 1 National Labor Relations Board, *Legislative History of the Labor-Management Reporting and Disclosure Act* 937, 1959 U.S. CODE CONG. & ADMIN. NEWS 2503, 2505.

24. The U.S. Court of Appeals for the Eighth Circuit confirmed Congress's intent to "broadly" exempt advice from the LMRDA's reporting requirements in the case of *Donovan v. The Rose Law Firm*, 768 F.2d 964, 974 (8th Cir. 1985). The Eighth Circuit specifically rejected the view expressed by some other circuit courts of appeal, and by DOL in the new Rule, that the advice exemption merely "clarifies" or makes explicit what is already implicit in Section 203(b). *Id.* In addition, the Eighth Circuit declared: "[A]n employer who has done no more than request labor relations advice from an attorney has no obligation under the LMRDA to file a report." *Id.*

25. For the past five decades, the DOL has consistently adhered to the foregoing statutory mandate by exempting expert advice from the LMRDA's reporting requirements. As stated in 1962 by Solicitor of Labor Charles Donahue: "Even when this advice is embedded in a speech or statement prepared by the advisor to persuade, it is nevertheless advice and must be treated as advice."

26. To the same effect is Section 265.005 of the DOL's longstanding LMRDA Interpretative Manual, which has for many decades stated the following with regard to the application of the advice exemption to circumstances where the consultant prepares an entire speech or document for the employer:

> We have concluded that such an activity can reasonably be regarded as a form of written advice where it is carried out as part of a bona fide undertaking which contemplates the furnishing of advice to an employer. Consequently, such activity in itself will not ordinarily require reporting unless there is some indication that the underlying motive is not to advise the employer. In a situation where the employer is free to accept or reject the written material prepared for him and therewith the employer, the fact

that the middleman drafts the material in its entirety will not in itself generally be sufficient to require a report.

27. The U.S. Court of Appeals for the District of Columbia Circuit in *UAW v. Dole*, 869 F. 2d 616, 619–20 (D.C. Cir. 1989), held that the foregoing longstanding interpretation of the advice exemption was reasonable, and Congress has repeatedly reenacted the LMRDA without taking any action over the past 50 years to disturb DOL's previous interpretation.

B. DOL'S New Rule

28. Notwithstanding the foregoing statutory mandate and judicial authority, on June 21, 2011, DOL published in the Federal Register a Notice of Proposed Rulemaking, entitled "Labor-Management Reporting and Disclosure Act, Interpretation of the 'Advice' Exemption." 76 Fed. Reg. 36191. Following public comment, including oppositions filed by many of the Plaintiffs and/or their affiliated associations and members, DOL published a modified version of the original proposal as the Final Rule that is being challenged in this Complaint.

29. In the new Rule, DOL defines "advice" as meaning "an oral or written recommendation regarding a decision or a course of conduct" 81 Fed. Reg. at 15947. But the Rule then narrows this definition by stating: "An employer's ability to ''accept or reject'' materials provided, or other actions undertaken, by a consultant, common to the usual relationship between an employer and a consultant and central to the prior interpretation's narrow scope of reportable activity, no longer shields indirect persuader activities from disclosure." *Id.* at 15926.

30. The Rule further states: "**Note:** If any reportable activities are undertaken, or agreed to be undertaken, pursuant to the agreement or arrangement, the exemptions do not apply and information must be reported for the entire agreement or arrangement." *Id.* at 15927-28.

Similarly, the Rule states that "if the consultant engages in both advice and persuader activities [newly defined to include previously exempt advice], the entire agreement or arrangement must be reported." *Id.* at 15937. Towards this unlawful end, the Rule redefines the following non-exclusive categories of advice that have previously been found to be exempt for reporting as now constituting forms of "indirect persuasion" that will not be exempt from reporting, even if such activity consists solely of recommendations to an employer: "Planning, directing, or coordinating activities undertaken by supervisors or other employer representatives;" ... "providing-with an object to persuade – material or communications to the employer, in oral, electronic, ... or written form, for dissemination or distribution to employees;" "conducting a seminar for supervisors or other employer representatives ... if the consultant develops or assists the attending employers in developing anti-union tactics and strategies;" or "developing or implementing personnel policies or actions for the employer ... with an object to persuade employees." *Id.* at 15938. The extensive text purporting to explain these significant changes in the long settled meaning of "advice" makes clear that each of the foregoing (and additional) examples of "indirect persuasion," according to the new Rule, will be reportable even though they may consist entirely of recommendations by the advisor to the employer regarding a decision or a course of conduct, which the employer is free to accept or reject, and which only the employer implements. *Id.* and *passim.*

31. The new Rule also significantly increases the types of disclosures required of employers on Forms LM-10 and of employer advisors on Forms LM-20, forcing them to disclose new details regarding the specific nature of any alleged persuader activity. *Id.* at 16022 (new instructions to Form LM-10); and 16040 (new instruction to Form LM-20).

32. Absent injunctive relief, the stated effective date of DOL's challenged rule is

April 25, 2016, as applicable to agreements entered into on or after July 1, 2016. *Id.* at 15924. As further explained below, Plaintiffs are entitled to injunctive relief because they are likely to succeed on the merits of their claims. Plaintiffs will also be irreparably harmed by the deprivation of their rights described above if the unlawful new Rule is allowed to go into effect. The balance of hardships strongly favors the Plaintiffs, and an injunction would be in the public interest.

V. CAUSES OF ACTION

COUNT I
Exceeding Statutory Authority

33. Plaintiffs re-allege and incorporate by reference the allegations in paragraphs 1-32 as if fully set forth here.

34. The Administrative Procedure Act, 5 U.S.C. § 706(2)(C) directs reviewing courts to "hold unlawful and set aside agency action, findings, and conclusions found to be . . . in excess of statutory jurisdiction, authority, or limitations, or short of statutory right."

35. DOL's new limits on the "advice" exemption conflict with and thereby violate the plain language and legislative intent of Section 203(c) of the LMRDA and exceed DOL's statutory authority to enforce the Act. Contrary to the challenged Rule, the LMRDA protects the right of employers to obtain advice on how best to communicate with employees on the subject of unions, both orally and in writing, without either the employer or the advisor having to file any burdensome and intrusive public reports, so long as the advisor does not itself communicate with the employer's employees, and so long as the employer is free to accept or reject the advice given. The challenged Rule must therefore be held unlawful and set aside.

36. Alternatively, DOL's new limits on the "advice" exemption are not a permissible

construction of the LMRDA, because they so narrow and obfuscate the scope of the exemption as to render it useless to employers and their advisors, who Congress intended to broadly protect from the burdensome reporting requirements.

COUNT II
The Rule is Arbitrary And Capricious

37. Plaintiffs re-allege and incorporate by reference the allegations in paragraphs 1-36 as if fully set forth here.

38. The Administrative Procedure Act, 5 U.S.C. § 706(2)(A) directs reviewing courts to "hold unlawful and set aside agency action, findings, and conclusions found to be . . . arbitrary and capricious, an abuse of discretion, or otherwise not in accordance with law."

39. DOL's challenged Rule ignores or misstates the plain meaning of the term "advice," not only as evidenced by the legislative history of the LMRDA, but even by reference to the dictionary definitions of "advice" cited in the Rule itself. The new Rule's instructions to employers and advisors as to the new lines to be drawn between reportable and non-reportable activity are so vague, confusing and inconsistent as to render compliance needlessly difficult if not impossible. DOL has also failed to give an adequate explanation for reversing its 50-year interpretation of the meaning of the term "advice." Indeed, the reasons given by DOL for its action are so inadequate as to give rise to an inference of pretext, indicating that DOL's true intent is to chill employers' exercise of their rights to obtain expert advice necessary to communicate effectively with their employees on the subject of unions. In addition, it is apparent from the lengthy preamble to the Rule that DOL relied on factors that Congress did not intend for it to consider, failed adequately to consider important aspects of the problem, runs counter to the evidence before the agency, or is so implausible that it cannot be a product of agency expertise,

all in violation of the Supreme Court's tests for arbitrary and capricious rulemaking. For these reasons as well, the challenged Rule must be held unlawful and set aside.

COUNT III
The Rule Violates the First Amendment

40. Plaintiffs re-allege and incorporate by reference the allegations in paragraphs 1-39 as if fully set forth here.

41. The First Amendment of the United States Constitution prohibits the government from infringing on Plaintiffs' rights of Freedom of Speech and Association. U.S. Const. amend. I.

42. The challenged Rule infringes on Plaintiffs' rights of Freedom of Speech and Association by arbitrarily narrowing the definition of advice that will be considered exempt from burdensome public reporting under the LMRDA and by substituting a vague new definition of advice that will chill employers in obtaining information from advisors for the purpose of communicating lawfully with employees on the subject of unions. The ability of associations and other advisors to communicate with their members and clients will likewise be chilled by the challenged Rule. Additionally, DOL's modified LM-10 and LM-20 forms compel speech by requiring detailed disclosure of the services provided to employers by their advisors. The new Rule imposes a content-based restriction on Plaintiffs' First Amendment rights that is subject to strict scrutiny and must be set aside under Supreme Court holdings. The new Rule also fails the Supreme Court's and Eighth Circuit's tests for exacting scrutiny under the First Amendment. The Rule also discourages employers from exercising their rights to join and benefit from remaining members of the Plaintiff associations without having their membership disclosed to DOL and without being burdened by the newly required reports.

COUNT IV
The Rule Violates Plaintiffs' Due Process Rights (Vagueness)

43. Plaintiffs re-allege and incorporate by reference the allegations in paragraphs 1-42 as if fully set forth here.

44. The Administrative Procedure Act, 5 U.S.C. § 706(2)(B), directs reviewing courts to "hold unlawful and set aside agency action, findings, and conclusions found to be ... contrary to constitutional right, power, privilege, or immunity." The Due Process clause of the Fifth Amendment to the U.S. Constitution prohibits criminal enforcement of statutory and regulatory requirements that are unconstitutionally vague and do not give fair warning of their requirements. U.S. Const. Amend. V. The LRMDA imposes criminal sanctions on violators of the reporting requirements ranging from fines of up to $10,000 to imprisonment for up to one year. 29 U.S.C. § 439.

45. The challenged Rule fails to give a person of ordinary intelligence fair notice as to what contemplated conduct is forbidden and what is permitted under the LMRDA. Employers and their potential advisors will be left to guess at the meaning of the new reporting requirements, once DOL's longstanding "bright line" test for advice is removed. The new standard for "advice" described in the challenged Rule is so confusing and open-ended with regard to potential persuasion, including inherently indefinable "indirect" persuasion, and so narrow and closed off with regard to advice, that employers and their advisors will have no way to tell, except through the DOL's *ad hoc* enforcement process, which forms of conduct that have been considered to be advice for the past 50 years will henceforth be found to be persuader activity.

COUNT V
The Rule Violates the National Labor Relations Act

46. Plaintiffs re-allege and incorporate by reference the allegations in paragraphs 1-45 as if fully set forth here.

47. Section 203(f) of the LMRDA obligates the DOL to uphold employers' rights under Section 8(c) of the National Labor Relations Act, 29 U.S.C. § 158(c). The U.S. Supreme Court has held that Section 8(c) precludes all regulation of non-coercive speech about unionization. *Chamber of Commerce v. Brown,* 554 U.S. 60, 67-68 (2008).

48. By regulating and infringing on the ability of employers to obtain advice from attorneys, associations, and other labor relations experts, due to the chilling effect of the DOL's new restrictions on the advice exemption, the challenged Rule conflicts with Section 8(c) of the NLRA and, by extension, Section 203(f) of the LMRDA.

COUNT VI
The Rule Unlawfully Infringes Attorney-Client Confidentiality

49. Plaintiffs re-allege and incorporate by reference the allegations in paragraphs 1-48 as if fully set forth here.

50. The legal ethics requirements of Arkansas (and every other state), require attorneys to maintain the confidentiality of all information relating to representation of a client, including requests for advice and the subject matter of such requests, absent informed consent or other exemptions not applicable here. *See* ARK. R. PROF'L CONDUCT 1.6. In addition, as noted above, Section 204 of the LMRDA, 29 U.S.C. § 434, expresses Congress's intent to protect from disclosure communications made in confidence between a client seeking legal counsel and an attorney.

51. The challenged Rule significantly infringes on the attorney-client relationship by

restricting the definition of "advice" that is exempt from disclosure, by blurring the line between "advice" and reportable persuader activity, and by creating unnecessary conflicts with attorney ethics rules. The new Rule thereby needlessly interferes and purports to preempt without legal authority the state ethics laws of Arkansas and many other states. The new Rule's infringement on the attorney-client relationship and state ethics laws is exacerbated by the new LM-20 reports that are made part of the challenged Rule, which for the first time will require attorneys to reveal itemized details regarding confidential information obtained from their clients, absent injunctive relief. The new LM-20 will require Plaintiff Cross Gunter and other attorney members of the Plaintiff associations to violate their legal ethics requirements or else incur criminal penalties improperly threatened by DOL. For these reasons as well, the challenged Rule must be found unlawful and set aside.

COUNT VII
The Rule Violates Regulatory Impact Laws and Orders

52. Plaintiffs re-allege and incorporate by reference the allegations in paragraphs 1-51 as if fully set forth here.

53. The Regulatory Flexibility Act of 1960, 5 U.S.C. § 601, requires agencies to consider the impact of their regulatory proposals on small entities, analyze effective alternatives that minimize small entity impacts, and make initial analyses available for public comment. Executive Orders 13563 and 12866 require agencies to assess all costs and benefits of available regulatory alternatives. Finally, the Small Business Regulatory Enforcement Fairness Act of 1996 requires a regulatory analysis of rules which are likely to result in an annual effect on the economy of $100 million or more; a major increase in costs or prices; or significant adverse effects on competition, employment, investment, productivity, innovation, or on the ability of the

United States-based companies to compete with foreign-based companies in domestic and export markets.

54. The DOL has failed to conduct any of the analysis called for by the statutes and orders listed above, or else has dramatically understated or ignored the likely impact of the challenged Rule on small entities, the costs of the challenged Rule, and the benefits of available regulatory alternatives. Many of Plaintiffs members are small businesses who are being harmed by DOL's failure to comply with the Act. For each of these reasons as well, the challenged Rule must be set aside.

VI. RELIEF REQUESTED

WHEREFORE, Plaintiffs pray that the Court:

55. Enter a preliminary injunction pending a final decision on the merits, enjoining Defendant from implementing the challenged Rule;

56. Enter a declaratory judgment as to each of the Counts set forth above declaring that the challenged Rule is invalid;

57. Enter an order vacating the challenged Rule and permanently enjoining Defendant from implementing it;

58. Award Plaintiffs their costs and expenses, including reasonable attorneys' fees under the Equal Access to Justice Act or otherwise;

59. Award such other further and additional relief as is just and proper.

Respectfully submitted,

/s/ J. Bruce Cross
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