IN THE
UNITED STATES DISTRICT COURT
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.	)

Amicus Curiae Brief of WASHINGTON LEGAL FOUNDATION
in Support of the Plaintiffs' Motion for Final Summary Judgment

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

Regulations

Other Authorities

INTRODUCTION[1]

Section 203 of the Labor Management Reporting and Disclosure Act of 1959 is a federal law that injects heavy government regulation of speech into union organizing campaigns by compelling consultants, including law firms, who help employers, either directly or indirectly, to persuade employees not to unionize, to disclose extensive financial information. Section 203 has survived over the past five-and-a-half decades in large measure because its enforcer, the U.S. Department of Labor, did not read the law so broadly that it could not bear up under the sort of strict judicial scrutiny that protects First Amendment rights. Now, the Department has significantly altered its interpretation of Section 203 in what is termed the "Persuader Rule."

As this Court is aware, one federal judge in Minnesota declined to enjoin enforcement of the Persuader Rule, *Labnet, Inc. v. U.S. Dep't of Labor*, No. 16-CF-0844, 2016 WL 3512143 (D. Minn. June 22, 2016) (Schiltz, J.), while another in Texas granted a nationwide preliminary injunction, in part on First Amendment grounds, just five days later, *National Federation of Independent Business v. Perez*, No. 5:15-cv-00066, 2016 WL 3766121 (N.D. Tex. June 27, 2016) (Cummings, J.) (hereinafter "*NFIB*"). Thereafter, this Court directed the parties to submit simultaneous summary judgment motions.

Washington Legal Foundation (WLF), as amicus curiae, anticipates the parties will focus heavily, as they did in their preliminary injunction memoranda, on arguments that the Persuader Rule is in conflict with Section 203. WLF also expects them to address the First Amendment issues raised by the Rule, but that they may not fully treat those issues. This amicus brief will attempt to assist the Court by giving the First Amendment issues fuller treatment. WLF filed a

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[1] This memorandum has been written solely by the attorneys who appear as counsel on it and no funding has been provided by any of the parties or their counsel.

similar amicus brief in the preliminary injunction proceedings in the Texas case, but not in the instant case or in the Minnesota case. WLF takes this opportunity to set forth the arguments we made in Texas—and that the Texas decision accepted as correct—and to explain why this Court should follow the First Amendment ruling from Texas, rather than the First Amendment ruling from Minnesota.

While this case could be resolved favorably to the plaintiffs entirely on statutory construction and administrative law principles, as the plaintiffs have argued, if the Court concludes that a grant of summary judgment to plaintiffs on statutory grounds is premature, it then will be faced squarely with the First Amendment challenge that the plaintiffs present. This brief shows that the Persuader Rule dramatically expands the definition of who is a "persuader" to include those who have no direct contact with employees and who merely provide advice on labor relations to employers which could be regarded as having the object of persuading employees regarding organizing and collective-bargaining rights. This expanded definition of persuaders, which simultaneously shrinks the definition of exempt "advice," places a heavy new content-based and viewpoint-based burden on speech that would push Section 203 well over the edge of constitutionality.

INTEREST OF THE AMICUS CURIAE

WLF is the nation's premier public-interest law firm and policy center. Its mission is to preserve and defend America's free-enterprise system by advocating for free-market principles, a limited and accountable government, individual and business civil liberties, and the rule of law. WLF wishes to be heard in this case because of the critical First Amendment issues that the Persuader Rule raises. WLF regards the First Amendment as one of the most important constitutional safeguards against excessive government regulation. Consequently, WLF

historically has participated as amicus curiae in the most important cases raising First Amendment issues. In the U.S. Supreme Court, for example, WLF filed amicus briefs in *Sorrell v. IMS Health Inc.*, 131 S. Ct. 2653 (2011); and *Crawford v. Marion County Election Bd.*, 128 S. Ct. 1610 (2008). WLF also participates as amicus in lower federal court cases such as this one where issues of wide-ranging importance are likely to command the attention of the Supreme Court. WLF believes it is of critical importance for the Court to consider the First Amendment issues raised here as they relate not only to labor relations, but also to the proper role of government regulation of speech generally.

Co-counsel for WLF in this matter, Thomas R. Julin of Gunster Yoakley & Stewart PA, also takes a special interest in this litigation because he has an active national First Amendment practice that has given him familiarity with many of the most critical issues raised by the challenge the plaintiffs have made to the constitutionality of the Department of Labor rule at issue. He successfully represented IMS Health Inc. and other companies in *Sorrell v. IMS Health Inc.*, 131 S. Ct. 2653 (2011), the Supreme Court's decision regarding the level of First Amendment scrutiny that must be applied to content and speaker-based regulations. He also has published relevant articles regarding First Amendment rights.[2] The Gunster law firm also is directly impacted by the Persuader Rule. Its lawyers provide employers advice regarding both union matters and general labor and employment matters.

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[2] Thomas R. Julin, *Confronting Online Privacy Regulation: Time to Defend the First Amendment*, 31 LEGAL BACKGROUNDER No. 14 (WLF May 14, 2016); Thomas R. Julin, *Is the FTC Our Ministry of Truth?—The FTC's Recent Prosecution Of Internet Companies Conjures Up Similarities to Orwell's Dystopian Future*, INSIDE COUNSEL (May 25, 2012) (http://www.insidecounsel.com/2012/05/25/technology-is-the-ftc-our-ministry-of-truth); Thomas R. Julin, Jamie Z. Isani & Patricia Acosta, *The Dog that Did Bark: First Amendment Protection of Data Mining*, 36 VT. L. REV. 881 (2012); Thomas R. Julin, Sorrell v. IMS Health *May Doom Federal Do Not Track Acts*, 10 BNA PRIVACY & SECURITY LAW REPORT 1262 (Sept. 5, 2011).

BACKGROUND

This summary highlights those aspects of the Rule relevant to the First Amendment issues discussed herein. The Department of Labor published the "final rule" at 81 Fed. Reg. 15924 on March 24, 2016, as a lengthy reinterpretation of Section 203(c) of the Labor Management Reporting and Disclosure Act of 1959 (LMRDA), 29 U.S.C. § 433(c), which itself is an exemption to Sections 203(a) and 203(b), of the LMRDA. 29 U.S.C. §§ 433 (a) & (b). The "rule" does not take the form of a traditional regulation setting forth in succinct fashion prohibited and allowed actions. Instead, the rule consists of a 129-page discourse which reads much more like a legal brief that has been prepared in anticipation of litigation, than any ordinary rule.

Of importance to the First Amendment issues, the rule highlights the Department's own vacillation regarding how the authorizing statute is to be interpreted. It explains that initially the Department "took the position that employers were required to report any 'arrangement 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'" and that a lawyer or consultant's revision of a document prepared by an employer was reportable activity. 81 Fed. Reg. at 15935.

But later, the Department decided that consultants would *not* be treated as persuaders subject to the disclosure requirements if the consultants simply provided materials to the employer that the employer could then "accept or reject." *Id.* Still later, the Department adopted an approach, from which it occasionally departed, that treated consultants as persuaders only if they engaged in "direct contact" with employees. *Id.* at 15936. This approach provided a high level of clarity for all concerned. In 2009, however, the Department stated that it would

reconsider this interpretation, and, after a public meeting, and receiving comments, finalized its new Persuader Rule and published it on March 24, 2016.

The revised interpretation, discussed at 81 Fed. Reg. at 15936-45, now treats a consultant as a persuader if the consultant engages in any activities that have the object of "directly or indirectly" persuading employees concerning their organizing or collective-bargaining rights. The primary justification given by the Department for this expanded definition is the use of the words "directly or indirectly" within Sections 203(a) and (b) themselves. *See* 81 Fed. Reg. at 15936 & 15940. In essence, the Department contends it is simply implementing the directive of the statute, even though previous administrations had failed to discern this alleged mandate during most of the five-decade history of the legislation.

The Rule explains that the Department's new reading of Section 203 makes a consultant a persuader if the consultant writes a speech to be delivered by the employer or drafts a letter to employees for the employer's signature, but that it does not make a consultant a persuader if the consultant simply provides "an oral or written recommendation regarding a decision or course of conduct." *Id.* at 15936-37. The Rule also states that under this approach a consultant is a persuader if the consultant engages in both "advice" and persuader activities. *Id.* at 15937.

The Rule attempts to clarify that a consultant will now be treated as a persuader if one engages in a variety of forms of "indirect contact" with employees. *Id.* at 15938 & n. 26. The Rule also states that consultants engaging in certain forms of speech, on the other hand, will not automatically be treated as persuaders. *Id.* at 15939-40. But, even engaging in any of these forms of speech will not be treated as within the Section 203(c) safe harbor for "advice" if the object of the speech is to persuade employees with respect to the matters described in Sections 203(a) and (b). *Id.*

Thus, the new Persuader Rule makes it difficult to discern who is a persuader of employees and who is a mere advisor regarding labor relations because the classification depends on the state of mind of the consultant. Put differently, any consultant, including any law firm, that delivers advice or service to an employer regarding any labor relations, without making the disclosures required of persuaders, can never be confident that he will not be charged with a violation of Section 203(b) and must be prepared to show the lack of intent to persuade employees – a negative proposition that can be nearly impossible to show and can thus easily mire the consultant in costly litigation.

But what may be of most significance to the First Amendment issues addressed in this brief is the impact that the Department's new interpretation has on the speech compelled by Form LM-21. That form compels a consultant to disclose to the world "receipts of any kind from employers *on account of labor relations advice or services,* designating the sources thereof." (Emphasis added). The required information is not limited to labor relations advice or services provided to an employer for whom persuader work is done, but specifically includes information regarding receipts from *all* employers on account of labor relations advice or services. Thus, for example, if a firm were advising 100 clients on labor relations matters, but engaged in persuader activities with respect to just one of them, the firm would be compelled by LM-21 to provide detailed information regarding the labor relations work done for all 100 clients. This disclosure would empower unions to direct organized protests to entreat each of the consultant's clients to sever its relationship with the consultant due to the consultant's admission that it had engaged in persuader speech.

Within the Rule, the Department notes that it has not yet proposed any changes to LM-21, that it expects to propose changes to that form in September 2016, and that therefore "issues

arising from the reporting requirements of the LM-21 are not appropriate for consideration under this rule." 81 Fed. Reg. at 15992 n. 88 & 16000. The Department also stated on April 13, 2016, that it will not for 90 days require filers of Form LM-20 to complete Parts B and C of Form LM-21, which require a statement of receipts from employers and disbursements in connection with labor relations advice or services. Still later, the Department adopted a special enforcement policy with respect to Form LM-21, excusing completion of parts of the form for now because of potential changes to the form.[3] None of this alters the threat that the new Persuader Rule poses to employers and their consultants. The Department's expanded interpretation of what constitutes persuader activity, its narrowed interpretation of what constitutes advice, and the difficulty of distinguishing between those two categories makes it impractical for any consultant, including any law firm, to continue to provide advice or services to clients concerning labor relations without also making the disclosures that are required when one engages in persuader activities, including all disclosures required by Form LM-21 as it exists.[4]

The Department has pointed a gun squarely at the head of every employer that obtains advice or services concerning labor relations, and it has made clear that any consultant providing such advice, whether that advice has the object of persuading employees or not, must be prepared to disclose all fees that it has received from any employer to which it provides advice or services regarding labor relations and all disbursements that it has made in connection with such advice or services. It is this aspect of the Persuader Rule that raises particularly serious First Amendment concerns.

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[3] *See* Office of Labor Management Standards, Form LM-21 Special Enforcement Policy (https://www.dol.gov/olms/regs/compliance/ecr/lm21_specialenforce.htm).

[4] The uncertainty regarding how LM-21 may be revised makes the need for injunctive relief all the more immediate.

ARGUMENT

Congress, when it enacted the LMRDA in 1959, attempted to walk the fine line between legislation that violates the First Amendment and legislation that does not. Congress thought it stayed within proper bounds because the Act would advance the nation's interest in fair and ethical labor negotiations without compelling either labor or management to make disclosures other than those that were essential to achieving the objectives of the Act. Since 1959, the Act has survived; critical to that survival has been the Department's conclusion prior to adoption of its new Persuader Rule, that consultants who do not engage in direct persuasion of employees, and merely provide advice that can be accepted or rejected by employers, are not to be regarded as persuaders. The Department's express overturning of that interpretation, if accepted as a permissible interpretation of Section 203, would render Section 203 itself unconstitutional because it no longer would directly advance a compelling governmental interest, and it would be broader than necessary to achieve the government's claimed objectives.

I.

Strict Scrutiny of Section 203 Is Required

Section 203 is quintessentially a form of government action that is both facially and actually aimed at suppressing the viewpoint of specific speakers with whom it disagrees. The speakers are employers who in virtually every case do not want their employees to unionize. The viewpoint of those speakers is that unionization is bad for employers, bad for employees, bad for the economy, and bad for the country. Section 203 applies on its face only to employers and places a burden on their speech which they believe their employees need to hear. When state action is so specifically targeting speakers and their viewpoint, the First Amendment mandates that the action be subjected to the strictest possible scrutiny, and it matters not that the

government can articulate a content-neutral objective, that the law might be characterized as a disclosure requirement, or that the targeted speech is economically motivated. It also matters not that the Department of Labor believes that its interpretation of Section 203 is authorized by Congress, that the Department believes it serves a compelling interest, or that the Department contends that it has no other means to achieve its objectives. When the First Amendment of the U.S. Constitution is at stake, the courts owe no deference to any administrative agency. Strict scrutiny governs to ensure that the government's legislative and executive powers are not used to suppress a point of view unless such extreme action is crucial to the nation's highest interests.

A. Strict Scrutiny Is Required Because the Rule Discriminates on the Basis of Content on Its Face

In *Reed v. Town of Gilbert*, 135 S. Ct. 2218, 2228 (2015), the Supreme Court made clear that in a First Amendment challenge "the crucial first step [is] determining whether the law is content neutral on its face. A law that is content based on its face is subject to strict scrutiny regardless of the government's benign motive, content-neutral justification, or lack of 'animus toward the ideas contained' in the regulated speech." (quoting *Cincinnati v. Discovery Network, Inc.*, 507 U.S. 410, 429 (1993)). Although *Reed* was evaluating a municipal ordinance regulating signs and this case involves regulation of employer persuasion, the Supreme Court has "recognized that employers' attempts to persuade to action with respect to joining or not joining unions are within the First Amendment's guaranty." *Thomas v. Collins*, 323 U.S. 516, 537 (1945) (citing *Labor Board v. Virginia Electric & Power Co.*, 314 U.S. 469 (1941)). Only "[w]hen to this persuasion other things are added which bring about coercion, or give it that character, the limit of the right has been passed." *Id.* at 537-38.

Section 203 is a law which plainly is content based. It is targeted directly at speech intended "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. The law does not apply to any other speech content, whether the speech originates with employers and is directed at employees or originates elsewhere. For example, it does not impose disclosure requirements on employers who advocate how employees should vote in federal, state, or local elections. More broadly, the government does not impose disclosure requirements on candidates, businesses, or ordinary citizens who advocate positions in elections, although it could be argued that voters generally could understand the motivation of advocates better if they became aware of whether they had paid consultants to assist them in the preparation of their political messages and, further, of all fees paid to those consultants by others. Section 203 singles out the speech of employers and their consultants based entirely on its content.

The Department argued in adopting the Persuader Rule that because the *purpose* of its new Persuader Rule was not punishment of employers who opposed unionization, but rather "to disclose to workers, the public, and the Government activities undertaken by labor relations consultants to persuade employees—directly or indirectly, as to how to exercise their rights to union representation and collective bargaining"—the law should be regarded as neither viewpoint nor content based, and that it therefore should be upheld in the courts as long as it could survive a more deferential level of scrutiny. 81 Fed. Reg. at 15926.

Some support for the position that a less-than-strict-scrutiny standard should be applied to Section 203 can be found in appellate decisions prior to *Reed*. The Fourth Circuit, analogizing Section 203 to the sort of statutory disclosure requirements imposed on candidates for public office, held that "the state must establish [only] a 'relevant correlation' or 'substantial relation' between the governmental interest and the information sought through disclosure." *Master*

Printers Ass'n v. Donovan, 751 F.2d 700, 704 (4th Cir. 1984) (*quoting Buckley v. Valeo*, 424 U.S. 1, 65-66 (1976)). The Fourth Circuit then upheld Section 203 under this standard. Similarly, in *Humphreys, Hutcheson & Moseley v. Donovan*, 755 F.2d 1211 (6th Cir. 1985), the Sixth Circuit employed the balancing test adopted by the Supreme Court in *Buckley v. Valeo* to gauge the constitutionality of disclosure requirements imposed on election contributions and expenditures. That balancing test examined whether interests advanced by the statute were compelling, the degree of infringement of speech rights, whether the purpose of the statute is substantially related to its requirements, and whether the level of disclosure is carefully tailored to the goals of the statute. *Humphreys, Hutcheson*, 755 F.2d at 1222. While this intermediate-level standard comes close to strict scrutiny,[5] it is not the same,[6] and it rests, in large measure, on the notion that disclosure requirements are imposed not because the Government favors one side or another in an election, but rather is trying to better inform voters about the information they may be receiving, in the content of political elections, from candidates, and in the context of

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[5] Commentators questioned early on whether *Buckley* was applying strict scrutiny at all. *E.g.*, Marlene Arnold Nicholson, *Political Campaign Expenditure Limitations and the Unconstitutional Conditions Doctrine*, 10 HASTINGS CONST. L.Q. 601, 607 (1983) (recognizing the lack of clarity in *Buckley* and observing that "the Court seemed to scrutinize some of the limitations more closely than others, giving credence to the interpretation that the level of scrutiny was subject to a sliding scale"). "[T]his sentiment was due to the ambiguity of the *Buckley* opinion, which was hastily written and less than crystal clear about its standards of review." Adam Winkler, *Fatal in Theory and Strict in Fact: An Empirical Analysis of Strict Scrutiny in the Federal Courts*, 59 VAND. L. REV. 793, 848 (2006). Later cases have made clear that the *Buckley* disclosure standard is not strict scrutiny. *See, e.g., Citizens United v. Federal Election Comm'n*, 558 U.S. 310, 366 (2010) (requiring only a sufficiently substantial interest, rather than a compelling interest); *Davis v. Federal Election Comm'n*, 554 U.S. 724, 744 (2008) (balancing the strength of the governmental interest against the seriousness of the actual burden on First Amendment rights).

[6] *See John Doe No. 1 v. Reed*, 561 U.S. 186, 232 (2010) (Thomas, J., dissenting) ("unlike the Court, I read our precedents to require application of strict scrutiny to laws that compel disclosure of protected First Amendment association").

union elections, from employers. But *Reed* calls this rationale for using a lower level of scrutiny into question by quite explicitly holding that "[c]ontent-based laws—those that target speech based on its communicative content—are presumptively unconstitutional and may be justified only if the government proves that they are narrowly tailored to serve compelling state interests." *Reed*. 135 S. Ct. at 2226. In other words, all content-based laws must be subjected to strict scrutiny.[7]

Subsequent to *Reed*, the Government has attempted to restrict the impact of *Reed* in other areas. For example, it argued in *Free Speech Coalition v. U.S. Attorney General*, No. 13–3681, 2016 WL 3191474 (3d Cir., June 8, 2016), that an exception to the doctrine that requires all content laws to be subjected to strict scrutiny had been recognized by the Supreme Court in cases such as *City of Renton v. Playtime Theatres, Inc.*, 475 U.S. 41 (1986), for content-based laws enacted not due to Government opposition to the targeted speech, but rather to combat so-called

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[7] The Fifth Circuit, in upholding Section 203(b)'s disclosure requirements as they had been interpreted prior to the Department's adoption of its new Persuader Rule, did not address whether Section 203(b) is subject to strict scrutiny. *Price v. Wirtz*, 412 F.2d 647 (5th Cir. 1969) (*en banc*). In fact, the *Price* decision did not address the constitutionality of Section 203(b), as more narrowly interpreted, at all. Instead, it simply concluded, in reliance on *Douglas v. Wirtz*, 353 F.2d 30 (4th Cir. 1965), a Fourth Circuit decision which also did not address the constitutionality of Section 203, that Congress intended Section 203(b) to require persuaders to disclose *all* fees received from and expenditures made in connection with all labor relations advice and services. *Id.* at 651. The Eighth Circuit reached the opposite conclusion in *Donovan v. Rose Law Firm*, 768 F.2d 964 (8th Cir. 1985), holding that Section 203(b) could not be interpreted so broadly in light of its history, but it also did not address whether the statute would be unconstitutional if given a broader reading. In any event, the *Price* majority's failure to reach the constitutional question frustrated five dissenting judges who concluded that the majority's interpretation of Section 203(b)—which was narrower than how the Department now interprets it—brought Section 203(b) into direct conflict with the First Amendment. *Id.* at 654 (Dyer, J., joined by Gewin, Coleman, Ainsworth & Godbold, JJ., dissenting) ("It must be emphasized that the rights with which we are here concerned are fundamental First and Fourth Amendment rights. That labor relations employers have the right to speak to attorneys regarding their business labor relations, to associate with attorneys for lawful legal advice, and to have private affairs of a lawful nature protected from governmental intrusion is beyond dispute").

secondary effects of speech such as crime which is sometimes associated with adult entertainment establishments. The Government asserted that this exception should be applied to the federal Child Protection and Obscenity Enforcement Act's (CPOEA) recordkeeping, labeling, and inspection requirements so that it need not meet strict scrutiny. Those disclosure requirements, the Government asserted, had been imposed not because of disagreement with the regulated speech—lawful adult pornography—but rather to prevent harm to children who might become the subjects of illegal child pornography if the disclosure requirements were not imposed. The Third Circuit rigorously examined this argument and concluded that the exception to strict scrutiny applied only in cases like *Renton*, which involved regulation of "brick-and-mortar purveyors of adult sexually explicit content." *Id.* at *8. The court explained that expansion of the "secondary effects" doctrine beyond that narrow set of cases "could lead to the erosion of First Amendment freedoms" by "transform[ing] a facially content-based law into a content-neutral one any time the Government can point to a laudable purpose behind the regulation that is unrelated to the protected speech." *Ibid* (paraphrasing *Reed*, 135 S. Ct. at 2228 ("an innocuous justification cannot transform a facially content-based law into one that is content neutral")). It also held applying a lower level of scrutiny would fly in the face of *Reed* and be contrary to its obligation to adhere to the Supreme Court's rulings. *Ibid; see also Homeless Helping Homeless, Inc. v. City of Tampa*, No. 8:15-cv-1219-T-23AAS (M.D. Fla. Aug. 5, 2016) (holding *Reed* required anti-solicitation ordinance to be treated as content based).

With these points in mind, it can be seen how the Minnesota ruling on the Persuader Rule went astray. Judge Patrick J. Schiltz of Minnesota held "Plaintiffs are correct … that the new rule—like the LMRDA itself—regulates on the basis of content," *Labnet*, 2016 WL 3512143 at *8, but he declined to subject it to strict scrutiny, stating that "because the new rule imposes

disclosure obligations, it is subject to the [lower] 'exacting scrutiny' standard." *Ibid.* In support of this conclusion he cited *Citizens United v. Federal Election Commission*, 558 U.S. 310, 366-67 (2010), a case that had upheld the constitutionality of disclosure requirements that are applied to candidates in federal elections. In essence, Judge Schiltz expanded the secondary-effects rationale that the Supreme Court has used only to review the constitutionality of disclosure requirements applied to candidates for public office and applied it to union campaigns to win representation rights from employees. Lower federal courts are not permitted to create their own exceptions to the Supreme Court's First Amendment case law by relying on doctrines developed by the Court in a completely distinct set of cases. As will be discussed further below, many distinctions counsel strongly against the Supreme Court's doing this itself; but for now, lower federal courts are constrained to follow the holding of *Reed* that content-based laws and regulations must be subjected to strict scrutiny.

Judge Schiltz also rejected application of strict scrutiny to the Persuader Rule on the basis of his conclusion that it "does not discriminate on the basis of viewpoint." *Labnet*, 2016 WL 3512143 at *8. He observed the Rule applies to both "pro- and anti-union speech." *Ibid.* He acknowledged the plaintiffs' argument that the preamble to the Persuader Rule shows that the rule was motivated by the Department's empathy for labor, but, in reliance on *Hill v. Colorado*, 530 U.S. 503, 724 (2000), and *Phelps-Roper v. Nixon*, 545 F.3d 685, 691 (8th Cir. 2008), *overruled*, *Phelps-Roper v. City of Manchester*, 697 F.3d 678 (8th Cir. 2012), he held that this evidence of an improper motive could not be used to subject the rule to strict scrutiny. *Hill* cannot be considered in isolation from subsequent Supreme Court decisions which he did not cite or discuss and which have clarified its meaning and come very close to overruling it entirely. In *Hill*, the Court examined a Colorado law which regulated speech within 100 feet of a health care

facility. The statute made it unlawful to knowingly approach within eight feet of another person to protest, educate or counsel that person. The majority concluded that the law was content neutral and survived intermediate scrutiny. Justices Scalia and Thomas disagreed, asserting that the law should have been deemed content based because it could be used for the purpose of stopping speech by those who opposed abortion and that the motivation of the legislature in enacting the law was evident. *Id.* at 744 (Scalia, J., dissenting). "When applied, as it is here, at the entrance of medical facilities, it is a means of impeding speech against abortion," he explained. *Ibid.*

Fourteen years later, the Court examined a similar Massachusetts statute in *McCullen v. Coakley*, 134 S. Ct. 2518 (2014), and although the majority again treated the law as content neutral, it also made clear that the law "would not be content neutral if it were concerned with undesirable effects that arise from 'the direct impact of speech on its audience' or '[l]isteners' reaction to speech.'" *Id.* at 2531-32. This is precisely why the Persuader Rule must be considered content based. It was motivated by what the Labor Department regarded as the undesirable effects of the speech of employers who persuaded employees that unionization and other forms of collective activity were contrary to their interests. In the Rule itself, the Department explained that it adopted the Rule due to concern that employers' speech was being used "to shape how employees exercise their union representation and collective[-]bargaining rights." 81 Fed. Reg. at 15925. The Rule was needed, the Department argued, because "employees may hear a strong message from their employer about how they should make choices regarding the exercise of their rights." *Id.* The Department quite obviously was not concerned that employers were encouraging employees to unionize or to seek higher wages, or better terms and conditions of employment. It was concerned that employer speech was

persuading employees to act contrary to what it regarded as the employees' best interests.

Justice Scalia, concurring with the invalidation of the statute in *McCullen*, objected that the majority should have accepted that *Hill* was wrong in holding laws of this type—those motivated by a desire to suppress a particular viewpoint—are content neutral. He cited an "abundance of scathing commentary describing how *Hill* stands in contradiction to our First Amendment jurisprudence." *Id*. at 2545 (Scalia, J., concurring). When *Hill* and *McCullen* are read together, no conclusion can be reached other than that the Persuader Rule is viewpoint based as well as content based.

In the Supreme Court's last term, the Court also held in *Heffernan v. City of Paterson*, 136 S. Ct. 1412 (2016), that strict First Amendment scrutiny is mandated whenever a government official acts with a viewpoint-based motive. *Id.* at 1418. Justice Breyer, writing for seven members of the Court, succinctly explained, "it was the employer's motive … that mattered." Here, the Department of Labor's pro-union, anti-management motivation is what matters and what requires treatment of the Persuader Rule as viewpoint based as well as content based.

Judge Sam Cummings of Texas succinctly agreed with this conclusion in issuing a nationwide preliminary injunction against enforcement of the Persuader Rule, holding: "DOL's New Rule imposes content-based burdens on speech and cannot survive strict scrutiny." *NFIB*, 2016 WL 3766121 at *31 ¶ 88.

B. The Level of Scrutiny Is No Less Because Section 203 Burdens Rather than Bans Speech

Section 203 does not, of course, prohibit employers or their consultants from engaging in speech. Rather, Section 203, as now interpreted by the Department, simply imposes a burden on employers and their consultants, in the form of compelled disclosures, when the object of their

speech is to persuade employees, directly or indirectly, regarding organization and collective bargaining. Burdening speech rather than banning it does not decrease the scrutiny to be applied. In *Sorrell v. IMS Health Inc.*, 131 S. Ct. 2653 (2011), the State of Vermont argued that laws burdening speech on the basis of content are less offensive to the First Amendment than laws that outright ban speech. The Supreme Court squarely rejected this argument. "The Court has recognized," Justice Kennedy wrote for the majority, "that the 'distinction between laws burdening and laws banning speech is but a matter of degree' and that the 'Government's content-based burdens must satisfy the same rigorous scrutiny as its content-based bans.'" *Id.* at 2664 (*citing United States v. Playboy Entertainment Group, Inc.*, 529 U.S. 803, 812 (2000)). "Lawmakers may no more silence unwanted speech by burdening its utterance than by censoring its content." *Sorrell*, 131 S. Ct. at 2664 (*citing Simon & Schuster, Inc. v. Members of N.Y. State Crime Victims Bd.*, 502 U.S. 105, 115 (1991); *Minneapolis Star & Tribune Co. v. Minnesota Comm'r of Revenue*, 460 U.S. 575 (1983) (speaker-based financial burden)).

The Supreme Court recognized the importance of burden-free speech in the labor-relations context when in *Thomas v. Collins*, 323 U.S. 516 (1945), it considered a state-law registration requirement imposed on union organizers. The government argued in that case that registration posed only a minimum burden on the union and it therefore need not be subjected to strict scrutiny. The Court disagreed, ruling: "The restraint is not small when it is considered what was restrained. The right is a national right, federally guaranteed. There is some modicum of freedom of thought, speech and assembly which all citizens of the Republic may exercise throughout its length and breadth, which no State, nor all together, nor the Nation itself, can prohibit, restrain or impede." *Id.* at 543. This ruling secured to union organizers a fundamental freedom to address employees about labor relations. The Court continued: "If the restraint were

smaller than it is, it is from petty tyrannies that large ones take root and grow. This fact can be no more plain than when they are imposed on the most basic rights of all. Seedlings planted in that soil grow great and, growing, break down the foundations of liberty." *Ibid.*

That disclosure requirements are burdensome cannot reasonably be questioned. They not only require an expenditure of money in order to comply, they also deter consultants, including law firms, from offering their services to employers who wish to persuade employees, and dissuade employers who seek counsel on labor relations matters that do not involve persuading employees from hiring firms that are engaged in those activities. Whether that burden is gauged to be great or small, it is not a burden that is imposed on other types of speech and therefore cannot be imposed unless the statute survives strict scrutiny.

C. The Level of Scrutiny Is No Less Because of the Employer's Economic Incentive

The Supreme Court has applied less-than-strict scrutiny to speech that it has categorized as "commercial." *See, e.g., Thompson v. Western States Medical Center*, 535 U.S. 357, 373 (2002); *Central Hudson Gas & Elec. Corp. v. Public Serv. Comm'n of N.Y.*, 447 U.S. 557, 566 (1980). Speech of employers concerning labor relations cannot be categorized as mere "commercial speech" because that term has been defined as "speech proposing a commercial transaction." *Cincinnati v. Discovery Network, Inc.*, 507 U.S. 410, 422 (2007) (rejecting argument that speech may be treated as commercial when it is merely economically motivated); *Board of Trustees of State University of New York v. Fox*, 492 U.S. 469, 482 (1989) ("the test for identifying commercial speech" is whether the speech "proposes a commercial transaction").[8]

[8] Prior to *Fox* and *Discovery Network*, the Supreme Court had occasionally described commercial speech in broader terms, as "expression related solely to the economic interests of the speaker and its audience." *Central Hudson Gas & Elec. Corp. v. Public Serv. Comm'n*, 447 U.S. 557, 561 (1980).

When employers, consultants and attorneys are engaged in persuader speech, they are not simply proposing a commercial transaction, they are not offering to sell a product or service, they are advocating for a political and economic structure for a private workplace. This form of speech is entitled to the fullest First Amendment protection available against regulation—the strict-scrutiny standard. *See Harris v. Quinn*, 134 S. Ct. 2618, 2639 (2014) (holding speech regarding labor relations is not merely "commercial speech").

D. The Level of Scrutiny Is No Less Because the Burden Placed on Employers Is Compelled Speech, Rather than Restricted Speech

"There is certainly some difference between compelled speech and compelled silence, but in the context of protected speech, the difference is without constitutional significance, for the First Amendment guarantees 'freedom of speech,' a term necessarily comprising the decision of both what to say and what *not* to say." *Riley v. Nat'l Fed. of the Blind*, 487 U.S. 781, 796-97 (1988). "It is … a basic First Amendment principle that 'freedom of speech prohibits the government from telling people what they must say.'" *United States Agency for Int'l Dev. v. Alliance for Open Soc'y Int'l*, 133 S. Ct. 2321, 2327 (2013) (*quoting Rumsfeld v. Forum for Academic & Institutional Rights, Inc.*, 547 U.S. 47, 61 (2006) (*citing W. Va. State Bd. of Ed. v. Barnette*, 319 U.S. 624, 642 (1943), and *Wooley v. Maynard*, 430 U.S. 705, 717 (1977))).

Disclosure requirements are a form of compelled speech, but notwithstanding the First Amendment principles which restrict government power to compel speech, they have been upheld in three different contexts: (1) political campaign contributions, *Citizens United v. Fed. Election Comm'n*, 558 U.S. 310, 371 (2010); (2) lobbyist expenditures, *United States v. Harriss*, 347 U.S. 612, 625–626 (1954); and (3) advertising of goods and services, *Milavetz Gallop & Milavetz, P.A. v. United States*, 559 U.S. 229 (2010) (attorney advertising); *Zauderer v. Office of Disciplinary Counsel of Supreme Court of Ohio*, 471 U.S. 626 (1985) (same).

The approval of disclosure requirements in *Citizens United* was far from a blanket approval of any and all disclosure requirements. Five members of the Supreme Court concluded in *Citizens United* only that the specific disclosure requirements of Section 311 of the Bipartisan Campaign Reform Act ("BCRA") 2 U.S.C. § 441d(d)(2), were constitutional as applied to *Hillary: The Movie*, a political documentary covering Hillary Clinton, and three advertisements for the movie.

The five-member *Citizens United* majority explained that disclosure is a less restrictive alternative to more comprehensive regulations of speech and that the public has an interest in knowing who is speaking about a candidate shortly before an election. The Court found the informational interest alone was sufficient to justify application of § 201 to these ads. The Court commented that "[w]ith the advent of the Internet, prompt disclosure of expenditures can provide shareholders and citizens with the information needed to hold corporations and elected officials accountable for their positions and supporters." *Citizens United*, 558 U.S. at 352.

The disclosure requirements imposed by the Rule and Section 203 contrast sharply with the disclosure requirements upheld in *Citizens United*. First, they are not restricted to communications shortly before an election. Second, they do not require disclosure with an electioneering communication. Third, the required disclosures do not tell voters anything that they do not already know about the identity of the person who is engaged in the communication—it is the employer. Fourth, the disclosures are not as simple or as minimal as those imposed by BCRA.

Turning to disclosure requirements imposed on lobbyists, they also function very differently than do those that Section 203 would impose if the Department's new interpretation were upheld. In *United States v. Harriss*, 347 U.S. 612 (1954), the Supreme Court found a

federal lobbyist disclosure law facially constitutional because it construed the law as imposing only disclosure requirements on *direct* lobbying of Members of Congress. That law, like Section 203 as it had been interpreted by the Department, did not require disclosures by those who engaged solely in *indirect* lobbying, because such lobbying was not deemed to pose the same sort of corruption risks. The *Harriss* majority avoided deciding the facial constitutionality of imposing the same requirements on "indirect lobbying"—sometimes referred to as "grassroots lobbying." It did so by construing the law at issue as applicable solely to direct, face-to-face lobbying of Congress and to direct letter writing to Congress. The majority's construction of the statute was motivated by concerns that the statute, unless narrowed, would be facially invalid. The three dissenters in *Harriss* concluded the law could not be narrowed and that the federal law must therefore be invalidated. *Id.* at 631 (Douglas, J., dissenting, joined by Black, J.) and 634 (Jackson, J., dissenting). The *Harriss* case therefore shows that Section 203 would be unconstitutional if it were regarded as authorizing the Department's new interpretation of it.

The five dissenters in *Price v. Wirtz*, 412 F.2d 647 (5th Cir. 1969) (*en banc*), not only expressed their displeasure with the majority for not addressing whether Section 203(b) had been rendered unconstitutional by the majority's reading of it, they also cautioned against reliance on *Harriss* to justify the disclosure requirements of Section 203(b), even as narrowly interpreted by the Department in 1969. They noted that in *Harriss* "the Supreme Court took pains to construe the Act in admitted efforts to save its constitutional validity … but even then there were vigorous dissents." *Id.* at 656 (Dyer, J., dissenting, joined by Gewin, Coleman, Ainsworth & Godbold, JJ.). "In the case sub judice, where fears by innocent clients are as immediate as they are apparent, rather than construing the statute so as to eliminate them the majority construes the statute so as to cause them." *Ibid.*

Disclosure requirements also are fairly commonly imposed on commercial speech or advertising used by the sellers of products or services in order to protect consumers from deception. *Milavetz*, 559 U.S. at 1331; *Zauderer*, 471 U.S. at 651. But, as discussed above, persuader speech of employers has never been categorized as mere "commercial speech."

Justice Douglas, concurring in the *Thomas v. Collins* judgment, added that although regulation could be imposed to prevent the use of economic power over jobs to influence action, "as long as he does no more than speak he has the same *unfettered* right, no matter which side of an issue he espouses." *Thomas*, 323 U.S. at 543-44 (Douglas, J., concurring) (emphasis added). Justice Jackson, also concurring, made clear that the First Amendment limits the government's authority to regulate employer speech to that "speech which results in 'coercion' or 'domination.'" *Id.* at 547 (Jackson, J., concurring). In accord with these principles, indirect persuasion cannot be burdened in the manner that the Persuader Rule would burden it.

It warrants mention also that Section 203, as it has been reinterpreted by the Persuader Rule, cannot be measured against the lower form of scrutiny that frequently is applied to disclosure rules imposed on advertisers for the simple reason that employer speech is not a form of advertising. But there also is another reason. Fundamentally, Section 203, as reinterpreted, seeks to compel those who engage in what might be characterized as persuader speech to communicate to employees a vast amount of information about the identity of their clients, the fees that are paid by their clients, and expenditures that are made in connection with those representations. The government is attempting to force those consultants to convey a message to employees that they serve a wide array of employers on a wide array of labor relations matters (which often do not even arguably involve employee persuasion), and that they are well compensated by those clients. Such disclosures render the consultants vulnerable to union

campaigns directed at their clients. This is not a mere disclosure requirement; it is a form of compelled, controversial speech which is subject to strict constitutional scrutiny.

E. No Deference Is Due to the Department of Labor's Views

Finally, this Court need not show any deference to the Department's view, as expressed in the Persuader Rule, that its interpretation of Section 203 withstands strict scrutiny. True, the National Labor Relations Act includes a provision (Section 8(c)) that codifies protections of employer speech; and a considered interpretation of Section 8(c) by the agency charged with administering the NLRA (*i.e.*, the National Labor Relations Board) may be entitled to deference from the courts. But that deference does not extend to Departmental interpretations of constitutional rights. "[A]n employer's right to speak is protected by the First Amendment. The mere codification of this constitutional right in section 8(c) is not enough to turn it into a mere statutory right, with the lesser protections that this transformation entails."[9]

At bottom, the Persuader Rule itself shows that the Labor Department well knows that its new interpretation of Section 203 should be subjected to strict scrutiny because it repeatedly contends that Section 203, as now interpreted, will serve what it claims to be "compelling governmental interest[s]." Rule, 81 Fed. Reg. at 15983 ("need to provide employees with this essential information"); 15986 ("increasing voter competence"); 15988 ("maintaining harmonious labor relations") 15988 ("ensuring that employees receive information about persuader activities"). As will be discussed below, however, none of those interests is compelling, none is advanced by the reinterpretation of Section 203, nor is that reinterpretation the least speech-restrictive means of achieving those objectives.

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[9] Ian M. Adams & Richard L. Wyatt, *Free Speech & Administrative Agency Deference: Section 8(c) and the National Labor Relations Board—An Expostulation on Preserving the First Amendment*, 22 J. OF CONTEMP. L. 19, 50 (1996).

II.

Section 203 as Reinterpreted Cannot Survive Strict Scrutiny

Once the Court determines that strict scrutiny is required, it then must examine whether the law, as interpreted by the Persuader Rule, directly advances a compelling government interest and, if so, whether the government has any other means of serving that interest that is less restrictive of speech. Neither aspect of this test can be met.

A. The Law Would Not Directly Advance Any Compelling Interest

The various interests the Department advances as justification for its broader interpretation of Section 203 all can be described as providing employees detailed information regarding employer consultants who indirectly engage in persuader activities so that the employees can better evaluate the messages conveyed to them by employers and consultants who directly engage with employees about their organizing and collective-bargaining rights. Significantly, the Department does not contend that the disclosures required by its new interpretation are necessary to prevent fraud or deception.

Indeed, the Department expressly disclaims that it is making any judgment that persuader speech is deceptive.[10] Instead, the Department contends that additional disclosures required by its new interpretation will advance the government's objective of "helping employees to assess the merits of the arguments directed at them." 81 Fed. Reg. at 15925. As discussed, courts have held that the government has an interest in requiring the disclosure of contributions and expenditures in connection with political campaigns. This sort of disclosure helps to prevent bribery of politicians that would undermine the democratic process of elections.

[10] 81 Fed. Reg. at 15957 n. 47 ("Although the commenters appear to criticize at least some of the activities as deceptive and/or improper, the Department has not made a judgment on the propriety of these actions. It is not the role of this Department to make such determination.").

But the disclosures required by the Department's new interpretation of Section 203 do not require anything that is remotely analogous to disclosures of contributions or expenditures in elections. The newly required disclosures are only of the fees paid to and expenditures made by consultants who provide advice and services regarding labor relations with the object of persuading employees, but who do not have direct contact with employees. No court, including the appellate courts in *Master Printers* and *Humphreys, Hutcheson*, has ever held that there is any interest, let alone a compelling interest, in providing employees this additional information. Consider that employees, prior to the Department's new Rule, already had access to extensive information regarding employer expenditures on direct persuader activities, the identities of persons engaged in those activities, and, with respect to consultants who had direct contact with employees, the fees they were paid by the employer for whom the consultants engaged in persuader activities, as well as, in most areas of the country, the fees they were paid by all other employers. That information, for more than five decades, has given employees a very clear view of the manner in which employers have formulated and delivered their communications to their employees. The Department cannot show that the additional information that is at stake in this litigation would do anything to advance any legitimate interest and certainly cannot show that it would advance the sort of compelling interest that is required to sustain a content-based, compelled-speech regulation.

The Department admits as much when it states there is "uncertainty of predicting how the worker will interpret and react to disclosed information," Rule, 81 Fed. Reg. at 15989, and that "[t]he public disclosure benefit to the employees and to the public at large cannot reasonably be ascertained due to the uncertainty in knowing whether employees would have participated or not in a representation election or cast their ballots differently if they had timely known of the

consultant's persuader activities." 81 Fed. Reg. at 16001.

Strict scrutiny does not permit the government to impose restrictions on speech or to compel speech on the basis of mere guesses of this sort. The government must have evidence that the regulation is necessary to serve a compelling government interest. If the government cannot reliably show that its new regulation will further some such interest, the regulation cannot pass constitutional muster. "The Constitution 'demands that content-based restrictions on speech be presumed invalid … and that the Government bear the burden of showing their constitutionality.'" *United States v. Alvarez*, 132 S. Ct. 2537, 2544 (2012) (quoting *Ashcroft v. American Civil Liberties Union*, 542 U.S. 656, 660 (2004)).

Providing employees with the information at issue in this case would allow unions to target for protests the clients of consultants who do not themselves engage directly in persuader activities and, perhaps, drive consultants from the market. But assisting unions in achieving this leverage cannot be categorized as a compelling or even important government interest. The government's interest is just the opposite. It is to ensure that employers continue to have access to a wide array of consultants, including those with diverse practices that are not solely dedicated to the delivery of direct persuader advice and services.

The abstract interest of simply providing information to employees that they might find useful also has not been recognized by the Supreme Court as a compelling interest, and for good reason. If it were a compelling interest, one could similarly assert a compelling interest in forcing candidates for public office to disclose the names of all of their advisers and how much they are paid from all sources. Yet, public knowledge of all aspects of how a candidate conducts a campaign and how all political advisers earn their livings has never been regarded as an important aspect of electoral fairness to justify compelled disclosure of such information.

Indeed, compelling such disclosures would deter candidates from obtaining good advice from qualified individuals, or deter qualified individuals from advising political candidates.

B. The Law Would Not Be the Least Restrictive Means of Achieving Any Compelling Interest

Strict scrutiny also requires that the government's chosen means of obtaining its objective be no more restrictive of speech than is essential to reaching the objective. Since the Persuader Rule does not directly advance any compelling government interest, the Court need not be concerned with whether less speech-restrictive means are available to achieve such an interest. But if the Court were to conclude that a compelling interest exists in providing better information to employees about employer persuader communications, there are many alternatives available to the government that would have far less of an impact on the speech rights of employers and the consultants they retain.

For example, the government itself can more rigorously enforce Section 203 as it previously had been interpreted. In the Persuader Rule, the Department states: "The impetus for this rulemaking was the Department's recognition that, while employers routinely use consultants to orchestrate counter-organizing campaigns, most agreements or arrangements with such consultants went unreported." 81 Fed. Reg. at 15933. If that is the problem, then enforcement is the solution, not expansion of the burdens that Section 203 already imposes on employer and consultant speech. The Department contends, "Underlying the paucity of reports was the Department's interpretation to essentially require consultants to report only agreements in which a consultant agrees to directly persuade employees on matters relating to union representation and collective bargaining." 81 Fed. Reg. at 15933. Nothing is cited in support of this statement. The Department does cite statistics which it says show the extent of the underreporting. 81 Fed. Reg. at 15933. It fails to explain, however, how its expansive

reinterpretation of Section 203 would solve the underreporting problem—which presumably could best be addressed simply by more rigorous enforcement of existing regulations.

None of the commentators cited by the Department support its contention that an expanded interpretation of Section 203 is the best means of eliminating underreporting. One of the cited articles—Charles B. Craver, *The Application of the LMRDA "Labor Consultant" Reporting Requirements to Management Attorneys: Benign Neglect Personified*, 73 Nw. Univ. L. Rev. 605, 631 (1978)—chastises the Department for its lack of enforcement effort, stating, "Many of the unintentional violations could undoubtedly be reduced through affirmative efforts by the Department of Labor to educate labor practitioners concerning their reporting duties." But instead of advocating expansion of Section 203 through aggressive reinterpretation, the author forcefully calls for a more judicious application of Section 203. "Greater compliance," he suggested, "would also be encouraged if the most onerous parts of the existing reporting rules were ameliorated by statutory amendment, and such modifications could be effectuated *without any meaningful diminution in the protection afforded to employees*." *Ibid* (emphasis added). In other words, the supposed underreporting that motivated the Department's new Persuader Rule was (in Craver's view) a consequence of the fact that Section 203, as previously interpreted, was already unnecessarily broad. The "cure" that the Department proposes for its perceived problem is far more restrictive of speech than the readily available alternative of better enforcement of the law as it historically has been interpreted.

Another less-speech-restrictive means to advance the objectives of Section 203 is for the government to speak directly rather than compelling others to speak. "The [Department] can express [its] view through its own speech." *Sorrell*, 131 S. Ct. at 2672. While the Department may contend that it has tried and it is fearful that its voice may not be heard, the Supreme Court

has been clear that the government's "failure to persuade does not allow it to hamstring the opposition. The [government] may not burden the speech of others in order to tilt public debate in a preferred direction." *Ibid.*

CONCLUSION

The plaintiffs have made a strong case that Section 203, as reinterpreted through the new Persuader Rule, is not authorized by Congress and that this construction of the Act should be avoided if possible so that the Act is not made vulnerable to constitutional attack. If, however, the Court concludes that the Persuader Rule is a reasonable interpretation of the Department's statutory mandate, then the Court should conclude that the Rule violates the First Amendment.

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CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing was served by CM/ECF on August 12, 2016, on all counsel or parties of record on the service list.

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