IN THE
UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA

LABNET INC., D/B/A WORKLAW NETWORK; SHAWE & ROSENTHAL LLP; ALLEN, NORTON & BLUE, P.A.; COLLAZO FLORENTINO & KEIL LLP; DENLINGER, ROSENTHAL & GREENBERG; KAMER ZUCKER ABBOTT; KEY HARRINGTON BARNES, P.C.; LEHR MIDDLEBROOKS VREELAND & THOMPSON, P.C.; NEEL HOOPER & BANES, P.C.; SEATON, PETERS & REVNEW, P.A.; SKOLER, ABBOTT & PRESSER, P.C.; AND UFBERG & ASSOCS., LLP,	)	
Plaintiffs,	)	Case No.: 16–CV–0844 (PJS/KMM)
v.	)	
UNITED STATES DEPARTMENT OF LABOR; THOMAS E. PEREZ, IN HIS OFFICIAL CAPACITY AS SECRETARY OF LABOR; AND MICHAEL J. HAYES, IN HIS OFFICIAL CAPACITY AS DIRECTOR, OFFICE OF LABOR–MANAGEMENT STANDARDS,	)	
Defendants.	)	

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

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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 half century 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."

This Court advised the parties on July 18, 2016, that it did not believe that it could find that all applications of Section 203, as interpreted by the Persuader Rule, would be invalid and that it therefore could not award the plaintiffs any relief because they had asserted a pre-enforcement facial challenge, citing *Washington State Grange v. Washington State Republican Party*, 552 U.S. 442, 449 (2008) as authority for this proposition. Dkt. 64.

Washington Legal Foundation (WLF), as *amicus curiae*, anticipates the parties will address the First Amendment issues raised by the Rule, but not fully. This memorandum respectfully shows that (I) the Court erred in holding the plaintiffs' facial First Amendment challenge can succeed only by showing Section 203 would be invalid

[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.

in all of its applications, (II) the Court erred in holding Section 203, as interpreted by the Persuader Rule, would not be subject to strict scrutiny, and (III) Section 203 could not survive strict scrutiny.

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 labor-relations advice 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. WLF has participated as *amicus curiae* in the most important cases raising First Amendment issues (*e.g., Sorrell v. IMS Health Inc.*, 564 U.S. 552 (2011)). 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.

BACKGROUND

The Rule attempts to clarify that a consultant will now be treated as a persuader if one engages in certain forms of "indirect contact" with employees. 81 Fed. Reg. at 15938 & n. 26. The Rule also states that consultants engaging in various other forms of speech will not automatically be treated as persuaders. *Id.* at 15939-40. But, even these kinds of speech will not be treated as within the Section 203(c) safe harbor for "advice" if their

object is to persuade employees with respect to the matters described in Sections 203(a) and (b). *Ibid.*

Any consultant, including any law firm, that delivers labor-relations advice or service to an employer, 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 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 perhaps most significant to the First Amendment issues addressed here 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, 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.

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 adopted a special enforcement policy for Form LM-21, excusing completion of parts of the form for now because of potential changes to the form.[2]

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 labor-relations advice or services to clients 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. This aspect of the Persuader Rule that raises particularly serious First Amendment concerns.

ARGUMENT

The new Persuader Rule, 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.

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

I.

The Court Erred in Holding the Facial Challenge Can Succeed
Only by Showing Section 203 Would Be Invalid in All of Its Applications

The Court's reliance on *Washington State Grange*, 552 U.S. at 449, as requiring the plaintiffs' facial challenge to show that Section 203, as interpreted by the Persuader Rule, would be "'unconstitutional in all of its applications,'" Dkt. 64 at 1 (quoting *Wash. State Grange*, 128 S. Ct. at 1190 (quoting *United States v. Salerno*, 107 S.Ct. 2095, 2258 (1987)), is incorrect. That standard has been more fully stated as requiring invalidation of a law where its overbreadth is shown to be "*substantial*, not only in an absolute sense, but also relative to the statute's plainly legitimate sweep." *United States v. Williams*, 128 S. Ct. 1830, 1838 (2008) (emphasis in original).[3] Later, in *United States v. Stevens*, 130 S. Ct. 1577, 1587 (2010), the Court made clear that it is the *Williams* standard, not the *Salerno* standard, which governs a facial challenge grounded in the First Amendment. That standard "seeks to strike a balance between competing social costs," *Williams*, 128 S. Ct. at 1838; it does not require the plaintiff to show that the challenged law is invalid in all of its applications.

In denying the plaintiffs' motion for preliminary injunction, this Court did not conduct the sort of balancing required under the *Williams* standard. The Court held:

> Under the circumstances—when plaintiffs have launched a facial challenge to a new regulation, when it appears that the regulation's potentially valid

[3] Recently, the Court has found statutes facially invalid without even requiring the *Williams* standard to be met where the "probable, and adverse, effect of the Act on freedom of expression" has been clear. *United States v. Alvarez*, 132 S. Ct. 2537, 2547 (2012).

> applications may outnumber its potentially invalid ones, and when there is only a minimal threat of irreparable harm—the Court concludes that it is preferable to let the regulation take effect and leave plaintiffs to raise their arguments in the context of actual enforcement actions.

Labnet Inc., 2016 WL 3512143, at *13. The standard articulated in *Washington State Grange, Williams,* and *Stevens* does not direct courts simply to assess whether potentially valid applications outnumber the potentially invalid ones. "The first step in overbreadth analysis is to construe the challenged statute; it is impossible to determine whether a statute reaches too far without first knowing what the statute covers." *Williams*, 128 S. Ct. at 1838. The next step is to determine whether it applies to a "substantial amount of protected expressive activity." *Id.* at 1841. The final step is to compare the burden the law imposes on protected speech with any legitimate objective it may serve.

Where, as will be shown, a law is content-based, facial invalidation is required even when the law is construed to have a "narrow sphere of operation," because when it comes to "content-based restrictions on protected speech, the Court has not adopted a free-wheeling approach." *Ibid.* Because Section 203 of the LMRDA is content-based, it cannot survive strict scrutiny.

II.

Strict Scrutiny of Section 203 Is Required If the Persuader Rule Is Upheld

Section 203 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. Those speakers view unionization as 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. When state action specifically targets speakers and their viewpoint, the First Amendment mandates strict scrutiny.

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

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). 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.

In *Reed v. Town of Gilbert*, 135 S. Ct. 2218, 2228 (2015), the Supreme Court clarified 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 *City of Cincinnati v. Discovery Network, Inc.*, 507 U.S. 410, 429 (1993)).

Section 203 is plainly content based. The law 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. Section 203 singles out the speech of employers and their consultants based entirely on its content.

The Department claims 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[,]" the law should be regarded as neither viewpoint nor content based, and that it therefore should be upheld under a more deferential level of scrutiny. 81 Fed. Reg. at 15926.

Reed calls this rationale for applying 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.

The Court held "Plaintiffs are correct … that the new rule—like the LMRDA itself—regulates on the basis of content," *Labnet Inc.*, 2016 WL 3512143, at *8, but then 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, the Court cited *Citizens United v. Fed. Election Comm'n*, 558 U.S. 310, 366–67 (2010), a case that had upheld the constitutionality of disclosure requirements applied to candidates in federal elections. In essence, the Court 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 by applying it to union campaigns to win representation rights from employees. But lower federal courts are not permitted to create their own exceptions to the Supreme Court's First Amendment case law by importing doctrines developed by the Court in a completely distinct set of cases.

As the Third Circuit explained in *Free Speech Coal., Inc. v. Attorney Gen. United States*, 825 F.3d 149 (3d Cir. 2016), expansion of the "secondary effects" doctrine beyond the narrow set of cases where the Supreme Court has applied it[4] "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." *Id.* at 163 (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. *Id.* at 164; *see also Homeless Helping Homeless, Inc. v. City of Tampa*, No. 8:15-cv-1219-T-23AAS, 2016 WL 4162882 (M.D. Fla. 2016) (*Reed* required anti-solicitation ordinance to be treated as content based).

This Court also rejected application of strict scrutiny to the Persuader Rule because it "does not discriminate on the basis of viewpoint." *Labnet Inc.*, 2016 WL 3512143, at *8. The Court observed the Rule applies to both "pro- and anti-union speech." *Ibid.* The Court acknowledged 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. 703, 724 (2000), and *Phelps-Roper v. Nixon*, 545 F.3d 685, 691 (8th Cir. 2008) *overruled by Phelps-Roper v. City of Manchester, Mo.*, 697 F.3d 678 (8th Cir. 2012), the Court held that this evidence of an improper motive could not be used

[4] *See, e.g., City of Renton v. Playtime Theatres, Inc.*, 475 U.S. 41 (1986).

to subject the rule to strict scrutiny.

The Court should read *Hill* in conjunction with the Supreme Court's more recent precedent in *McCullen v. Coakley*, 134 S. Ct. 2518 (2014). There, although the majority 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.

When *Hill* and *McCullen* are read together, they conclusively demonstrate that the Persuader Rule is viewpoint based as well as content based. *See also Heffernan v. City of Paterson, N.J.*, 136 S. Ct. 1412, 1418 (2016) (holding that strict First Amendment scrutiny is mandated whenever a government official acts with a viewpoint-based motive); *NFIB v. Perez*, No. 5:16-CV-00066-C, 2016 WL 3766121 (N.D. Tex. June 27, 2016) at *31 ¶ 88 ("DOL's New [Persuader] Rule imposes content-based burdens on speech and cannot survive strict scrutiny.").

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

Justice Douglas, concurring in *Thomas v. Collins*, said 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 sought by the Persuader Rule. Disclosure requirements are a form of compelled speech and have been upheld in only three quite limited contexts: (1) political campaign contributions, *Citizens United*, 558 U.S. at 371; (2) lobbyist expenditures, *United States v. Harriss*, 347 U.S. 612, 625–626 (1954); and (3) advertising, *Milavetz, Gallop & Milavetz, P.A. v. United States*, 559 U.S. 229 (2010) (attorney advertising).

The five-member *Citizens United* majority explained that disclosure is a less restrictive alternative to more comprehensive regulation of speech and that the public has an interest in knowing who is speaking about a candidate shortly before an election. The disclosure requirements imposed by the Rule and Section 203 contrast sharply with the disclosure requirements upheld in *Citizens United*. They are not restricted to communications shortly before an election. They do not require disclosure with an electioneering communication. The required disclosures do not tell voters anything they do not already know about the identity of the person who is engaged in the communication—the employer. The disclosures are not as simple or as minimal as those imposed by BCRA.

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 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 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. Hence, this is not a mere disclosure requirement; it is a form of compelled, controversial speech which is subject to strict constitutional scrutiny.

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

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 NLRA 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."[5]

[5] 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).

III.

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 less-restrictive means of serving that interest. Neither aspect of this test can be met.

A. The Law Would Not Directly Advance Any Compelling Interest

The various interests the Department advances[6] 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.

But the newly required disclosures reveal only the fees paid to and expenditures made by consultants who provide labor-relations advice and services with the object of persuading employees, but who do not have direct contact with employees. No court has held that any interest exists, let alone a compelling interest, in providing employees this information. Employees have long had access to extensive information regarding employer expenditures on direct persuader activities, the identities of persons engaged in

[6] 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").

those activities, and, with respect to consultants who had direct contact with employees, the fees they were paid by the employer, as well as, in most areas of the country, the fees they were paid by all other employers. The Department cannot show that the additional information 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.

Providing employees with the information at issue in this case would allow unions to target for protest 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 even an important government interest. The government's interest is just the opposite, 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.

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. 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.

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.

Another alternative is for the government to speak directly rather than compelling others to speak. "The [Department] can express [its] view through its own speech." *Sorrell*, 564 U.S. at 578. 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." *Id*. at 578-79.

CONCLUSION

If the Court concludes that the Persuader Rule is a reasonable interpretation of the Department's statutory mandate—or that a facial challenge to the Rule fails on other grounds—then the Court must hold that Section 203 facially violates the First Amendment. As interpreted, it would compel employers and those who advise them to engage in speech they do not wish to engage in, substantially burdening their First Amendment rights while serving no legitimate government interest.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE WITH WORD LIMIT

I hereby certify that this memorandum complies with the typeface requirements of the local rules and the word-limitation imposed by this Court's order. The memorandum contains 3,989 words

s/ Marko J. Mrkonich
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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 September 16, 2016, on all counsel or parties of record on the service list.

s/ Marko J. Mrkonich
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