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; ARKANSAS HOSPITALITY ASSOCIATION; COALITION FOR A DEMOCRATIC WORKPLACE; 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; and **MICHAEL J. HAYES**, in his official capacity as Director, Office of Labor-Management Standards, U.S. Department of Labor, **DEFENDANTS.**	**CASE NO. 4:16-CV-169 (KGB)**

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

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

STATUTES

LEGISLATIVE MATERIALS

OTHER AUTHORITIES

INTEREST OF AMICUS CURIAE

The Chamber of Commerce of the United States of America (the "Chamber") is the world's largest business federation. It represents 300,000 direct members and indirectly represents the interests of more than three million companies and professional organizations of every size, in every industry sector, from every region of the country. An important function of the Chamber is to represent the interests of its members in matters before Congress, the Executive Branch, and the courts. To that end, the Chamber regularly files amicus briefs in cases that raise issues of vital concern to the Nation's business community.

The Chamber's members, which include companies and law firms and even solo practitioners, have a strong interest in the outcome of this proceeding. From 1962 until the present, the Department of Labor ("DOL") across administrations of both parties applied a clear and consistent interpretation of the advice exemption to the reporting requirements of the Labor-Management Reporting and Disclosure Act ("LMRDA") for "persuader" activity. That interpretation of the LMRDA permitted lawyers, their firms, and non-lawyer consultants to provide recommendations on union-organizing matters to their clients without fear of breaching their ethical obligations with respect to client confidences. At the same time, it faithfully implemented the statutory requirement of disclosure by those who did not advise employers, but instead sought to directly or indirectly persuade employees on union-related issues.

The DOL's new rule, however, abandons that well-established and longstanding interpretation, and thus imposes stringent disclosure obligations on attorneys, law firms, and consultants providing their employer clients what anyone would call "advice." It raises serious constitutional questions regarding employers' statutory and constitutional right to seek advice on how to communicate with their employees. It will chill the free exchange of ideas between employers and employees and will impose substantial compliance costs as employers and their

attorneys are forced to grapple with DOL's incoherent new guidelines. Of greatest concern, the DOL's new interpretation of the advice exemption in the LMRDA—if allowed to take effect—threatens to expose thousands of lawyers, law firms, and companies to potential criminal liability for failure to abide by an exceedingly vague interpretation of the LMRDA.

For these reasons, the Chamber submits this brief on behalf of its members' interests and in support of a preliminary injunction. To minimize duplication, the Chamber does not address the irreparable injury, balance of the equities, and public interest requirements, and instead focuses on two issues of statutory interpretation and administrative law before the Court. On all scores, however, the Chamber supports the Plaintiffs on their arguments.

SUMMARY OF ARGUMENT

The DOL's interpretation of the reporting obligations imposed by the Labor-Management Reporting and Disclosure Act, 29 U.S.C. § 433, is contrary to the unambiguous statutory text. Section 433(b) imposes certain reporting obligations for employers and third-party consultants that agree, directly or indirectly, to engage in activity to persuade an employee to join (or not to join) a union. The statute carves out from that reporting requirement the provision of "advice." Since 1962, DOL consistently has construed "advice" to encompass communications between an employer and its lawyers or other consultants where the employer was receiving recommendations on how to proceed, which the employer was of course able to follow or to decline.

But DOL, abandoning a bipartisan interpretation that had offered clear bright lines for employers, lawyers, and other consultants, has now announced a new, artificially narrow interpretation of "advice." *Interpretation of the "Advice" Exemption in Section 203(c) of the Labor-Management Reporting and Disclosure Act*, 81 Fed. Reg. 15,924 (Mar. 24, 2016). This new interpretation excludes many communications that are obviously "advice" under the

ordinary meaning of that term—such as a consultant's suggestions on how to write a persuasive speech, or a recommendation from a law firm about a best course of action.

DOL contends that its cramped interpretation of "advice" is necessary because the prior interpretation did not give sufficient weight to the LMRDA's requirement that both "direct" *and* "indirect" persuasion activities be reported. But that is simply not true. DOL's longstanding interpretation did not render meaningless the reporting obligations for "indirect" persuader activity. Indeed, the D.C. Circuit previously found DOL's prior interpretation to be permissible—and DOL's rulemaking expressly concedes that it was. *Int'l Union v. Dole*, 869 F.2d 616, 620 (D.C. Cir. 1989) (R.B. Ginsburg, J.); 81 Fed. Reg. at 15,941. In finding its prior interpretation inadequate, DOL overlooked an interpretation of "indirect persuasion" that is perfectly compatible with the ordinary meaning of "advice." "Direct persuasion" refers to communications that forthrightly advocate a particular view of unionization, while "indirect persuasion" means persuasion through more subtle or oblique methods, such as statements endorsing a particular worldview or providing factual information without specifically opining on whether an employee should join a union. By its plain terms, the statute covers both forms of persuasive communications to employees, while exempting communications to employers that any English speaker would characterize as "advice."

Furthermore, DOL's new interpretation of the LMRDA's advice exemption is also contrary to the basic canons of statutory construction. For more than five decades, DOL adopted a clear, administrable interpretation of the advice exemption that cohered with the overall statutory context and scheme of the LMRDA and that advanced the intent of Congress. That longstanding interpretation avoided serious constitutional questions under the First Amendment and the Fifth Amendment—questions that DOL's new interpretation raises, rather than avoids.

Those issues are particularly important because violations of the reporting requirements for persuader activity in the LMRDA are subject to criminal penalties, and the rule of lenity requires that any statutory ambiguity be resolved in favor of lenity. Therefore, if there is any doubt as to the statute's proper interpretation, then DOL's prior, narrower interpretation of the reporting requirement and its broader interpretation of the advice exemption must govern. Because the statute, when interpreted in light of these canons, clearly precludes DOL's interpretation, that interpretation must be rejected under the first step of *Chevron, U.S.A., Inc. v. Nat. Res. Def. Council, Inc.*, 467 U.S. 837, 842 (1984).

Even if § 433 is ambiguous (and it is not), for these same reasons DOL's interpretation is unreasonable and therefore fails at *Chevron*'s second step. DOL's interpretation not only ignores the statutory text, structure and purpose, but also adopts an unworkably vague standard and imposes severe burdens on attorney-client confidences. Indeed, even if the literal text of § 433 is susceptible of more than one construction, the established canons of construction render DOL's new interpretation an impermissible resolution of any ambiguity.

In addition, DOL's rule is arbitrary and capricious. The Plaintiffs have identified numerous ways in which DOL's Rule falls short of the well-established requirements for reasoned decisionmaking. In this brief, the Chamber highlights one particular flaw, which is that DOL impermissibly undertook to reform two of the statute's three reporting requirements in open disregard of the consequences its decision would have for the third. DOL requires the use of three reporting forms: the LM-10, LM-20, and LM-21. Several commenters argued that DOL's new rule would impose particularly arduous reporting obligations with respect to the LM-21 form. DOL's answer was to address only the LM-10 and LM-20 form and defer its consideration of the LM-21 form to a future rulemaking. That response is irrational because

DOL's interpretation of "advice" will necessarily affect the reporting obligations with respect to the LM-21 form. DOL cannot just ignore those obligations when adopting its interpretation.

ARGUMENT

Plaintiffs seek to enjoin DOL from implementing and enforcing its new interpretation of the scope of the reporting obligations imposed by the LMRDA, 29 U.S.C. § 433. The agency adopted this new interpretation in a final rule published on March 24, 2016 ("the Rule"). 81 Fed. Reg. 15,924. Under the Rule, many agreements between employers and law firms and non-lawyer consultants, which previously were exempt under the LMRDA's advice exemption, now will be subject to the statute's reporting requirements on the ground that they involve "indirect[]" persuasion of employees, 29 U.S.C. § 433(b)(1), and do not constitute "giv[ing] advice," *id.* § 433(c). DOL previously interpreted the advice exemption to apply where, for example, a lawyer provided advice to an employer regarding union-organizing activities notwithstanding that the advice, if accepted by the employer, might result in the lawyer indirectly facilitating the employer's efforts to persuade employees not to join a union.

But now DOL interprets the reporting obligation to apply unless the lawyer or other consultant is engaged *solely* in advice that does not indirectly persuade. Because that new interpretation cannot be reconciled with the plain meaning of the statute, is contrary to the context and congressional purpose of the LMRDA, and is foreclosed by several established interpretive principles, it is entitled to no deference and should be set aside.

I. DOL's New Interpretation Is Unambiguously Foreclosed By The LMRDA.

Under the *Chevron* framework, an agency's interpretation governs "if it is a reasonable interpretation of the statute." *Entergy Corp. v. Riverkeeper, Inc.*, 556 U.S. 208, 218 (2009) (citing *Chevron*, 467 U.S. at 843-44). If DOL's interpretation is contrary to the clear meaning of the LMRDA, then "that is the end of the matter; for the court, as well as the agency, must give

effect to the unambiguously expressed intent of Congress." *Chevron*, 467 U.S. at 842-43. That is because any such interpretation would be unreasonable as a matter of law. *Entergy*, 556 U.S. at 218 n.4 ("[I]f Congress has directly spoken to an issue then any agency interpretation contradicting what Congress has said would be unreasonable."). In assessing whether an interpretation is reasonable, the Court should employ all of the "traditional tools of statutory construction." *Chevron*, 467 U.S. at 843 n.9. Here, application of those traditional tools demonstrates that DOL's new interpretation of the LMRDA "goes beyond the meaning that the statute can bear." *MCI Telecomms. Corp. v. Am. Tel. & Tel. Co.*, 512 U.S. 218, 229 (1994).

A. The Plain Meaning of the Statute Cannot Be Reconciled With DOL's New Interpretation.

As traditionally understood, the LMRDA sets up a straightforward two-step inquiry. First, the statute imposes a reporting obligation on "activities where an object thereof is, directly or indirectly . . . to persuade employees" regarding unionization. 29 U.S.C. § 433(b)(1). Second, the statute carves out an exemption from the reporting requirement for certain activities, including "giv[ing] advice to [an] employer." *Id.* § 433(c). Thus, the statute states that the reporting obligation applies to all activities motivated by a particular purpose—*i.e.*, persuading employees regarding unionization—unless those activities constitute the giving of advice.

DOL's new interpretation transforms this straightforward statutory scheme into a complex and unadministrable hash. DOL reads the statute to create two mutually exclusive categories of activities: activities having the "object" to "persuade employees," and the giving of advice. According to DOL, if the purpose of a communication with an employer is to persuade employees not to join a union, then the communication ceases to be "advice." But this is obviously incorrect: many communications can be both "advice" *and* intended to persuade. Suppose, for example, that an employer has drafted a speech to deliver to employees about the

potential consequences of unionization. The employer contacts a consultant and specifically asks for "advice" about the speech. The consultant answers that her "advice" is to strike a more conciliatory tone, including, perhaps, by using certain suggested language in lieu of some of the original phrasing. Any English speaker would agree that the consultant has offered "advice" about the speech. Yet DOL's new interpretation would hold that this was not "advice" at all, because it had the ultimate object of helping the employer better persuade the employees. *See, e.g.*, 81 Fed. Reg. at 15,927 (advice exemption does not encompass "revising employer-created materials . . . if an 'object' of the revisions is to enhance persuasion"); *id.* at 15,939 ("revising an employer created document to further dissuade employees from supporting the union[] will trigger reporting"). That newly invented definition of "advice" simply cannot be reconciled with the plain meaning of the word. *See, e.g.*, *Merriam-Webster's Collegiate Dictionary* (10th ed. 2002) (defining "advice" as "recommendation regarding a decision or course of conduct: counsel").

Indeed, the implausibility of DOL's interpretation is underscored by the fact that the very same act apparently would be "advice" if it had a different motivation. For example, if the consultant's sole purpose was to help the company avoid unflattering press coverage, the same comments on the same speech would turn out to be "advice" after all. There is simply no way this distinction can be reconciled with the ordinary meaning of "advice."

DOL justified its extraordinary definition of "advice" as an effort to ensure that the advice exemption does not "override" the otherwise-applicable reporting obligation. 81 Fed. Reg. at 15,926. But "overriding" something is exactly what an exemption is *supposed* to do. Congress imposed a broad reporting obligation and then overrode it—in part—by exempting specified activities, including giving advice. If there were any doubt, the section's heading

makes its function crystal clear: it makes "[a]dvisory or representative services *exempt* from filing requirements." 29 U.S.C. § 433(c) (emphasis added); *see INS v. Nat'l Ctr. for Immigrants' Rights, Inc.*, 502 U.S. 183, 189 (1991) ("[T]he title of a statute or section can aid in resolving an ambiguity in the legislation's text.").

DOL's effort to define persuader activities and advice giving so that they form non-overlapping categories is thus unnecessary, and indeed squarely at odds with the exemption regime that Congress adopted. Because DOL's new interpretation defies the "design and structure of the statute" and gives an unrecognizable meaning to the simple word "advice," it is foreclosed by Congress's clearly expressed intent. *Util. Air Regulatory Grp. v. EPA*, 134 S. Ct. 2427, 2442 (2014) (quotation marks omitted).

According to DOL, however, the agency's cramped reading of the "advice" exemption is necessary because Congress decided to cover activities that aim "directly *or indirectly*" to persuade employees. 29 U.S.C. § 433(b) (emphasis added); *see, e.g.*, 81 Fed. Reg. at 15,925-26 ("This rule ensures that indirect reporter [sic] activity, as intended by Congress, is reported and disclosed . . . ."). Indeed, the agency relies on this argument in the very first sentence of the Rule: "The purpose of this rule is to revise the Department's interpretation of section 203 . . . to require reporting of 'indirect' persuader activities and agreements." 81 Fed. Reg. at 15,925. The central premise of this argument is that, under DOL's prior interpretation, the advice exemption swallowed the statute's express coverage of "indirect[]" persuasion.

But that premise is wrong; DOL's new interpretation is not necessary to give meaning to the LMRDA's coverage of "indirect" persuasion. The prior rule embraced by five decades of DOL's predecessors—across administrations of both parties—did not read "indirect" persuasion

out of the statute, or in any way render it a nullity. The prior interpretation simply understood the term differently—and far more plausibly—than DOL now suggests.

In ordinary usage, "direct" persuasion involves open, frank communication addressed to the question at issue, and "indirect" persuasion involves subtler or more oblique efforts to change a person's mind. If a piece of persuasive writing (such as a brief) is described as "direct," for example, that means that it is forthright and speaks squarely to the issue at hand. By contrast, if it is characterized as "indirect," that means it gets at the point more subtly or obliquely. Both are efforts to persuade the audience, but one style pursues this directly, and the other does so indirectly. For instance, if a person directly suggests that an employee not join a union, he is engaging in direct persuasion. If that person offers factual information about the history of unions, or mentions that an admired family member did not unionize, without offering a specific opinion on whether to join a union, he is engaging in indirect persuasion.

The phrase "indirectly persuade" is routinely used in precisely this way. *See, e.g.*, *Davis v. Halpern*, 768 F. Supp. 968, 985 (E.D.N.Y. 1991) (explaining that, under Title VII, a "plaintiff may indirectly persuade the court of pretext by showing that the employer's proffered explanation is not worthy of credence"); Brian Cogan & Tony Kelso, *Encyclopedia of Politics, the Media, and Popular Culture* 281 (2009) (describing a "denunciation of the George W. Bush administration that was designed to indirectly persuade the population to vote for democratic challenger Senator John Kerry"). To take another example, there is a substantial literature on the relative virtues of "direct" and "indirect" persuasion in advertising, where those terms are used in this same way.[1] Both forms of advertising are "direct" in the sense that they are *directed* at the

[1] *See, e.g.*, Edward F. McQuarrie & Barbara J. Phillips, *Indirect Persuasion in Advertising: How Consumers Process Metaphors Presented in Pictures and Words*, 34 J. Advertising 7 (2005);

consumer, with no intermediary; they simply differ in the way they go about persuading him or her of the virtues of a product.

As DOL's prior rule recognized, Congress sought to cover both of these forms of persuasion. That is, a persuader who resorts to *indirection* in communicating with employees, like a persuader who squarely urges a view about unionization, is subject to the statute's requirements. The "directly or indirectly" language thus precludes quibbling over whether the persuader was really trying to change an employee's mind on the ultimate question of unionization, rather than simply to inform the employee of certain relevant facts, to influence the employee's overall worldview, or the like. The statute short-circuits such debates because it applies *whenever* the speaker is trying to bring his audience around to a certain view about unionization—by whatever route, be it direct or indirect.

This understanding of "indirect" persuasion squares with the ordinary meaning of the statutory language, and it readily explains why the "advice" exemption, as previously construed, in no way swallows the reporting rule. But DOL did not fairly consider this longstanding and straightforward interpretation of the statute. Instead, it caricatured the old rule as simply omitting "indirect" persuasion altogether (which it did not), and proceeded to offer an extended attack on that straw man as a basis for its radical new understanding of the word "advice." Accordingly, the agency's new interpretation is an implausible solution in search of a problem.

B. Well-Established Canons of Construction Confirm That Congress Clearly Did Not Intend DOL's New Interpretation.

The *Chevron* analysis requires the Court to look not only to the plain text of the statute, but also to the various other tools that courts customarily employ to discern a law's meaning.

Youjae Yi, *Direct and Indirect Approaches to Advertising Persuasion: Which Is More Effective?*, 20 J. Bus. Res. 279 (1990).

See, e.g., *INS v. Cardoza-Fonseca*, 480 U.S. 421, 449 (1987) (relying on the "ordinary canons of statutory construction" to discern whether the statute unambiguously forecloses the agency's reading); *see also City of Arlington v. FCC*, 133 S. Ct. 1863, 1876 (2013) (Breyer, J., concurring in part) (explaining that "the statute's text, its context, the structure of the statutory scheme, and canons of textual construction are relevant in determining whether the statute is ambiguous" and collecting cases to that effect).

In this case, three tools of statutory construction—context, constitutional avoidance, and the rule of lenity—confirm that Congress intended to exempt all advice offered to employers from the statute's reporting obligation. Accordingly, DOL's interpretation is entitled to no deference, and the Rule cannot stand.

1. Context Precludes DOL's New Interpretation.

"A fair reading of legislation demands a fair understanding of the legislative plan." *King v. Burwell*, 135 S. Ct. 2480, 2496 (2015). In this case, the plan is perfectly clear. Congress exempted "advice" from the reporting obligations in order to exempt legal advice, as well as that of non-lawyer consultants, about how to persuade employees on union issues. Congress had legal advice squarely in mind when it exempted "advice": other activities exempted in the very same statutory sentence were "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," which are the typical work of lawyers. 29 U.S.C. § 433(c). And Congress's intent to cover non-lawyer consultants is clear from Congress's use of the phrase "advice" rather than "legal advice"—a point confirmed by the legislative history. *See* S. Rep. No. 85-1684, at 8-9 (1958) ("Since *attorneys at law and other responsible labor-relations advisers* do not themselves engage in influencing or affecting

employees in the exercise of their rights under the National Labor Relations Act, an *attorney or other consultant* who confined himself to giving advice, taking part in collectively bargaining and appearing in court and administrative proceedings nor would such a consultant be required to report." (emphasis added)).

Thus, in context, the question before the Court is this: would the ordinary understanding of "legal advice" encompass efforts to assist a client in persuading a third party? The answer is obviously yes. Lawyers routinely assist their clients in persuading third parties. They advise companies poised to go public by drafting a prospectus; they help individuals and advocacy groups persuade legislators by drafting testimony; and so forth. All of this material is plainly encompassed in the ordinary meaning of "legal advice." *See, e.g.*, *Int'l Union*, 869 F.2d at 619 n.4 (R.B. Ginsburg, J.) ("the term 'advice,' in lawyers' parlance, may encompass, *e.g.*, the preparation of a client's answers to interrogatories, the scripting of a closing or an annual meeting" (citation omitted)). Yet DOL's new interpretation holds that none of this material is "advice"—apparently because the ultimate purpose of that material is to persuade someone of something. In light of Congress's evident purpose to exempt legal advice from the statute's coverage, that interpretation is untenable.

The same logic extends to consultants. The word "consult"—a synonym of "advise"—is ordinarily understood to encompass activities whose ultimate purpose is persuasion. A consultant might be retained to help prepare an effective presentation, for example, or to advise a company about the efficacy of different persuasive tactics. For example, an employer might be familiar with several different arguments against unionization—the cost of union dues, the possibility of inadequate union representation, or the like—and might seek advice from a consultant on which of those arguments would be the most effective in persuading its employees

not to join a union. Clearly, a consultant providing such work product is engaging in the act of "consulting"—and hence "advising." Given that such engagements were one of the paradigms for which the advice exemption was devised, it makes no sense to suppose that Congress meant to exclude such material from that same exemption merely because the purpose of the consulting arrangement was to persuade employees not to unionize. Rather, Congress unambiguously intended to exempt all such communications from the LMRDA's reporting requirements.

DOL's new interpretation also conflicts with the plain terms and context of the LMRDA in another respect. The statute specifically exempts from reporting the services of a consultant by reason of his "engaging or agreeing to engage in collective bargaining on behalf of [an] employer . . . or the negotiation of an agreement or any question arising thereunder." 29 U.S.C. § 433(c). The process of collective bargaining necessarily includes communications and conduct at the bargaining table, as well as those that occur before and after the bargaining session. *See generally Procter & Gamble Mfg. Co.*, 160 NLRB 334, 340-341 (1966). Indeed, as the Second Circuit aptly observed:

> Labor negotiations do not occur in a vacuum. While the actual bargaining is between employer and union, the employees are naturally interested parties. During a labor dispute the employees are like voters whom both sides seek to persuade. . . . [U]nions are granted extensive powers to communicate with employees in the represented unit. Consistent with the First Amendment, the employer must also be afforded an opportunity to communicate its positions.

NLRB v. Pratt & Whitney Air Craft Div., 789 F.2d 121, 134 (2d Cir. 1986) (citations omitted).

Although DOL's rule does not require reporting regarding persuader activities undertaken in formal collective bargaining sessions, it does require consultants to report communications "drafted by the consultant" for potential use by an employer "about the parties' progress in negotiations, arguing the union's proposals are unacceptable to the employer, encouraging employees to participate in a union ratification vote or support the union committee's

recommendations, or concerning the possible ramifications of striking." 81 Fed. Reg. at 15,971; *see id.* at 15,939 ("While many reports will be triggered by persuader activities related to the filing of representation petitions, *others will result from activities related to collective bargaining*. . . ." (emphasis added)).

Thus, no reporting is required for activities where a lawyer sits at the bargaining table, argues that the employer's proposals are fair and reasonable, and informs the union bargaining team that if they strike, the employer has the right to replace them on a temporary or permanent basis. But if the very same lawyer recommends to his client that they make those very same points to employees who were not at the bargaining table, or assists the employer in drafting any such communications, DOL's new rule transforms that work into reportable "persuader activities." That outcome finds no support in the text of the statute, and it "makes scant sense." *Mellouli v. Lynch*, 135 S.Ct. 1980, 1989 (2015) (declining to accord *Chevron* deference to an agency's "incongruous" parsing of a statutory scheme resulting in an interpretation that "makes scant sense"). DOL's interpretation therefore fails at *Chevron* Step 1.

2. Constitutional Avoidance Precludes DOL's New Interpretation.

The canon of constitutional avoidance is "a tool for choosing between competing plausible interpretations of a statutory text, resting on the reasonable presumption that Congress did not intend the alternative which raises serious constitutional doubts." *Clark v. Martinez*, 543 U.S. 371, 381 (2005). This indicator of Congress's intent is central to the determination whether Congress unambiguously resolved a question at *Chevron*'s first step. *See, e.g.*, *Edward J. DeBartolo Corp. v. Fla. Gulf Coast Bldg. & Constr. Trades Council*, 485 U.S. 568, 574-75 (1988) (explaining at *Chevron* Step 1 that "where an otherwise acceptable construction of a statute would raise serious constitutional problems, the Court will construe the statute to avoid

such problems unless such construction is plainly contrary to the intent of Congress" (citations omitted)).

Even if DOL's new interpretation were textually permissible (and it is not), the constitutional doubts it raises would nonetheless preclude it. DOL does not—nor could it—deny that the prior interpretation, which it applied for fifty years, is a permissible reading of the statute. And the new reading clearly raises formidable constitutional difficulties that the prior reading did not. The canon of constitutional avoidance compels the conclusion that Congress intended the old rule.

First, DOL's new interpretation undermines the First Amendment justification for the statute's disclosure requirement. Because disclosure requirements impose a significant burden on constitutionally protected speech, they are, at a minimum, subject to "'exacting scrutiny,'" which requires a "'substantial relation' between the disclosure requirement and a 'sufficiently important' governmental interest." *John Doe No. 1 v. Reed*, 561 U.S. 186, 196 (2010) (internal quotation marks omitted). Specifically, in the election context, disclosure requirements are upheld only if they serve to ferret out misleading activities, such as the pernicious practice of running election-related advertisements "'while hiding behind dubious and misleading names,'" *McConnell v. FEC*, 540 U.S. 93, 197 (2003), which misleads voters and impairs the integrity of the marketplace of ideas.

That is very similar to the interest traditionally served by the LMRDA's disclosure requirements. As previously understood, those disclosure requirements ensure that, where employees are on the receiving end of anti-union messages by someone who cannot readily be identified as the employer's agent, they know if their employer is really behind those messages. That purpose reflects the "prime congressional concern to uncover employer-expenditures for

anti-union persuasion carried out, often surreptitiously, not by employers or supervisors, but by consultants or middlemen." *Int'l Union*, 869 F.2d at 619 n.5; *see* Pls. Br. at 4-7 (detailing legislative history). Indeed, the Senate Report on the legislation specifically observed that "public disclosure" of covered activities "will accomplish the same purpose as public disclosure of conflicts of interest." S. Rep. No. 86-187, at 12 (1959). This interest has served as the basis for decisions upholding the constitutionality of the LMRDA's reporting requirements under DOL's prior interpretation. *See, e.g.*, *Humphreys, Hutcheson & Moseley v. Donovan*, 755 F.2d 1211, 1222 (6th Cir. 1985); *Master Printers of Am. v. Donovan*, 751 F.2d 700, 707-08 (4th Cir. 1984).

DOL's new, narrow interpretation of the advice exemption, however, unmoors the LMRDA's reporting provision from this familiar interest. Informing employees that an employer has obtained advice from particular attorneys or consultants to help the employer be more persuasive does *not* help the employees to better understand the speaker's—that is, the employer's—incentives.[2] Nor does it serve to identify the real party in interest behind a communication (which is still the employer). The employer's incentives are the same whether or

[2] Indeed, that is especially true because the National Labor Relations Board ("NLRB") has truncated its representation case procedures so that a union campaign and election can—and now often does—occur in far less than 30 days. *See* Jennifer Abruzzo, Deputy General Counsel, National Labor Relations Board, UPDATE ON NLRB REPRESENTATION CASE RULE CHANGES 17 (October 2015) (noting a median of 23 days between the filing of the representation petition and an election), http://static.politico.com/90/7f/9962cd2d4f0bac217340c784a691/nlrb-data-on-representation-procedures.pdf. But the report due under the LMRDA must be filed only 30 days after an employer and a consultant have entered into an agreement. *See, e.g.*, 29 C.F.R. §406.2. Thus, the new reporting that DOL requires may be useless to employees in light of the NLRB's changes to the timing of union elections.

not it has obtained outside input, and the real party-in-interest is plainly the employer, not the consultant, regardless.[3]

DOL candidly acknowledges these distinctions from the disclosure interests previously credited by the courts, 81 Fed. Reg. at 15,985-86, which cannot support its new interpretation. Accordingly, the agency spins out a new theory: disclosure of consulting arrangements, it argues, provides "pertinent information" because it allows employees to put the employer's message "into the proper context." *Id.* at 15,986. It is highly dubious that this novel and sweeping interest would pass constitutional muster. *See, e.g.*, *McIntyre v. Ohio Elections Comm'n*, 514 U.S. 334, 348 (1995) ("The simple interest in providing voters with additional relevant information does not justify a state requirement that a writer make statements or disclosures she would otherwise omit."). But, at a minimum, DOL's new theory raises grave constitutional questions that the traditional interpretation entirely avoids. Assuming that both interpretations are plausible, therefore, the constitutional avoidance canon dictates that the prior interpretation must be preferred.

Second, DOL's new interpretation construes the statute as imposing a content-based distinction, whereas the old interpretation did not. Under the prior rule, the statute's applicability turned on the speaker's *audience*. If a consultant addressed only the employer, disclosure was not required; if the same consultant addressed employees themselves, it was. *See* 81 Fed. Reg. at

[3] DOL's invocation of the Wizard of Oz in announcing the Rule is thus particularly inapt. *See* Office of Labor Management Standards, *Final Rule on Persuader Reporting Increases Transparency for Workers*, http://www.dol.gov/olms/regs/compliance/ecr_finalrule.htm (last updated Mar. 24, 2016) ("'Pay no attention to that man behind the curtain. The great Oz has spoken,' the actor Frank Morgan thundered in the famous 1939 movie."). This "man behind the curtain" interest aptly captures the *original* concern motivating (and justifying) the LMRDA. But it has nothing to do with DOL's new interpretation, which extends the rule to cases where the apparent speaker is *not* controlled by a hidden speaker and is serving its *own* agenda rather than someone else's.

15,925 (explaining that the prior rule "shield[ed] employers and their consultants from reporting agreements in which the consultant has no face-to-face contact with employees"). By contrast, under the new rule, the statute's application for the first time turns on what the speaker *says* to the employer.

This new regime implicates the First Amendment principle that the government may not engage in content discrimination, which inevitably skews the marketplace of ideas. DOL failed to appreciate the significance of this point because it focused only on the extent of the *burden* imposed by disclosure requirements. *See* 81 Fed. Reg. at 15,984. The costs of disclosure, the agency insists, are not so heavy that speakers will be deterred from exercising their rights. *See id.* But whatever the merits of this response, it entirely ignores an important aspect of the problem. The First Amendment strongly disfavors selective government interventions into the marketplace of ideas *whether or not* speech is being completely deterred. "The first danger to liberty lies in granting the State the power to examine publications to determine whether or not they are based on some ultimate idea and, if so, for the State to classify them." *Rosenberger v. Rector & Visitors of Univ. of Va.*, 515 U.S. 819, 835 (1995). Even if all the government proceeds to do is *subsidize* or *facilitate* the speech that it classifies favorably, that interference with the free market is presumptively impermissible. *Id.* at 834; *Good News Club v. Milford Cent. Sch.*, 533 U.S. 98, 110 (2001).

DOL's new interpretation exposes the LMRDA to serious First Amendment doubts because, whether or not anyone is ultimately deterred from speaking, it marks a new intervention by the federal government into the marketplace of ideas. The examples set forth in the Rule make this clear. "For example, reporting is required if the consultant determines that a monthly bonus to employees should be the equivalent of one month's dues payments of the union

involved in an election." 81 Fed. Reg. at 15,973. But if the consultant simply offers *different* advice—such as offering "guidance on employer personnel policies and best practices" without touching on the union, *id.* at 15,928—no reporting obligation applies. This imposition of regulatory consequences based on the content of speech raises serious constitutional concerns—and that is putting it mildly. Indeed, both Congress and the Supreme Court have stressed the special importance of "encourag[ing] free debate on issues dividing labor and management" in the workplace. *Chamber of Commerce of U.S. v. Brown*, 554 U.S. 60, 67 (2008) (quotation marks omitted). The LMRDA should not be read to enact a system of selective, content-based speech regulations in this delicate area unless no alternative interpretation is available. Here, of course, the prior rule offers an alternative account—and indeed a more plausible one—that is free of this new form of constitutional doubt.

Third, DOL's new interpretation of the statute also threatens to render it unconstitutionally vague. The Due Process Clause proscribes any law that is "so standardless that it invites arbitrary enforcement," *Johnson v. United States*, 135 S. Ct. 2551, 2556 (2015), or which fails to give fair notice of what is prohibited, such that "men of common intelligence must necessarily guess at its meaning and differ as to its application," *Connally v. General Construction Co.*, 269 U.S. 385, 391 (1926). As the Supreme Court has emphasized, these principles apply with particular force in the First Amendment context because vague regulations inevitably deter even unregulated speech. *See FCC v. Fox Television Stations, Inc.*, 132 S. Ct. 2307, 2317 (2012) ("When speech is involved, rigorous adherence to those requirements is necessary to ensure that ambiguity does not chill protected speech.").

Here, at a minimum, DOL's new interpretation unnecessarily steers the statute perilously close to "a vagueness shoal." *Skilling v. United States*, 561 U.S. 358, 368 (2010). Under the

prior rule, "advice" bore its ordinary meaning—and so long as consultants or attorneys were engaged in advising an employer, they could be confident they were not also involved in covered persuasion. Now, however, whether an activity constitutes "advice" will depend on the "object" or motive that a court may later impute to the consultant's speech—taking account of "the agreement, any accompanying communication, the timing, or other circumstances relevant to the undertaking." 81 Fed. Reg. at 15,928. Attorneys and consultants will understandably balk at the prospect of having their speech parsed under this totality-of-the-circumstances test and will be forced to stay well clear of the line—chilling more protected speech than even DOL identifies in the Rule. Moreover, the Rule gives obscure and inconsistent instructions that will necessarily leave "men of common intelligence" to "guess at its meaning" in a given case. *Connally*, 269 U.S. at 391. For example, a consultant need not report if he merely provides the employer with a selection of "off-the-shelf" materials from which the employer may choose. 81 Fed. Reg. at 15,938. But if the consultant "plays an active role in selecting the materials," the reporting obligation applies. *Id.* It is entirely unclear what constitutes an "active role," or how large a menu of choices the consultant must provide the employer to avoid being accused of guiding the employer's selection. Likewise, a consultant may advise an employer regarding personnel policies, such as developing a grievance process. *Id.* at 15,939. But the very same action becomes reportable if an enforcement agency might infer from "the circumstances" that the policy had a purpose, at least in part, of obviating the need for union representation. *Id.*

By replacing a clear and determinate reporting rule with an ambiguous one, DOL's new interpretation once again exposes the statute to new, serious, and unnecessary constitutional doubts. It should be strongly disfavored on that basis.

3. The Rule of Lenity Precludes DOL's New Interpretation.

Violations of the reporting requirements in 29 U.S.C. § 433 are misdemeanor offenses, subject to criminal penalties of up to one year in jail and as much as a $10,000 fine, 29 U.S.C. § 439. Accordingly, any ambiguity in the scope of § 433 must "be resolved in favor of lenity." *United States v. Bass*, 404 U.S. 336, 347 (1971) (quotation marks omitted). The rule of lenity requires that "when choice has to be made between two readings of what conduct Congress has made a crime, it is appropriate, before we choose the harsher alternative, to require that Congress should have spoken in language that is clear and definite." *United States v. Universal C. I. T. Credit Corp.*, 344 U.S. 218, 221-22 (1952); *see id.* at 222 ("We should not derive criminal outlawry from some ambiguous implication.").

At a minimum, it is plausible to read the advice exemption as DOL did for the past fifty-plus years, *see Int'l Union*, 869 F.2d at 620; 81 Fed. Reg. at 15,941, and that reading avoids concerns about the scope and vagueness of the criminal penalties under this statute. As the Supreme Court has explained, "[I]f a statute has criminal applications, 'the rule of lenity applies' to the Court's interpretation of the statute" even in noncriminal cases, "'[b]ecause we must interpret the statute consistently, whether we encounter its application in a criminal or noncriminal context.'" *Martinez*, 543 U.S. at 381 (quoting *Leocal v. Ashcroft*, 543 U.S. 1, 11-12 n.8 (2004)).

II. DOL's New Interpretation Is An Untenable Resolution Of Any Ambiguity In The Statute.

Even if the LMRDA does not unambiguously preclude DOL's new interpretation of the advice exemption, the Court may not defer to DOL's view as "a permissible construction of the statute" under *Chevron*, 467 U.S. at 843, because it is not "a reasonable interpretation" of the law. *Id.* at 844.

Each of the considerations raised above functions not only as a reason that DOL's new interpretation is contradicted by the statute's unambiguous meaning, but also as a reason why resolving any remaining ambiguity as DOL has done is unreasonable. *See Mayo Foundation for Medical Educ. & Research v. United States*, 562 U.S. 44, 53 (2011) (noting that *Chevron*'s second step requires consideration of "whether the agency's answer is based on a permissible construction of the statute" (quotation marks omitted)). Those reasons include the plain meaning of the statute (including the word "advice"); its context and manifest purpose; the canon of constitutional avoidance; and the rule of lenity. This overwhelming case against DOL's new interpretation places it beyond "the bounds of reasonable interpretation." *Michigan v. EPA*, 135 S. Ct. 2699, 2707 (2015) (quotation marks omitted). And the unreasonableness of the agency's interpretation is confirmed by the fact that—notwithstanding Congress's clear intent to protect attorneys from being required to disclose confidential information, *see* 29 U.S.C. § 434—the Rule construes the statute to mandate disclosure of highly sensitive information regarding the nature and scope of the representation. Moreover, as the plaintiffs rightly point out, an attorney seeking to defend himself under the statute will be compelled to disclose the purpose of the work for which he was retained, a fact that goes to the heart of the confidential attorney-client relationship. *See* Pls. Br. 46. Accordingly, the Rule would fail at *Chevron*'s second step even if it made it past the first.

III. DOL's New Interpretation Is Arbitrary and Capricious.

In addition, the Rule should be set aside under the Administrative Procedure Act because it is arbitrary and capricious. *See* 5 U.S.C. § 706(2)(A). The Plaintiffs have identified numerous ways in which DOL's Rule falls short of the well-established requirements for reasoned decisionmaking. Pls. Br. 26-32. In this brief, the Chamber highlights one flaw in particular, which is that DOL impermissibly undertook to reform two of the statute's three reporting

requirements in open disregard of the consequences its decision would have for the third. That manner of proceeding allowed the agency to avoid engaging with serious objections to its proposed approach and thereby rendered its decision-making process irrational.

The LMRDA imposes three distinct reporting requirements. First, a consultant who is engaged by an employer for purposes of covered activity must file a report within thirty days of entering into such a relationship. 29 U.S.C. § 433(b). DOL has prescribed Form LM-20 for this purpose. Second, an employer who engages in any such arrangements must file a year-end report covering all such activities for the past year. *Id.* § 433(a). DOL has prescribed Form LM-10 for that purpose. And finally, a consultant who has engaged in any covered activities must also file a year-end report, which must detail its receipts and disbursements in connection with its work. *Id.* § 433(b). DOL has prescribed Form LM-21 for that purpose.

In the rulemaking at issue here, DOL overhauled its interpretation of what must be reported on Forms LM-20 and LM-10—that is, the consultant's per-engagement report, and the employer's annual report. Since the reporting requirements embodied in Form LM-21 are triggered by whether a person engages in any covered activity under the LMRDA, 29 U.S.C. § 433(b), these changes necessarily overhauled who will be subject to the annual reporting obligation implemented by Form LM-21.

Yet DOL refused to consider the ramifications of its new statutory interpretation in light of the additional demands imposed by the consultant's annual report (Form LM-21). Rather, the agency consigned such concerns to a separate rulemaking, which it estimates will give rise to a proposed rule in September 2016. 81 Fed. Reg. at 15,992 & n.88. In particular, the ABA and other commenters had forcefully argued that the agency's new construction of the statute would subject far more lawyers to an unreasonable and potentially unconstitutional mandate to disclose

vast amounts of privileged and confidential information. *Id.* at 15,999-16,000. Indeed, the Chamber and a broad coalition of business groups and other associations explicitly told both the Secretary of Labor and the Office of Information and Regulatory Affairs that it should address Form LM-21 in the same rulemaking as Form LM-10 and Form LM-20, in light of the overlapping issues. *See* Letter to the Honorable Thomas Perez, Secretary of Labor, Request to Consolidate the Proposed Persuader Advice Exemption Rule with the Impending Proposal to Change Form LM-21 (Feb. 19, 2014) (attached as Exhibit A); Letter to the Honorable Howard Shelanski, Administrator of OIRA, Request To Consolidate The Proposed Persuader Advice Exemption Rule (RIN: 1245-AA03) With The Impending Proposal To Change Form LM-21 (RIN: 1245-AA05) (Dec. 18, 2015) (attached as Exhibit B). Yet, rather than respond to these serious concerns, DOL faulted the commenters for "fail[ing] to note that this rulemaking focuses exclusively on the Form LM-20, not the Form LM-21." 81 Fed. Reg. at 16,000.

Agencies may ordinarily proceed incrementally and confront one facet of a broad regulatory problem at a time. But they may not enact "a rule that utterly fails to consider how the likely future resolution of crucial issues will affect the rule's rationale." *Nat'l Ass'n of Broad. v. FCC*, 740 F.2d 1190, 1210 (D.C. Cir. 1984). Moreover, "an agency does not act rationally when it chooses and implements one policy and decides to consider the merits of a potentially inconsistent policy in the very near future." *ITT World Commc'ns, Inc. v. FCC*, 725 F.2d 732, 754 (D.C. Cir. 1984).

In this case, there are only two possibilities. The first is that DOL will reconsider the scope of the advice exemption in good faith in the course of its Form LM-21 rulemaking, this time considering the costs that its new definition will impose by virtue of the annual reporting obligation imposed on attorneys and consultants. If that were the case, the agency's decision to

implement the policy without regard to those costs—only to reconsider it "in the very near future"—would be irrational. *ITT World Commc'ns,* 725 F.2d at 754. The second possibility is that DOL has already made up its mind about the scope of the advice exemption through *this* rulemaking, while artificially excluding important costs of its approach from consideration by deferring them to the next one, when the issue will already have been resolved. In other words, DOL structured its decision-making in such a way that it "'entirely failed to consider an important aspect of the problem.'" *Nat'l Ass'n of Home Builders v. Defs. of Wildlife*, 551 U.S. 644, 658 (2007) (quoting *Motor Vehicle Mfrs. Ass'n of United States, Inc. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983)). In either event, the Rule is arbitrary and capricious and should be set aside. And at an absolute minimum, the implementation of the revisions to Forms LM-10 and LM-20 should be stayed until DOL has completed its rulemaking regarding the revisions to Form LM-21.

CONCLUSION

For the foregoing reasons, the Chamber respectfully contends the Court should grant the Plaintiffs' motion for a preliminary injunction.

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Respectfully submitted,

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