

**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.

CASE NO. 4:16-CV-169 (KGB)

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

DEFENDANTS.

**PLAINTIFFS' MOTION FOR PRELIMINARY INJUNCTION
AND EXPEDITED HEARING**

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

Preliminary Injunction and Expedited Hearing (“Motion”), pursuant to Rule 65 of the Federal Rules of Civil Procedure, state:

1. On March 30, 2016, Plaintiffs filed their Complaint for Injunctive and Declaratory Relief against Defendants Thomas E. Perez, in his official capacity as Secretary of Labor for the U.S. Department of Labor, and Michael J. Hayes, in his official capacity as Director of the Office of Labor-Management Standards, U.S. Department of Labor (collectively referred to as “Defendants” or “DOL”), to enjoin DOL from enforcing its new Rule, titled “Labor-Management Reporting and Disclosure Act; Interpretation of the Advice Exemption,” 81 Fed. Reg. 15924 (March 24, 2016) (to be published at 29 C.F.R. Parts 405 and 406) (the “Rule”). Plaintiffs incorporate by reference the allegations set forth in that Complaint.

2. Absent injunctive relief, the challenged Rule, which is otherwise scheduled to take effect on April 25, 2016, will cause a radical change in the well-settled application of Section 203(c) of the Labor-Management Reporting and Disclosure Act of 1959 (“LMRDA” or the “Act”), 29 USC § 433(c), which states: “Nothing in this section shall be construed to require any employer or other person to file a report covering the services of such person by reason of his giving or agreeing to give advice to such employer.”

3. The Rule would effectively and unconstitutionally repeal the statutory advice exemption by sweeping aside more than fifty (50) years of consistent, judicially approved enforcement of the LMRDA’s reporting requirements applicable to millions of employers represented by the Plaintiffs, both in Arkansas and nationally, and their advisors, including trade associations, lawyers, and other consultants who are also represented by the Plaintiffs in this lawsuit. Essentially, under the Rule, employers who receive previously exempt guidance from Plaintiffs on how to communicate lawfully with their employees on labor issues, will be required—

under threat of criminal penalty—to file public reports with DOL regarding the arrangement with their advisor(s), the nature of the advice provided to them, and the fees paid for such advice (the LM-10 report). Plaintiffs will also be required for the first time to file public reports with DOL, under threat of criminal penalty, disclosing the nature of their advice to employers that DOL has newly characterized as “persuader” activity (the LM-20 report). Similarly, advisors who are deemed to be “persuaders” must also file a greatly-expanded number of reports of non-persuader “labor relations advice and services” provided to employers (the LM-21 report). The challenged Rule must be enjoined because DOL has exceeded its statutory authority under the LMRDA. Similarly, the Court should grant Plaintiffs’ Motion because the Rule, which casts aside over fifty (50) years of enforcement precedent without any rational explanation, is arbitrary and capricious.

4. The challenged Rule must be enjoined because it irreparably harms Plaintiffs’ First Amendment rights by coercing speech in the form of the newly required public reports and by chilling lawful speech and membership rights of the Plaintiffs and their advisors on labor relations issues, which would now have to be *publicly* reported for the first time in the LMRDA’s history. The Rule burdens Plaintiffs’ speech and cannot satisfy the strict scrutiny of this Court’s analysis of a content-based restriction on their speech. The challenged Rule also violates the First Amendment because it is overbroad and punishes a substantial amount of protected free speech.

5. This Court should also grant injunctive relief because the challenged Rule irreparably and impermissibly intrudes into confidential attorney-client communications and confidential client information, forcing lawyers to breach their ethical obligations to preserve client confidences under Rule 1.6 of the Arkansas Rules of Professional Conduct. LMRDA Section 203 protects privileged communications. By requiring attorneys and their employer clients to file detailed reports regarding the advice arrangements that exist between them and regarding the

nature of the advice provided, the Rule contravenes the LMRDA and, therefore, DOL has acted *ultra vires* in exceeding the scope of its authority.

6. Injunctive relief is also appropriate because the Rule violates Plaintiffs' Fifth Amendment rights to due process under the U.S. Constitution. The challenged Rule—which imposes significant criminal penalties—is fatally deficient in clarity and thus suffers constitutional defect under the vagueness doctrine. The Rule's test for distinguishing between reportable persuader activity and non-reportable advice is so vague and confusing that it violates the Due Process Clause of the Fifth Amendment, as it fails to provide fair warning to Plaintiffs as to what activities will trigger criminal liability, thereby causing further irreparable harm.

7. Finally, injunctive relief is proper under the Regulatory Flexibility Act, 5 U.S.C. § 611, because DOL failed to conduct a sufficient cost-benefit analysis pertaining to the adverse impact of the Rule on small businesses.

8. As more fully explained in the accompanying Memorandum of Law in Support of Plaintiffs' Motion ("Memorandum"), filed simultaneously with this Motion, Plaintiffs are likely to succeed on the merits of this action, and—absent injunctive relief—will suffer irreparable harm. Plaintiffs have no other remedy to cure the Rule's chilling effect on their First Amendment rights.

9. Accordingly, this Court should grant Plaintiffs' Motion for Preliminary Injunction and Expedited Hearing. An order for injunctive relief in the present case will simply preserve the status quo and temporarily retain the same interpretation of the advice exemption that has been in effect for more than fifty (50) years, and therefore, DOL will not be harmed by a preliminary injunction. An order for preliminary injunction will additionally serve to protect the public interest, because public policy demands that a governmental agency be enjoined from acting in a manner contrary to the law.

10. Therefore, Plaintiffs are entitled to a preliminary injunction from the Court ordering that the Rule's effective date be delayed until the conclusion of this matter.

11. This Motion is supported by the accompanying Memorandum and the following Exhibits, incorporated herein by reference:

Exhibit A **Affidavit of Bill Roachell, President of ABC Arkansas**
Exhibit B **Affidavit of Ben Brubeck, Vice President of Regulatory, Labor, and State Affairs of ABC National**
Exhibit C **Affidavit of Richard Roderick, Managing Director of Cross, Gunter, Witherspoon & Galchus, P.C.**

12. Plaintiffs request an expedited hearing on this matter.

WHEREFORE, Plaintiffs ABC Arkansas, ABC National, Chamber/AIA, AHA, CDW, NAM, and Cross Gunter respectfully request that the Court grant their Motion for Preliminary Injunction and Expedited Hearing.

Respectfully submitted,

/s/ J. Bruce Cross

J. Bruce Cross, Ark. Bar No. 1974028
Abtin Mehdizadegan, Ark Bar No. 2013136

**CROSS, GUNTER, WITHERSPOON &
& GALCHUS, P.C.**

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bcross@cwgw.com | abtin@cwgw.com

– and –

/s/ Maury Baskin

Maurice Baskin, DC Bar No. 248898*

LITTLER MENDELSON, PC
815 Connecticut Ave., N.W.

Washington, DC 20036

(202) 772-2526

mbaskin@littler.com

**pro hac vice pending*

ATTORNEYS FOR THE PLAINTIFFS

CERTIFICATE OF SERVICE

I, J. Bruce Cross, hereby certify that on this **1st day of April, 2016**, one true and exact copy of the foregoing **Plaintiffs' Motion for Preliminary Injunction and Expedited Hearing** was filed electronically with the Clerk of Court using the CM/ECF system, which shall send notification of such filing, and via U.S. Mail, to the following:

Thomas E. Perez
Secretary of Labor
Department of Labor
200 Constitution Avenue, N.W.
Washington, DC 20210

Michael J. Hayes
Director, Office of Labor-Management Standards
Department of Labor
200 Constitution Avenue, N.W.
Washington, DC 20210

Christopher Thyer
U.S. Attorney, Eastern District of Arkansas
425 W. Capitol Avenue, Ste. 500
Little Rock, AR 72201

Channing D. Phillips
U.S. Attorney, District of Columbia
555 4th Street N.W.
Washington, DC 20210

Loretta Lynch
Attorney General
U.S. Department of Justice
950 Pennsylvania Avenue, N.W.
Washington, DC 20210

/s/ J. Bruce Cross

J. Bruce Cross

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ASSOCIATED BUILDERS AND
CONTRACTORS OF ARKANSAS
et al.,

PLAINTIFFS,

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THOMAS E. PEREZ *et al.*,

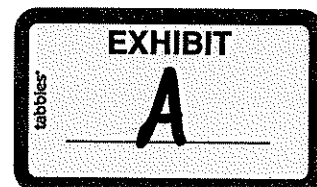
DEFENDANTS.

Case No.

AFFIDAVIT

I, Bill Roachell, being duly sworn, hereby state the following:

1. I am the President of Associated Builders & Contractors of Arkansas ("ABC Arkansas"), one of the Plaintiffs in the pending case known as *Associated Builders and Contractors of Arkansas, et al v. Perez*, Case No. 16-CV-_____ (E.D. Ark). ABC Arkansas is a trade association representing hundreds of construction contractors, vendors, suppliers and industry professionals in Arkansas who share the view that construction work should be awarded and performed based upon merit, regardless of labor affiliation. ABC Arkansas is affiliated with the national trade association, that is also a plaintiff in this case, Associated Builders and Contractors, Inc., ("ABC National"). ABC National represents nearly 21,000 construction industry employers sharing the same merit shop philosophy around the country. Most members, both nationally and in Arkansas, are small businesses and do not have the resources to employ in-house labor relations specialists or labor attorneys. They rely on us and ABC-member advisors to obtain lawful labor relations advice.



2. ABC Arkansas and ABC National have advised our members with regard to labor relations issues, including advising members as to lawful responses to union organizing efforts under the National Labor Relations Act ("NLRA"). Such advice takes many forms, including providing written materials on labor relations issues advising our members how to lawfully respond to union organizing and how to address labor relations issues generally, including employee handbooks and best practice workplace policies. We also conduct seminars for member employers' executives on how to lawfully communicate with employees concerning union organizing, and sometimes speak to members at chapter meetings about the latest developments in union organizing and pressure tactics. Though we often communicate on union issues by inviting guest speakers who are experts in labor relations to periodically talk about issues related to union organizing, chapter staff also can be called upon to give such advice to members directly. During my tenure with ABC Arkansas, we have never engaged in persuader activity towards employees of our member companies, as that term has been consistently enforced by the U.S. Department of Labor ("DOL") over the last 50 years. Instead, we have exercised our rights of free speech and free association to advise our members on labor relations issues important to their businesses and the merit shop philosophy.

3. ABC Arkansas also includes in its membership law firms, including Cross, Gunter, Witherspoon & Galchus, P.C. ("Cross Gunter"), public relations consulting firms, and insurance and benefits consulting firms. These entities have provided labor relations advice to ABC Arkansas members of the types described above (seminars, written materials, management training, and other forms of consulting advice) much of

which is intended to lawfully assist employers in maintaining a positive workplace environment in which unions are unnecessary.

4. It is my understanding that DOL's new Rule drastically changes the definition of "advice" that is exempt from reporting requirements of the Labor-Management Reporting and Disclosure Act. If allowed to take effect, this change will irreparably harm ABC Arkansas, its employer members, and its employer advisor members, particularly with regard to our exercise of First Amendment rights of Free Speech and Free Association. This harm will result from both our Association and our members being forced to disclose their communication of lawful, exempt labor relations advice under the new Rule through the filing of burdensome and intrusive public reports with DOL, under threat of criminal penalties. ABC Arkansas and its members will be irreparably harmed in their efforts to obtain lawful advice for the purpose of communicating with their employees and will be unable in many cases to obtain such advice, and, therefore, unable to communicate a lawful workplace message as they are entitled to do under the law because of the chilling effect of the reporting requirements and criminal penalties imposed by the Rule. ABC Arkansas and its members will also be irreparably harmed in the exercise of our constitutional rights to Due Process because the new Rule is so vague in its terms that we will have no fair warning as to what communications are reportable persuader activity, subject to criminal penalties for failure to report.

5. If the Rule is allowed to take effect, then ABC Arkansas will face irreparable harm by way of an unconstitutional condition: Either we will be compelled to stop all communications with our members on labor relations topics that might

conceivably be viewed as “indirectly persuasive” of the members’ employees with regard to unions, for fear of having to file the burdensome reports disclosing our members and member payments to us, or else we will be compelled to file the DOL’s reports, thereby imposing on members the duty to file reports or else to cease maintaining their membership in ABC Arkansas. In addition, our attorney and other consultant members will lose their First Amendment and statutory rights to communicate lawful advice to other ABC members, and ABC’s members will lost their First Amendment and statutory rights to receive such advice, for fear of having to file the burdensome public reports discussed above.

6. ABC Arkansas has the ability to bring this action on behalf of itself and its members because: (1) ABC Arkansas’ members would otherwise have standing to sue in their own right; (2) the interests at stake in this case are germane to ABC Arkansas’ organizational purposes; and (3) neither the claims asserted nor the relief requested requires the participation of ABC Arkansas’ individual members.

7. ABC Arkansas’ members would otherwise have standing to sue in their own right because they will suffer imminent harm under the new Rule, both legal and practical, unless the Rule is declared unlawful and enjoined by this Court. Among other things, ABC Arkansas’ member employers will be required to stop seeking previously exempt advice on labor relations issues from ABC Arkansas, ABC National and/or ABC member attorneys, such as Cross, Gunter, and other outside advisors due to the threat of having to file public LM-10 reports with DOL or else face criminal penalties.

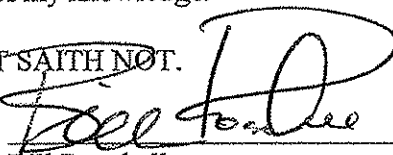
8. The interests at stake are germane to ABC Arkansas’ principles, which include the mission of advising our members on labor relations issues related to union

organizing and collective bargaining, and protecting the rights of our members to communicate with their employees regarding their rights to refrain from supporting unionization and/or collective bargaining.

9. The claims asserted and relief requested by ABC Arkansas in this lawsuit do not require participation of its members, because its Complaint is a facial challenge to the new Rule based upon the Rule's unlawful departure from the statutory authority delegated by Congress under the Act and violations of the Constitution. The Complaint also challenges the arbitrary and capricious nature of the new Rule, based upon the failure of the Department to provide adequate explanation of its reversal of five decades of policy implementing the Act's requirements. The Complaint is entirely based on principles of law and the Administrative Record and thus requires no individual employer participation.

I have read the foregoing statement and swear under penalties of perjury that it is true and accurate to the best of my knowledge.

FURTHER AFFIANT SAITH NOT.

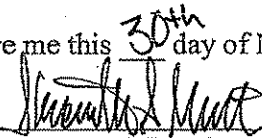

Bill Roachell

3-30-16
Date

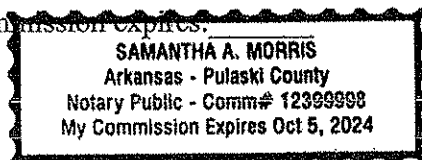
VERIFICATION

STATE OF ARKANSAS §
 § ss.
COUNTY OF PULASKI §

SUBSCRIBED AND SWORN to before me this ^{30th} day of March, 2016.


NOTARY PUBLIC

My commission expires:



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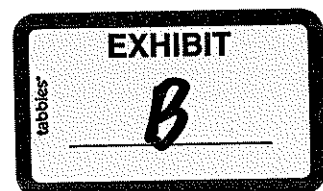
THOMAS E. PEREZ, *et al*,

DEFENDANTS.

AFFIDAVIT

I, Ben Brubeck, being duly sworn, hereby state the following based on personal knowledge:

1. I am the Vice President of Regulatory, Labor and State Affairs of Associated Builders & Contractors, Inc., one of the Plaintiffs in the pending case known as *Associated Builders and Contractors of Arkansas, et al v. Perez*, Case No. 16-CV- 169 (E.D. Ark). 2. ABC is a national trade association with 70 chapters around the country representing nearly 21,000 construction contractors, vendors, suppliers and industry professionals throughout the country, including in Arkansas, who share the view that construction work should be awarded and performed based upon merit, regardless of labor affiliation. Most ABC members, both nationally and in Arkansas, are small businesses and do not have the resources to employ in-house labor relations specialists or labor attorneys. They rely on ABC and ABC-member advisors, including labor relations attorneys and other consultants, to obtain lawful labor relations advice. ABC Arkansas is a separately incorporated chapter of ABC.



3.. One of ABC's core missions is to advise our members with regard to labor relations issues, including advising members as to lawful responses to union organizing and pressure tactics. ABC was formed in 1950, at a time when the construction industry was dominated by unions who represented more than 85% of the construction industry labor market, effectively excluding nonunion contractors and their employees from competing to win contracts to build public and private projects in many areas of the country. See Northrup, Thieblot and Baskin, *Construction Union Tactics To Regain Jobs And Public Policy*, at pp. 10-11 (George Mason U. Olin Institute 2008). In response to the efforts of ABC members and others over the decades since to promote open competition based on merit in the industry, the construction industry today is much more open and competitive for both union and nonunion contractors, which has strongly benefited industry consumers and the public at large. In response, however, construction unions have resisted the loss of their former monopoly by threatening and committing numerous acts of violence and coercion against ABC and its members. These acts have been documented in many published materials, but the most definitive report is the book entitled "FREEDOM IN THE WORKPLACE" written by ABC's former general counsel, Samuel Cook.¹

4. As documented in the book, dozens of acts of union violence have been committed against ABC and its chapters and members over the course of decades. Such acts include, among many other examples, the riots and mass demonstrations against Altomose Construction in Pennsylvania, BE&K Construction in Minnesota, and 5,000 union demonstrators throwing objects at ABC members attending ABC's national

¹ Samuel Cook, *FREEDOM IN THE WORKPLACE* (Regnery Publishing 2005).

convention in San Francisco. References to these and dozens of other similar acts of violence against ABC and its members are collected at page 837 of the index to “Freedom in the Workplace” and are described in detail throughout the book.

5. Such threats and acts of violence and other forms of illegal coercion against ABC members are not merely a matter of historical interest. Just last year, ABC property was destroyed by arson after an ABC chapter spoke out in support of passage of a “right to work” law. *See* “Arson suspected at Dick’s Sporting Goods construction site in Valparaiso [Indiana],” nwitimes.com/news/local, April 6, 2015. The year before that, union agents were convicted of firebombing an ABC member’s construction site. *See* “Ironworkers ‘hit man’ pleads guilty,” philly.com/2014-09-25/news (describing the arson committed by agents of the Ironworkers Local Union 401 against an ABC member’s construction of a Quaker meetinghouse near Philadelphia, PA). Most recently, just last week, members of an ABC chapter reported being threatened with loss of construction contracts if they continued to maintain their membership in ABC, as a result of which they asked that their membership not be disclosed publicly.

6. While many ABC members are proud to disclose their membership to the public, the documented acts of union violence and pressure tactics against merit shop contractors has led some ABC members to be fearful that public disclosure of their membership and payments to ABC will lead to threats and coercion against them, based on the history and ongoing nature of such union activities in the construction industry. As further explained below, the likelihood of such disclosure, violating ABC members’ constitutional rights to freedom of speech and association, is greatly increased by DOL’s new Rule, which on its face requires that advice of the type provided by ABC to its

member employers and received by such employers from attorneys and consultant advisors, will now have to be publicly reported.

7. Such advice takes many forms, including providing written materials to member employers describing effective responses to union organizing campaigns and related union pressure tactics. Depending on the advice requested from member employers, ABC materials may include talking points and facts that employers may use to lawfully persuade their employees that unions are unnecessary in their workplace, or simply to promote the many benefits of merit construction. ABC and its chapters also advise member employers by updating them on the latest developments in labor law and other important government affairs, encouraging member employers to pass on such information as they see fit to their employees. ABC also conducts seminars and webinars for member employer executives on labor relations issues. Such programs sometimes include recommendations on lawful and persuasive facts and statements that employers may wish to communicate to their employees to explain the benefits of operating on a merit shop and/or union free basis. ABC also advises its members regarding “best practices” in the workplace, some of which can help employers make unions unnecessary by encouraging a positive workplace environment.

8. ABC nationally does not engage in persuader activity towards employees of member companies, as that term has been consistently enforced by the U.S. Department of Labor (“DOL”) over the last 50 years, nor do we advise our chapters to do so, unless they are prepared to file the necessary reports. Instead, we have exercised our rights of free speech and free association to advise our members on labor relations issues important to their businesses and the merit shop philosophy, solely in order to assist

member employers in communicating both lawfully and persuasively with their own employees.

9. ABC also includes in its membership around the country many law firms, including Cross, Gunter, Witherspoon & Galchus, P.C. ("Cross Gunter"), labor relations consulting firms, and insurance and benefits consulting firms. These entities have long provided labor relations advice to ABC members of the types described above (seminars, written materials, management training, and other forms of consulting advice) much of which is intended to advise employers how they may lawfully and persuasively communicate the benefits of merit shop construction to their employees and otherwise maintain a positive workplace environment in which unions are unnecessary.

10. It is my understanding that DOL's new Rule drastically changes the definition of "advice" that is exempt from the reporting requirements of the Labor-Management Reporting and Disclosure Act. If allowed to take effect, this change will irreparably harm ABC, its chapters in Arkansas and around the country, its employer members, and its employer advisor members, particularly with regard to our exercise of First Amendment rights of Free Speech and Free Association. This harm will result from both our Association and our chapters and members being forced to disclose their communication of lawful, exempt labor relations advice under the new Rule through the filing of burdensome and intrusive public reports with DOL, under threat of criminal penalties. ABC and its chapters and members will be irreparably harmed in their efforts to obtain lawful advice for the purpose of communicating with their employees and will be unable in many cases to obtain such advice, and, therefore, unable to communicate a lawful workplace message as they are entitled to do under the law. This irreparable harm

will be incurred because of the chilling effect of the reporting requirements and criminal penalties imposed by the Rule. ABC and its chapters and members will also be irreparably harmed in the exercise of our constitutional rights to Due Process because the new Rule is so vague in its terms that it lacks fair warning as to exactly what communications are reportable persuader activity, subject to criminal penalties for failure to report.

11. More specifically, if the Rule is allowed to take effect, then ABC will face irreparable harm by way of an unconstitutional condition: Either we will be compelled to stop all communications with our members on labor relations topics that might conceivably be viewed as “indirectly persuasive” of the members’ employees with regard to unions, for fear of having to file the burdensome reports disclosing our members and member payments to us, or else we will be compelled to file publically the required DOL reports, thereby imposing on member employers the duty to file reports as well, or else to cease maintaining their membership in ABC. In addition, our member attorneys and other consultant members will lose their First Amendment and statutory rights to communicate lawful advice to other ABC members, and ABC’s member employers will lose their First Amendment and statutory rights to receive such advice, for fear of having to file the burdensome public reports discussed above.

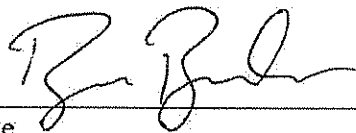
12. ABC has filed this action on behalf of its members under the belief that: (1) ABC members would otherwise have standing to sue in their own right; (2) the interests at stake in this case are germane to ABC’s organizational purposes; and (3) neither the claims asserted nor the relief requested requires the participation of ABC’s individual members.

13. ABC's members would otherwise have standing to sue in their own right because they will suffer imminent harm under the new Rule, both legal and practical, unless the Rule is declared unlawful and enjoined by this Court. Among other things, ABC's member employers in Arkansas and around the country will be required to stop seeking previously exempt advice on labor relations issues from ABC, its chapters, and/or ABC member attorneys, and other outside advisors due to the threat of having to file public LM reports with DOL or else face criminal penalties.

14. The interests at stake are germane to ABC's principles, which include the mission of advising our members on labor relations issues related to union organizing and collective bargaining, and protecting the rights of our members to communicate with their employees regarding their rights to refrain from supporting unionization and/or collective bargaining.

15. The claims asserted and relief requested by ABC in this lawsuit do not require participation of its members because its Complaint is a facial challenge to the new Rule based upon the Rule's unlawful departure from the statutory authority delegated by Congress under the Act and violations of the Constitution. The Complaint also challenges the arbitrary and capricious nature of the new Rule, based upon the failure of the Department to provide adequate explanation of its reversal of five decades of policy implementing the Act's requirements. The Complaint is entirely based on principles of law and the Administrative Record and thus requires no individual employer participation.

I have read the foregoing statement and swear under penalties of perjury that it is true and accurate to the best of my knowledge.

 4/1/16
Name Date

Ben Brubeck
Vice President of Regulatory, Labor and State Affairs
Associated Builders and Contractors
440 First Street NW
Washington, DC 20001
(202) 595-1505

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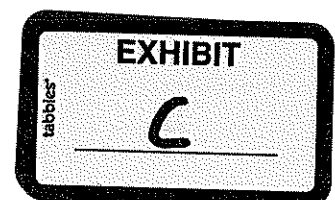
DEFENDANTS.

AFFIDAVIT

I, Richard A. Roderick, being duly sworn, hereby state the following facts based upon my personal knowledge and belief:

1. I am over the age of eighteen (18) and am competent to provide the testimony in this Affidavit. I am the Managing Director of Cross, Gunter, Witherspoon & Galchus, P.C. ("Cross Gunter"), one of the party Plaintiffs in the pending case known as *Associated Builders and Contractors of Arkansas, et al. v. Perez et al.*, United States District Court for the Eastern District of Arkansas, Case No. 16-CV-_____ (E.D. Ark.), which seeks to have declared unlawful and set aside the Final Rule promulgated by the U.S. Department of Labor ("DOL") on March 24, 2016 titled, "Interpretation of the "Advice" Exemption in Section 203(c) of the Labor-Management Reporting and Disclosure Act," 81 Fed. Reg. 15924 (to be codified at 29 C.F.R. parts 405 & 406) (the "Rule").

2. I am a licensed attorney and member in good standing and eligible to practice before the State Bar of Arkansas and in the United States District Court of



Arkansas, Eastern and Western Districts. Since I was admitted to the State Bar of Arkansas in 1986, I have primarily practiced in the area of labor and employment law and have been with Cross Gunter since 1994. During my tenure as Managing Director of Cross Gunter, I became familiar with the Labor-Management Reporting and Disclosure Act of 1959 (“LRMDA” or “Act”), 29 U.S.C. § 433, and its reporting requirements for so-called “persuader” activity, as that term has been interpreted and enforced for over fifty years.

3. Cross Gunter is a law firm representing many employers in a variety of industries. We are regularly called upon to give advice to our clients on labor relations matters, including advice regarding lawful responses to union-related issues. Cross Gunter does not and has never engaged in “persuader” activity as that term has been consistently enforced over the last fifty years under the LRMDA. However, Cross Gunter does provide lawful advice to employers of the types that the new Rule has improperly identified for the first time as potentially “persuader” activity. Such advice includes seminars for employer executives and other forms of management training, assistance in developing policies for employee handbooks, training supervisors in the lawful conduct of conversations and meetings with employees on labor relations issues, and drafting, revising, or otherwise recommending written materials to employers in order to advise such employers regarding the lawful presentation of their views on labor issues to their employees and how best to do so in order to achieve a successful result. Cross Gunter’s ethical obligations to its clients includes providing candid advice, which includes guidance on the law as well as on other considerations such as moral, economic, social and political factors, that may be relevant to the client’s situation.

4. The activities described in Paragraph 3 of this Affidavit are privileged and confidential matters that generally reflect and include attorney work product. Even in those cases where the activities in Paragraph 3 do not expressly involve attorney-client privileged matters or attorney work product, our attorneys are nonetheless bound to keep such activities confidential pursuant to Rule 1.6 of the Arkansas Rules of Professional Conduct. In all the years of Cross Gunter's law practice and throughout pretrial discovery under federal and state rules, to my knowledge, Cross Gunter has never been compelled to disclose or explain the confidential circumstances regarding such activities. Consistent with the interpretation of the phrase "persuader" activity used in enforcing the LRMDA, the provision of advice regarding labor relations matters has never been subject to the Act's reporting requirements.

5. Now, however, as the preamble to the Rule makes clear, the new, incredibly broad definition purportedly assigned to "indirect persuader" activity eliminates the previously well-accepted distinction between non-reportable advice and reportable persuader activity, specifically with regard to the preparation of or revision to persuasive materials by labor relations consultants and other persons. Despite expressly admitting that the LRMDA in no way requires any employer or other person to file a report or disclose any information by reason of providing advice, in an unprecedented usurpation of Congress's power, DOL has effectively rewritten the LRMDA to render the "advice" exemption meaningless. The Rule accomplishes this result, *inter alia*, by declaring advice to be "indirectly persuasive" if an object of the advice is to help the employer (not the attorney) to persuade the employer's own employees; and by holding that advice mixed together with persuader activity loses its exemption; and by numerous

large and small exceptions to the broad statutory advice exemption that DOL's Rule has newly created without statutory authority. 81 Fed. Reg. 15924, 15937.

6. Unless enjoined, Cross Gunter and a significant number of its employer-clients would be required to disclose a substantial amount of confidential client information, including the existence of the client-lawyer relationship and the identity of the client, the nature of the legal representation, and a description of the legal tasks performed. Cross Gunter also would be required to report detailed information regarding disbursements made by the firm charged to its clients in the ordinary course of lawful business.

7. Accordingly, unless enjoined prior to April 25, 2016, the Rule will irreparably harm Cross Gunter in its ability to communicate such lawful labor relations advice to employer clients, due to the unavoidable risk of being compelled to file burdensome and intrusive public reports regarding the nature and cost of the advice provided, or otherwise face the threat of criminal penalties. Likewise, our clients will be irreparably harmed in their efforts to obtain such advice for the purpose of communicating with their employees and will be unable in many cases to obtain such advice, and therefore unable to communicate, because of the chilling effect attendant with the Rule's reporting requirements and criminal sanctions.

8. Cross Gunter will be irreparably harmed if the Rule is not enjoined because, absent an injunction, it will be required to disclose the entirety of its representation agreements and billings even if ninety-nine percent (99%) of the services rendered were non-reportable "advice" activities. Cross Gunter will also be irreparably harmed in the exercise of its constitutional rights to Due Process because the new Rule is

so vague in its terms that Cross Gunter will have no fair warning as to what communications are reportable persuader activity, subject to criminal penalties for failure to report. The Rule does not clarify and instead “muddies the waters” in determining what is reportable activity. As such, we will be required to analyze each potential contact with our clients in an effort to determine whether previously-exempt advice falls within DOL’s unlawfully expanded definition of reportable persuader activity. This will result in significant expense to the employers with whom Cross Gunter does business and will discourage them from seeking our advice due to the unavoidable uncertainty as to whether such advice will be have to be publicly reported.

9. Cross Gunter plays a key role in helping its clients and their officials understand and comply with the applicable law and to act in the entity’s best interest. To fulfill this important societal role, Cross Gunter must enjoy the trust and confidence of its clients’ officers, directors, and other leaders, and Cross Gunter must be provided with all relevant information necessary to properly represent such clients. In addition, to maintain the trust and confidence of the employer client and provide it with effective legal representation, Cross Gunter must be able to consult confidentially with the client. Cross Gunter can only serve its purpose when it has the privacy and freedom to provide lawful services incident to the attorney-client relationship when it is free from the consequences or the apprehension of the dangerous disclosure requirements in the Rule. If the purpose of the attorney-client privilege and the ethical rule protecting even non-privileged client confidences are to be served at all, the attorney and client must be able to predict with some degree of certainty whether particular discussions will be protected.

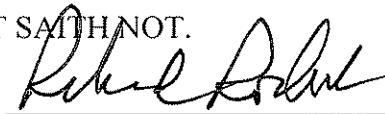
10. By purporting to require Cross Gunter to file detailed public reports with DOL stating the identity of its employer clients, the nature of the representation and the types of legal tasks performed, and the receipt and disbursement of legal fees whenever Cross Gunter provides advice or other legal services relating to the clients' persuader activities, the Rule chills and seriously undermines the confidential client-lawyer relationship.

11. The Rule also creates a dire Hobson's choice that no attorney should ever be forced to make. Under DOL's Rule, Cross Gunter will be forced to request that its clients waive their rights to confidentiality as to significant aspects of the representation in order to receive our advice. Absent such waiver, Cross Gunter will be forced to violate either its ethical obligations to the State Bar of Arkansas or else subject itself to criminal penalties under the LRMDA. In essence, DOL has created an unconstitutional infringement of Cross Gunter's First and Fifth Amendment rights, and its clients' fundamental right to counsel.

12. Unless enjoined before April 25, 2016, the Rule will result in immediate and irreparable harm to Cross Gunter and its clients.

I have read the foregoing statement and swear under penalties of perjury that it is true and accurate to the best of my knowledge.

FURTHER AFFIANT SAITH NOT.



Richard A. Roderick

3/30/16

Date

VERIFICATION

STATE OF ARKANSAS §
 § ss.
COUNTY OF PULASKI §

SUBSCRIBED AND SWORN to before me this 30th day of March, 2016.

Brenda F. Murray
NOTARY PUBLIC

My commission expires: _____

