UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MINNESOTA

LABNET, INC., d/b/a WORKLAW NETWORK, SHAWE & ROSENTHAL LLP, ALLEN, NORTON AND BLUE, P.A., COLLAZO FLORENTINO & KEIL LLP, DENLINGER, ROSENTHAL & GREENBERG, KAMER ZUCKER ABBOTT, KEY HARRINGTON BARNES, P.C., LEHR MIDDLEBROOKS VREELAND & THOMPSON, P.C., NEEL HOOPER & BANES, P.C., SEATON, PETERS & REVNEW, P.A., SKOLER, ABBOTT & PRESSER, P.C., and UFBERG & ASSOC., LLP,	
Plaintiffs,	
	Civil Action No. 0:16-CV-00844-PJS/JSM
v.	
UNITED STATES DEPARTMENT OF LABOR, THOMAS E. PEREZ in his official capacity as Secretary of Labor, and MICHAEL J. HAYES, in his official capacity as Director, Office of Labor -Management Standards,	
Defendants.	

BRIEF OF THE ATTORNEYS GENERAL
OF THE STATES OF MASSACHUSETTS, MINNESOTA, CALIFORNIA, CONNECTICUT, ILLINOIS, MARYLAND, NEW YORK, OREGON, VIRGINIA, WASHINGTON, AND THE DISTRICT OF COLUMBIA
AS *AMICI CURIAE*,
IN SUPPORT OF THE DEFENDANTS
ON CROSS-MOTIONS FOR SUMMARY JUDGMENT

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I. INTRODUCTION AND STATEMENT OF INTEREST OF STATE AMICI

The Attorneys General for the States of Massachusetts, Minnesota, California, Connecticut, Illinois, Maryland, New York, Oregon, Virginia, Washington, and the District of Columbia (collectively, *Amici*) respectfully submit this brief as *amici curiae* in support of the U.S. Department of Labor's recently revised interpretation of the Advice Exemption to the reporting requirements contained in the Labor-Management Reporting and Disclosure Act (LMRDA) ("the new rule").[1] The Act requires employers and their labor relations consultants, including law firms, to file public reports with respect to activities undertaken to, directly or indirectly, persuade employees concerning their rights to organize and bargain collectively. 29 U.S.C. § 433. Legal challenges to the Department's revised interpretation, which was scheduled to take effect July 1, 2016, are pending before this Court, as well as before federal district courts in Arkansas and Texas.

Our states enforce laws in the public interest, including those that set fair labor standards and affect the health and safety of working people. We share an interest in protecting those who are most vulnerable to workplace exploitation and in ensuring that workers know and understand their rights. Our states enforce some of the most basic employee rights, including minimum wage and overtime laws. *Amici*, therefore, recognize the important role that collective action and organizing efforts can play in securing better wages, benefits, and working conditions without government

[1] Interpretation of the "Advice" Exemption in Section 203(c) of the Labor-Management Reporting and Disclosure Act, 81 Fed. Reg. 15,924 (March 24, 2016).

intervention.[2] To that end, it is critically important that workers are free to make autonomous decisions that affect the terms and conditions of their employment.

Amici recognize that transparency in union organizing campaigns is essential to the welfare of all working people. Unions improve wages and working conditions not only for their own members, but for all workers. They do this by securing passage of labor standards legislation, setting community standards through their negotiated collective bargaining agreements, and helping to enforce workplace regulations.[3] Unions also enhance enforcement of existing laws by providing support for workers who exercise their rights (and who face or suffer retaliation as a result), by reporting illegal employment practices to employers and government enforcement authorities such as *Amici*, and by bringing employer misconduct to the attention of the public and other public officials. For all of these reasons, and as further described below, *Amici* support the Department's new rule which makes way for fairer elections through greater transparency.

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[2] John Logan, *The Union Avoidance Industry in the United States*, British J. of Indus. Rel. 44:4 at 663 (Dec. 2006) (hereinafter *The Union Avoidance Industry*), available at http://www.jwj.org/wp-content/uploads/2014/03/JohnLogan12_2006UnionAvoidance.pdf. *See also* David Weil, Boston University School of Management Research Paper No. 2010-20, *Improving Workplace Conditions through Strategic Enforcement,* A Report to the U.S. Department of Labor's Wage and Hour Division (May 2010) at 19, available at http://www.dol.gov/whd/resources/strategicEnforcement.pdf (absence of unions "reduces bargaining pressures to raise wages and improve working conditions, and also hinders the initiation of enforcement actions arising from worker complaints.").

[3] *See* Matthew Walters and Lawrence Mishel, *How unions help all workers*, Economic Policy Institute (Aug. 26, 2003), available at http://www.epi.org/publication/briefingpapers_bp143/ .

II. ARGUMENT

Defendants' motion for summary judgment should be granted as the new rule is a reasonable interpretation of the LMRDA that further enhances Congress's stated interest in protecting workers' rights to make decisions about whether to organize without undue interference, through greater transparency in the election process.[4] The information required to be reported would not ordinarily reveal privileged communications between attorneys and their clients, and there is no conflict with state rules of professional responsibility because those ethical obligations of confidentiality generally contemplate exceptions for disclosure of information when required by law.

A. The Department's New Interpretation of the Disclosures Required by the LMRDA Advances the Act's Purpose of Protecting Employees' Rights to Organize without Undue Interference, by Fostering Greater Transparency, a Bedrock of Fair and Democratic Elections.

The LMRDA regulates the relationship between labor unions and employers in the private sector. 29 U.S.C. § 401 et seq. Congress enacted the LMRDA "to protect employees' rights to organize, choose their own representatives, bargain collectively, and otherwise engage in concerted activities for their mutual aid or protection[.]" 29 U.S.C. § 401(a). To carry out these objectives, the Act imposes certain reporting obligations on unions and employers, as well as on consultants (including attorneys) retained by employers to engage in "persuader activities" concerning employees' collective bargaining rights. 29 U.S.C. §§ 431, 433. As a primary purpose in enacting

[4] Although the Plaintiffs have raised a number of different issues in their challenge to the new rule, this brief focuses on the way in which the revised interpretation improves transparency and that its application does not conflict with attorneys' ethical confidentiality obligations.

the LMRDA, Congress viewed the "persuader business" as "detrimental to good labor relations," and sought to "neutraliz[e]" this "legislatively suspect field" by subjecting persuaders to "goldfish-bowl publicity," through mandatory reporting. *Price v. Wirtz*, 412 F.2d 647, 650 (5th Cir. 1969). Thus, the disclosures required by Section 203(b) of the Act serve to provide employees with a fuller context about the information they receive from their employers when intended to persuade them from exercising their collective bargaining rights. 29 U.S.C. § 433.[5]

At issue here, Section 203(c) contains a reporting exemption for a consultant's "advice."[6] Under the Department's prior interpretation of the Advice Exemption, no

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[5] The Persuader Rule provides:

> Every person who pursuant to any agreement or arrangement with an employer undertakes activities where an object thereof is, directly or indirectly—… to persuade employees to exercise or not to exercise, or persuade employees as to the manner of exercising, the right to organize and bargain collectively through representatives of their own choosing… shall file within thirty days after entering into such agreement or arrangement a report with the Secretary… containing… a detailed statement of the terms and conditions of such agreement or arrangement. Every such person shall file annually, with respect to each fiscal year during which payments were made as a result of such an agreement or arrangement, a report with the Secretary… containing a statement… of its receipts of any kind from employers on account of labor relations advice or services, designating the sources thereof, and… of its disbursements of any kind, in connection with such services and the purposes thereof. In each such case such information shall be set forth in such categories as the Secretary may prescribe.

29 U.S.C. § 433.

[6] Nothing in this section shall be construed to require any employer or other person to file a report covering the services of such person by reason of his giving or agreeing to give advice to such employer or

reporting of persuader activity was required, so long as the employer was free to accept or reject the consultant's recommendations and the outside consultant had no direct contact with employees. 81 Fed. Reg. 15,925. Over the years, employers and their consultants have used this interpretation to their advantage by deliberately choosing to undertake anti-union campaigns "almost exclusively"[7] through indirect persuasion of employees.[8] As a result, reporting of persuader activity has become rare, even as employers routinely rely on outside consultants, including law firms, to oversee union avoidance efforts. 81 Fed. Reg. at 15,927.

Employers routinely hire outside consultants to orchestrate anti-union campaigns.[9] Common features of these efforts include counter-organizing literature

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> representing or agreeing to represent such employer before any court, administrative agency, or tribunal of arbitration or engaging or agreeing to engage in collective bargaining on behalf of such employer with respect to wages, hours, or other terms or conditions of employment or the negotiation of an agreement or any question arising thereunder.

29 U.S.C. § 433(c).

[7] 81 Fed. Reg. at 15,927.

[8] John Logan, *Consultants, lawyers, and the 'union free' movement in the USA since the 1970s* (hereinafter *Consultants, Lawyers*), Indus. Rel. J. 33:3 at 205 (2002) ("[m]ost consultants claim that one of the few emphatic policies that they adhere to during counter-organizing campaigns is never to engage in reportable activities."), available at http://www.jwj.org/wp-content/uploads/2014/03/Logan-Consultants.pdf.

[9] About seventy-five percent of employers use a consultant. Kate Bronfenbrenner, *No Holds Barred, The Intensification of Employer Opposition to Organizing*, Economic Policy Institute (May 2009) (hereinafter *No Holds Barred*) at 23, available at http://www.epi.org/files/page/-/pdf/bp235.pdf; *The Union Avoidance Industry*, *supra* at 651, 669; *Consultants, Lawyers, supra* at 209-210. And, about sixty-one percent of

directed to employees as well as individual and group staff meetings where supervisors and top managers allege union corruption and predict job loss, plant closures, or relocations as possible outcomes of a union victory.[10] Operating from behind the scenes, consultants try to convince employees that the employer is "the sole source for credible information," while portraying the union as an outside agitator who cares more about collecting union dues than about the workers' well-being.[11] Because employees often are unaware that their employer has hired a consultant to persuade them from unionizing,[12] their views about the decision whether to organize may be influenced by fear of the negative consequences predicted by collective bargaining.[13]

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employers retain an outside lawyer-consultant. Kate Bronfenbrenner, *Employer Behavior in Certification Elections and First-Contract Campaigns: Implications for Labor Law Reform*, ILR Press at 80, 84 (Jan. 1994), available at http://digitalcommons.ilr.cornell.edu/cgi/viewcontent.cgi?article=1017&context=articles.

[10] *See Consultants, Lawyers*, supra at 203. Survey data shows that eighty-nine percent of employers require their workers to attend captive audience meetings, and seventy-seven percent require one-on-one meetings with supervisors. *No Holds Barred*, *supra* at 10.

[11] *Consultants, Lawyers* at 203, 205. *See also* Comments of the International Brotherhood of Electrical Workers, AFL-CIO to the U.S. Department of Labor, Office of Labor Management Standards (June 21, 2011) (in response to the Department's proposed rule change) at 2, available at http://op.bna.com.s3.amazonaws.com/dlrcases.nsf/r%3FOpen%3Dgcii-8msrnt.

[12] "[E]mployees are often blissfully unaware of the consultant's presence because consultants use first-line supervisors to spearhead anti-union campaigns. This allows the consultant to remain in the background, and side-step the reporting requirements of the LMRDA." *Consultants, Lawyers, supra* at 201. "[A]s long as the consultant deals only with supervisors and management, 'he can easily slide out from under the scrutiny'

To create more balance in the process, the Department's new interpretation of the Advice Exemption aims to more thoroughly promote fair union elections by expanding the types of conduct which employer-retained consultants, including attorneys, must disclose as indirect persuader activity during a union organizing campaign. Specifically, the new rule no longer exempts indirect persuader activity from reporting, and furthermore, "[*i*]*f the consultant engages in both advice and persuader activities… the entire agreement or arrangement must be reported.*" 81 Fed. Reg. at 15,937 (emphasis added). Disclosures about how much money an employer pays an outsider to defeat a unionization drive and the degree of that consultant's involvement in those efforts may likely impact an employee's perspective about the neutrality of the employer's information, much like the effect of campaign-finance and contribution disclosures applicable to elections for public office. Therefore, the expanded reporting requirements would foster a more level playing field and create a more informed employee electorate through increased transparency. And, even if some questions may arise about where to draw the line between reportable activity and exempt advice, the new rule properly addresses a large and important category of indirect persuader activities.

The Plaintiffs, however, maintain that the new rule fails in its objective because by the time that a consultant's reports are filed, most union elections will have already

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of the Department of Labor." *Id.* at 205 (citing Levitt, M. with T. Conrow, *Confessions of a Union Buster* (Crown Books 1993)).

[13] *Consultants, Lawyers, supra* at 204.

taken place (ECF 1, at 3, 21). Plaintiffs contend that most employers retain their consultants just shortly before union elections, but the reports are not due until 30 days after the consultants are retained,[14] and thus long after such elections have been held under the NLRB's recently expedited election process.[15] However, notwithstanding the usual election timeline, it is well documented that many employers initiate union avoidance campaigns even prior to the filing of an election petition.[16] Indeed, many employers retain their consultants to defeat union organizing efforts more than a month before election petitions are even filed,[17] and those union avoidance efforts continue

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[14] Consultants satisfy their reporting requirements by filing Form LM-20, within 30 days of entering into an agreement or arrangement to provide such services to an employer, and by filing Form LM-21, annually. 29 C.F.R. §§ 406.2, 406.3.

[15] During fiscal year 2015, from the time when a union election petition was filed until the election was held was a median of thirty-three days, a reduction of about five days from the prior regulation. National Labor Relations Board, Median Days from Petition to Election, available at https://www.nlrb.gov/news-outreach/graphs-data/petitions-and-elections/median-days-petition-election .

[16] For example, forty-seven percent of all unfair labor practice charges were brought before an election petition had even been filed, while over thirty percent of those were brought 30 days or more before the filing of an election petition, and over 30 percent of such charges were brought between 31 to 76 days or more after the petition was filed: this data confirms that employer opposition starts long before the filing of a petition and continues on after the election. Kate Bronfenbrenner and Dorian Warren, *The Empirical Case for Streamlining the NLRB Certification Process: The Role of Date of Unfair Labor Practice Occurrence,* ISERP Working Paper Series 2011 (June 2011) at 3-4 (analyzing data from 1000 certification elections from 1999 through 2003), available at http://digitalcommons.ilr.cornell.edu/cgi/viewcontent.cgi?article=1158&context=workingpapers.

[17] *Id.* at 20, 25.

well after elections are held, up through the initial contract negotiation or decertification process.[18] Therefore, contrary to the Plaintiffs' argument, because many employers retain outside consultants to defeat unionizing efforts early on in the process and those efforts continue up through the initial contract negotiations, the Department's new interpretation would help to ensure a more level playing field by creating a more informed employee electorate.

B. The New Regulation's Reporting Requirements Do Not Ordinarily Conflict with Either the Attorney-Client Privilege or the Related Ethical Confidentiality Obligations Applicable to Lawyers.

Plaintiffs and the opposing state *Amici* maintain that the new rule requires lawyers to violate their ethical confidentiality obligations under ABA Model Rule 1.6, and similar provisions found in state professional rules of conduct, by mandating certain disclosures, including the existence of the attorney-client relationship, client identity, description of the reportable persuader activity, and amounts paid (ECF 1, at 5, 13; ECF 15, at 19-22; ECF 30, at 4-6). However, contrary to their claims, information reportable under the Persuader Rule does not ordinarily reveal privileged communications between attorneys and their clients, and there is no conflict with state professional responsibility rules, which normally contemplate an exception for disclosure of confidential information when required by "other law," including a federal regulation such as the new rule. Moreover, to the extent that an attorney who engages in indirect persuader

[18] *Consultants, Lawyers, supra* at 209-210; *The Union Avoidance Industry, supra* at 655 (noting the typical consultant campaign lasts about ten weeks, but many last for years); *No Holds Barred, supra* at 22 (summarizing data showing that only forty-eight percent of bargaining units have agreements in place within a year after an election).

activity provides only non-legal business services, there may be no such ethical duty since the obligation to maintain confidentiality applies only in the context of legal advice.

As developed from common law, the attorney-client privilege is an evidentiary rule applicable to communications between lawyer and client, made in confidence, while the lawyer is acting in a professional capacity to provide legal services. *United States v. Horvath*, 731 F.2d 557, 561 (8th Cir. 1984).[19] Its purpose is to encourage full and frank communication between attorneys and their clients. *Upjohn Co. v. United States*, 449 U.S. 383, 389 (1981). The privilege is reinforced by the broader ethical duty under Model Rule of Prof'l Conduct 1.6(a) and similar state rules requiring lawyers to keep attorney-client communications in confidence.[20] *See, e.g., Brennan's, Inc. v.*

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[19] To qualify under the privilege:

> (1) the asserted holder of the privilege is or sought to become a client; (2) the person to whom the communication was made (a) is a member of the bar of a court, or his subordinate and (b) in connection with this communication is acting as a lawyer; (3) the communication relates to a fact of which the attorney was informed (a) by his client (b) without the presence of strangers (c) for the purpose of securing primarily either (i) an opinion on law or (ii) legal services or (iii) assistance in some legal proceeding, and not (d) for the purpose of committing a crime or tort; and (4) the privilege has been (a) claimed and (b) not waived by the client.

Diversified Indus., Inc. v. Meredith, 572 F. 2d. 596, 601-602 (8th Cir. 1977) (quoting *United States v. United Shoe Mach. Corp.*, 89 F. Supp. 357, 358-59 (D. Mass. 1950)).

[20] Model Rule 1.6(a) generally prohibits a lawyer from revealing "information relating to the representation of a client" unless one of the enumerated exceptions apply. Model Rule 1.6(b)(6) provides such an exception in order "to comply with other law or court order."

Brennan's Restaurants, Inc., 590 F.2d 168, 172 (5th Cir. 1979). However, the privilege is not absolute.

Because assertion of the privilege results in withholding relevant information, it applies "only where necessary to achieve its purpose." *Fisher v. United States*, 425 U.S. 391, 403 (1976). It is, therefore, narrowly construed. *See, e.g.*, *Humphreys, Hutcheson & Moseley v. Donovan ("HH&M")*, 755 F.2d 1211, 1219 (6th Cir. 1985) (citing *In re Grand Jury Investigation No. 83-2-35*, 723 F.2d 447, 451 (6th Cir. 1983), *cert. denied*, 467 U.S. 1246 (1984)). Thus, the privilege must yield as necessary to "countervailing law or strong public policy." [21] *United States v. Goldberger & Dubin, P.C.*, 935 F.2d 501, 504 (2d Cir. 1991). Against this background, courts have long held that, absent special circumstances, the existence of an attorney's relationship with a client, the nature and scope of that relationship, the client's identity, and the fee arrangement between them are not protected from disclosure.[22] *See, e.g.*, *In re Grand*

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[21] This concept is analogous to laws requiring physicians to make various types of reports to the government about their patients, notwithstanding a state's otherwise-applicable physician-patient privilege and patient privacy interests. *See, e.g.*, *Whalen v. Roe*, 429 U.S. 589 (1977) (upholding New York statute requiring disclosures to the state about patients taking certain prescriptions, in order to minimize the misuse of dangerous drugs).

[22] Various courts have recognized several limited and closely related exceptions to this general rule, where a client's identity or fee arrangement may be privileged, in "special circumstances": 1) "when there is a strong probability that disclosure would implicate the client in the very criminal activity for which legal advice was sought"; 2) where disclosure of client identity would serve as "the last link" to an existing chain of incriminating evidence likely to implicate the client in a crime; and 3) the "confidential communications exception," where, if in releasing identity and fee information, the

Jury Subpoena, 55 F.3d 368, 368 (8th Cir. 1995) ("rules of confidentiality ordinarily do not apply to client identity and fee information"), *citing United States v. Sindel*, 53 F.3d 874, 877 (8th Cir. 1995) (upholding IRS requirement for attorney's disclosure of client's name, address, tax identification number, and other information relating to cash transaction).[23] Likewise, there is no recognized privilege for general descriptions about legal services provided, such as those often seen in billing records. *See, e.g.*, *Chaudhry v. Gallerizzo*, 174 F. 3d 394, 402 (4th Cir. 1999).

Specifically, with respect to the reporting required for "persuader attorneys," courts have held that such information is not protected. *HH&M*, 755 F.2d at 1219 ("We conclude that none of the information that LMRDA section 203(b) requires to be reported runs counter to the common-law attorney-client privilege."); *Wirtz v. Fowler*, 412 F. 2d 315, 332-33 (5th Cir. 1966) (attorney-client privilege does not prohibit disclosure of client identity, terms of the arrangement, general nature of the activities undertaken, or the amount of fee, as such information required to be reported under the Persuader Rule is ordinarily not considered as "confidential"), *overruled in part on other grounds*, *Price v. Wirtz*, 412 F.2d 647 (5th Cir. 1969).[24] Indeed, the disclosures

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attorney would necessarily disclose confidential communications. *See United States v. Sindel*, 53 F.3d 874, 876 (8th Cir. 1995) (providing a summary of these exceptions).

[23] Indeed, Plaintiffs concede that similar disclosures have been upheld in other contexts (*see* ECF No. 15, at 23 (citing *Sindel*, 53 F.3d at 877)).

[24] Relying on the Act's statutory privilege, Section 204, Plaintiffs and the opposing state *amici* argue that it protects not only privileged information from disclosure, but also any information that is communicated (ECF 15 at 23; ECF 30 at 12-13). However, Section 204's scope has been found to be no greater than the privilege at common

required by Section 203(b) have been found to be unquestionably 'substantially related' to the government's compelling interest in deterring corruption in the labor relations field." *HH&M*, 755 F.2d at 1222 (citing *Master Printers of Am. v. Donovan*, 751 F.2d 700, 707 (4th Cir. 1984)).[25]

These cases remain relevant to the Department's new interpretation at issue here. Although the new rule expands the types of persuader activities that must be disclosed in the 30-day report (Form LM-20), the nature of information to be reported has not changed (81 Fed Reg. 15,992).[26] *See* 81 Fed. Reg. 16,051 (containing checklist of

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law. *HH&M*, 755 F.2d at 1216, 1219 n.11 (legislative history evinces Congressional intent that Section 204 provides "the same protection as that provided by the common-law attorney-client privilege") (citing *Wirtz*, 372 F.2d at 332 (concluding that Section 204 was "roughly parallel [to] the common-law attorney-client privilege," and common-law privilege would not prevent disclosure of information required from an attorney-persuader)). In further support of their position, the opposing state *Amici* also refer to the court's interpretation of the Advice Exemption, Section 203(c), in *Donovan v. Rose Law Firm*, 768 F.2d 964 (8th Cir. 1985) (EFC No. 30 at 12-13). But *Donovan*, which considered the Advice Exemption with respect to the broader disclosures under annual Form LM-21, held that the consultant's obligation to report was limited to employers for whom the consultant actually provided persuader services – not that such information was privileged or confidential. *Id*. at 975.

[25] Circuit courts, however, remain split on the permissible scope of the consultant annual report, Form LM-21, which requires information about income and disbursements for every client who received labor-relations advice or services, regardless whether any persuader activities were involved. *Donovan*, 768 F.2d at 967. Although the Eighth Circuit rejected this broad application of Form LM-21, four other circuits have upheld its reporting requirements. *See Int'l Union, United Auto., Aerospace & Agr. Implement Workers of Am. v. Dole*, 869 F.2d. 616, 619 n.3 (D.C. Cir. 1989) (collecting cases).

[26] The Department's new interpretation continues to require reporting of non-privileged information, such as financial disclosures and the terms and conditions of the persuader agreements. Compare the revised instructions for Form LM-20 (81 Fed. Reg. 16,040-49) and the revised Form (81 Fed. Reg. 16,050-51) with the pre-2016

reportable persuader activities in the revised Form). Therefore, while the new rule continues to require disclosure of identity and amount of fees paid, as well as descriptions identifying the persuader services provided, in the absence of extraordinary circumstances, such information is not privileged or confidential.

Moreover, in the typical case the new reporting requirements also do not run afoul of an attorney's broader ethical obligation to keep confidential information related to a client's representation. *See generally* ABA Model R. 1.6. Under Model Rule 1.6(b)(6), disclosure of information related to a representation is authorized when necessary "to comply with other law or court order."[27] Although the ABA has taken issue with the Department's new interpretation, *see* 81 Fed. Reg. 15,992 (referencing the ABA's September 21, 2011 letter to the Department, opining that the regulation is inconsistent with Model Rule 1.6 and could undermine the confidentiality of the client-

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instructions available at (https://www.dol.gov/olms/regs/compliance/GPEA_Forms/lm-20_Instructions_3_2015.pdf) and the pre-2016 Form (available at https://www.dol.gov/olms/regs/compliance/GPEA_Forms/LM-20p.pdf). Note, however, that in April 2016, the Office of Labor-Management Standards announced that, although consultants must still file Form LM-21, until further notice, no enforcement action will be taken due to a filer's failure to provide information about the total receipts and disbursements. *See* "Form LM-21 Special Enforcement Policy" (available at: https://www.dol.gov/olms/regs/compliance/ecr/lm21_specialenforce.htm).

[27] *See also* R. 1.6(b)(9) of the Minnesota Rules of Prof'l Conduct, which provides that a lawyer may reveal information relating to the representation of a client if "the lawyer reasonably believes the disclosure is necessary to comply with other law or a court order".

lawyer relationship and employers' right to counsel), the *Amici* believe the regulation is entirely consistent with Model R. 1.6.

Under Model Rule 1.6(b)(6), "[t]he phrase 'other law' refers, generally, to statutory or regulatory requirement." ABA Formal Op. 473, n.1 (2016). "A lawyer may use or disclose confidential client information when required by law, after the lawyer takes reasonably appropriate steps to assert that the information is privileged or otherwise protected from disclosure." The Restatement (Third) of the Law Governing Lawyers (2000) § 63. Comment A to the Restatement (2016) provides:

> A lawyer's general duty… not to use or disclose confidential client information … is superseded when the law specifically requires such use or disclosure…. Similar issues may arise in pre-trial discovery or in supplying evidence to a legislative committee, grand jury, or *administrative agency*. A lawyer may be directly required to file reports, such as such as registering as the agent for a foreign government or reporting cash transactions…. In such situations, steps by the lawyer to assert a privilege would not be appropriate and are not required.

Id. (emphasis added).[28] Thus, the duty of confidentiality "does not require lawyers to keep quiet about what the law requires them to reveal; the force of 'other law' is already

[28] R. 1.6 cmt. 10 of the Minnesota Rules of Prof'l Conduct provides, in part, that "[w]hether such a law supersedes Rule 1.6 is a question beyond the scope of these rules…. If, however, other law supersedes this rule… paragraph (b)(9) permits the lawyer to make such disclosures as are necessary to comply with the law." And, Comment 11 to this Rule provides:

> A lawyer may be ordered to reveal information relating to the representation of a client by a court or by another tribunal or governmental entity claiming authority pursuant to other law to compel the disclosure. Absent informed consent of the client to do otherwise, the lawyer should assert on behalf of the client all nonfrivolous claims that the order is not authorized by other law or that the information sought is protected against disclosure by the attorney-client privilege or other applicable law. In the event of an

accounted for in the definition of the lawyer's ethical obligation." Rebecca Aviel, *When the State Demands Disclosure*, 33 Cardozo L. Rev. 675, 699 (2011). Accordingly, since attorneys' ethical obligations contemplate exceptions for disclosure of certain information when required by law, including disclosures to an administrative agency pursuant to a properly adopted regulation, the reporting requirements do not conflict with the rules of professional responsibility. And, therefore, disclosures about the fact that the lawyer was retained and provided persuader services would not violate either the Act or the rules of professional responsibility.[29]

Of course not every state's rules regarding attorney-client confidentiality exactly mirror Model Rule 1.6. *See, e.g.*, Cal. Rules of Prof'l Conduct R. 3-100 (generally prohibiting disclosure of confidential information, except with the informed consent of the client or to the extent necessary to prevent a criminal act likely to result in "substantial bodily harm"); Cal. Bus. & Prof. Code § 6068(e) (2004) (requiring

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> adverse ruling, the lawyer must consult with the client about the possibility of appeal to the extent required by Rule 1.4. Unless review is sought, however, paragraph (b)(9) permits the lawyer to comply with the court's order.

Id.

[29] *See also* April 27, 2016 letter from 17 law professors to the Committee on Education and the Workforce, concluding there is no conflict between the new rule and the Model Rules of Professional Conduct (analogizing the attorney/consultant disclosures required under the LMRDA to required disclosures by attorneys when they engage in certain activities on behalf of clients under the Lobbying Disclosure Act of 1995),
Available at http://democrats-edworkforce.house.gov/imo/media/doc/34%20Law%20Professors%20Letter%20to%20HEW%20Committee%20(003)1.pdf .

attorneys to maintain client confidences without explicit exception for disclosures required by "other law"). *Cf.* Comment [2] to the Cal. R. of Prof'l Conduct 3-100 ("…a member may not reveal such information except with the consent of the client or as authorized or required by the state Bar Act, these rules, or other law;"). But even when a state's confidentiality rules sweep more broadly, informed consent by the client would permit attorneys who decide to provide non-legal persuader services to comply with the Persuader Rule without any potential ethical conflict. *See, e.g.*, Cal. Rules of Prof'l Conduct R. 3-100(A); *cf.* 81 Fed. Reg. 15,999 (advising attorneys to explain the Persuader Rule to current and prospective clients, and to review their persuader agreements). And if any potential conflict did arise in particular cases, those issues can be resolved on a case-by-case basis; such scenarios do not support the broad invalidation of a duly enacted federal regulation. *See* 81 Fed. Reg. 15,998 (acknowledging that "rare situations" of conflict with ethical rules can be addressed "on a case-by-case basis").

Furthermore, to the extent that an attorney provides only non-legal business services, the protections normally arising from the client-lawyer relationship may not even exist. "The fact that a person is a lawyer does not make all communications with that person privileged." *United States v. Martin*, 278 F.3d 988, 999 (9th Cir. 2002). "Communications from attorney to client are privileged only if they constitute legal advice, or tend directly or indirectly to reveal the substance of a client confidence." *U.S. v. Defazio*, 899 F.2d 626, 635 (7th Cir. 1990). Therefore, where an attorney who engages in persuader activity is providing a business service, there is no ethical duty to

maintain confidentiality. *See* Gwen T. Handelman, *Tears and Fears: The Illusory Ethical Issues Raised by Strengthening Enforcement of the LMRDA Persuader Reporting Rules*, 27 ABA J. Lab. & Emp. L. 433, 453 (Spring 2012) ("Losing the protections of the attorney-client relationship is the price of exchanging clients for customers."); *id.* (citing Model Rule 5.7, noting that it "places the burden on the lawyer to make clear to the business customer that the protections of a lawyer-client relationship do not apply").[30] S*ee also United States v. Huberts*, 637 F.2d 630, 640 (9th Cir. 1980) (no confidential relationship exists when an attorney acts as a business advisor).

The majority of courts agree that "attorneys engaged in the usual practice of labor law are not obligated to report under section 203(b)," since "the ordinary practice of labor law does not encompass persuasive activities." *HH&M*, 755 F.2d at 1215-16, nn.8 & 9 (citing *Price*, 412 F.2d at 649 and *Douglas v. Wirtz*, 353 F.2d 30, 32 (4th Cir.

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[30] Comment 1 to Model Rule 5.7 provides:

> When a lawyer performs law-related services or controls an organization that does so, there exists the potential for ethical problems. Principal among these is the possibility that the person for whom the law-related services are performed fails to understand that the services may not carry with them the protections normally afforded as part of the client-lawyer relationship. The recipient of the law-related services may expect, for example, that the protection of client confidences, prohibitions against representation of persons with conflicting interests, and obligations of a lawyer to maintain professional independence apply to the provision of law-related services when that may not be the case.

See also Minnesota Rules of Prof'l Conduct R. 5.7 cmt. 1, which is substantially similar.

1965), *cert. denied*, 383 U.S. 909 (1966)). And, in circumstances where a lawyer provides business services as well as legal advice, the Department's revised instructions make clear: "If you are an attorney who provides legal advice and representation in addition to persuader services, you are only required to describe such portion of the agreement as the provision of 'legal services,' without any further description." 81 Fed. Reg. 16,046.[31] Accordingly, no improper disclosures would be required.

III. CONCLUSION

For the foregoing reasons, the Court should find in favor of the Defendants on the merits.

[31] Furthermore, as the Department notes, rather than addressing hypothetical questions in this context, such issues "are more appropriately resolved upon enforcement of the final rule once it becomes effective." 81 Fed. Reg. 15,997.

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CERTIFICATE OF SERVICE

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