IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
LUBBOCK DIVISION

NATIONAL FEDERATION OF INDEPENDENT BUSINESS *et al.*,	)	
Plaintiffs,	)	Case No. 5:16-cv-00066-C
v.	)	
THOMAS E. PEREZ, in his official capacity as Secretary, United States Department of Labor *et al.*,	)	
Defendants.	)	

DEFENDANTS' BRIEF IN OPPOSITION TO INTERVENOR-PLAINTIFFS' APPLICATION FOR PRELIMINARY INJUNCTION

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INTRODUCTION AND BACKGROUND

In 1959, Congress enacted the Labor-Management Reporting and Disclosure Act, Pub. L. No. 86-257, 73 Stat. 519 (1959) ("LMRDA" or "Act"). Among the Act's goals are to increase transparency and to provide sufficient information to employees to allow them to make informed choices about whether to be represented by a labor union for purposes of collective bargaining. On March 24, 2016, the United States Department of Labor ("Labor" or "the Department") issued a final rule, 81 Fed. Reg. 15,924 ("the Rule"), strengthening its existing regulations implementing Congress's purposes. The Rule clarifies that the Act's disclosure provisions apply when a consultant engages in activities to persuade employees about the exercise of their right to organize and bargain collectively, even if the consultant does not contact employees directly.

Plaintiffs, five national organizations, have moved for preliminary injunctive relief enjoining Labor from enforcing this rule, and the parties have completed briefing on that motion (ECF Nos. 25, 46, 59). On May 19, 2016, the Court granted leave for ten states[1] to intervene as plaintiffs in this action (ECF No. 48). The complaint in intervention included an application for preliminary injunctive relief, *see* Compl. in Intervention & App. for Inj. Relief ¶¶ 63-77 (ECF No. 44-1). However, intervenors fail to satisfy the requirements for such emergency relief. Intervenors are not likely to succeed on the merits. The Rule is consistent with traditional protections afforded to privileged attorney-client communications. Additionally, intervenors fail to show that the Rule conflicts with any of their laws regarding the confidentiality of information related to an attorney's representation of a client. Rather, the law of each of the ten states either expressly or implicitly permits disclosure of such information to the extent necessary to comply with another law, such as the Rule. The Rule is also consistent with the Tenth Amendment

[1] Texas, Alabama, Arkansas, Indiana, Michigan, Oklahoma, South Carolina, Utah, West Virginia, and Wisconsin.

because it does not commandeer states or state officials to administer any federal program. The Rule also does not contradict any LMRDA provision, and to the extent that it interprets an ambiguity in that statute, that interpretation is entitled to deference. Intervenors also fail to demonstrate any significant threat of imminent irreparable harm, to show that the balance of equities favors them, or that preliminary injunctive relief will serve the public interest. For these reasons, the Court should deny intervenors' application for a preliminary injunction.

ARGUMENT

Intervenors' Application for a Preliminary Injunction Should Be Denied.

"A preliminary injunction is an extraordinary remedy never awarded as of right." *Winter v. Nat. Res. Def. Council*, 555 U.S. 7, 24 (2008). A party seeking a preliminary injunction must show: "(1) a substantial likelihood of success on the merits, (2) a substantial threat of irreparable injury if the injunction is not issued, (3) that the threatened injury if the injunction is denied outweighs any harm that will result if the injunction is granted, and (4) that the grant of an injunction will not disserve the public interest." *Jordan v. Fisher*, 813 F.3d 216, 220-21 (5th Cir. 2016). Due to its "extraordinary" nature, no preliminary injunction should be "granted unless the party seeking it has clearly carried the burden of persuasion on all four requirements." *Id*. at 221 (citation and internal punctuation omitted).

I. Intervenors Have Not Shown a Substantial Likelihood of Success on the Merits.

A. Intervenors Are Not Likely to Succeed on Their First Cause of Action Because the Rule Is Consistent With the Protection Afforded to Privileged Attorney Client-Communications and Does Not Preempt State Law Except to the Extent That State Law Is Deemed to Conflict With the Rule.

Intervenors' first cause of action alleges that the Rule is "not in accordance with law" under Section 706(2)(A) of the Administrative Procedure Act, 5 U.S.C. § 706(2)(A) because: (1)

the Rule conflicts with the protection afforded to privileged attorney-client communications, Compl. in Intervention ¶¶ 27-29, 32-34; (2) the Rule is inconsistent with state attorney confidentiality laws, *id*. ¶¶ 20, 28-30, 33-35, (3) and to the extent the Rule is inconsistent with these state laws, it cannot be deemed to preempt them without an express congressional statement of preemption. *Id*. ¶¶ 18-20, 39-40. None of these allegations is correct.[2]

1. The Rule Is Consistent With the Protection Traditionally Afforded to Privileged Attorney-Client Communications.

Intervenors' contention that the Rule is inconsistent with the traditional protections afforded to privileged attorney-client communications, Compl. in Intervention ¶¶ 27-29, 32-34, is contradicted by binding Fifth Circuit precedent. Section 204 of the Act provides that nothing in the LMRDA "shall be construed to require an attorney" to include in a required report "any information . . . lawfully communicated to such attorney by any of his clients in the course of a legitimate attorney-client relationship." 29 U.S.C. § 434. The Fifth Circuit has held that this provision "roughly parallel[s] the common-law attorney-client privilege." *Wirtz v. Fowler*, 372 F.2d 315, 332 (5th Cir. 1966), *rev'd in part on other grounds*, 412 F.2d 647 (5th Cir. 1969)[3]; *accord Humphreys, Hutcheson & Moseley v. Donovan*, 755 F.2d 1211, 1216, 1219 (6th Cir. 1985); *Douglas v. Wirtz*, 353 F.2d 30, 33 (4th Cir. 1966) (treating Section 204 as equivalent to the attorney-client privilege).

[2] It also bears noting that the purported interests identified by intervenors would not be sufficient to confer standing on them, had they chosen to file suit independently of Plaintiffs. *See Lujan v. Defs. of Wildlife*, 504 U.S. 555, 560 (1992) (to establish standing, a plaintiff must, *inter alia*, "have suffered an injury in fact – an invasion of a legally protected interest which is (a) concrete and particularized, and (b) actual or imminent, not conjectural or hypothetical") (internal citations and punctuation omitted); *Powers v. Ohio*, 499 U.S. 400, 410 (1991) ("In the ordinary course, a litigant must assert his or her own legal rights and interests, and cannot rest a claim to relief on the legal rights or interests of third parties.").

[3] In *Price v. Wirtz*, 412 F.2d 647 (5th Cir. 1969) (en banc), the Fifth Circuit overruled only Part VII of *Fowler*, 372 F.2d at 333-34, which held that an attorney who has engaged in persuader activities must report only on persuader activities, rather than reporting non-persuader labor relations advice and services for non-persuader clients. *See Price*, 412 F.2d at 647-51. Parts I-VI and VIII, cited here, remain good law.

Both under the Act and in other contexts, the Fifth Circuit has repeatedly rejected attempts to extend the traditional protections afforded to privileged attorney-client communications to cover information not traditionally considered privileged, such as the basic fact of legal representation or the name of a client.[4] In *Fowler*, the Fifth Circuit rejected an assertion by attorneys that attorney-client privilege protected "the name of their client, the receipts and disbursements pursuant to [persuader] arrangements, and the general nature of their activities on behalf of these clients" from disclosure under Section 203(b), explaining that "[t]hese activities cannot be considered as confidential information communicated from the clients to [their attorneys]." *Fowler*, 372 F.2d at 333 (footnote omitted). Furthermore, as noted in another case construing the Act, "[i]n general, the fact of legal consultation or employment, clients' identities, attorney's fees, and the scope and nature of employment are not deemed privileged." *Humphreys*, 755 F.2d at 1219. The Sixth Circuit in *Humphreys* rejected the appellant-law firm's claim that "even if it is subject to the reporting requirements of section 203, the requested information is protected by the attorney-client privilege recognized in section 204," *id*., explaining that "[t]he attorney-client privilege only precludes disclosure of *communications* between attorney and client and does not protect against disclosure of the facts underlying the communication." *Id*. at 1219 (emphasis in original) (citation omitted). Thus, attorney-client privilege did not protect from disclosure "the fact of legal consultation or employment, clients' identities, attorney's fees, and the scope and nature of employment" or "the amount of money paid or owed by a client to his attorney . . . except in exceptional circumstances." *Id*.

[4] *See, e.g., DeGuerin v. United States*, 214 F. Supp. 2d 726, 735-37 (S.D. Tex. 2002) (examining Fifth Circuit case law and concluding that "[t]he law has long been settled that a client's identity and fee information are not normally privileged" and "will only be considered privileged in a few, very narrow, special circumstances"); *Howell v. Jones*, 516 F.2d 53, 58 (5th Cir. 1975) ("The great weight of authority . . . refuses to extend the attorney-client privilege to the fact of consultation or employment, including the component facts of the identity of the client and the lawyer."); *Nguyen v. Excel Corp.*, 197 F.3d 200, 206 (5th Cir. 1999) ("Inquiry into the general nature of the legal services provided by counsel does not necessitate an assertion of the privilege because the general nature of services is not protected by the privilege.").

Consequently, "none of the information that LMRDA section 203(b) requires to be reported runs counter to the common-law attorney-client privilege." *Id*.

Because the same is true with respect to the information required to be reported under the Rule, the same result should follow. The Rule does not require the reporting of privileged information. Rather, the information required to be reported consists of: (1) a copy of the persuader agreement between the employer and consultant; (2) the identity of the parties to the agreement; (3) a description of the agreement's terms; (4) the nature of the persuader and information-supplying activities to be undertaken pursuant to the agreement (selected from a checklist of activities; (5) the period when the activities were or are to be performed and the extent of their completion; and (6) the persons who performed the persuader activities, and the dates, amounts, and purposes of payments made under the agreement. 81 Fed. Reg. at 15,992; *see also* App. 1-6.[5] The Rule "does not require the disclosure of any particular documents, apart from the persuader agreement." 81 Fed. Reg. at 15,995. "While receipt and disbursement information must be disclosed under the rule, the rule does not require that the billing, voucher, or other documents that includes this information be publicly disclosed." *Id*. None of this information required to be reported falls within the traditional confines of the attorney-client privilege.

2. Intervenors Have Failed to Show That the Rule Is Inconsistent With Any of Their Laws on the Subject of Attorney Confidentiality.

Intervenors contend that the Rule is inconsistent with their laws regarding attorney confidentiality. Compl. in Intervention ¶¶ 20, 28-30, 33-35. Such state laws sweep more broadly than attorney-client privilege but explicitly authorize disclosure in the circumstances

[5] Employers submit the required information to Labor using the Form LM-10, "Employer Report," *see* 29 C.F.R. part 505, while consultants use the Form LM-20, "Agreement & Activities Report." *See id*. part 406. Copies of the current Forms LM-10 and LM-20 are included in the Appendix hereto.

presented here. As set out in the Appendix hereto, the relevant laws of the ten states regarding attorney confidentiality are modeled after Model Rule of Professional Conduct 1.6, which, while generally prohibiting an attorney from "reveal[ing] information relating to the representation of a client," expressly permits such disclosure "to the extent the lawyer reasonably believes necessary . . . to comply with other law or a court order[.]" Model Rules Prof'l Conduct 1.6(a), (b)(6); *see* App. 7-15. In their versions of Model Rule 1.6, nine of the ten states expressly permit the disclosure of information relating to the representation of a client as necessary "to comply with" or "as required by" "other law or a court order."[6] And the tenth state (Alabama) recognizes in comments to its rules of professional conduct that "[i]n addition to" those rules, "a lawyer may be obligated or permitted by other provisions of law to give information about a client."[7] Therefore, to the extent that the Rule applies, attorneys may comply with the ten states' rules relating to confidentiality of information by making such disclosures as are necessary to comply with the Rule.[8] There is thus no conflict between the Rule and the laws of the ten states at issue.

[6] *See* Ark. R. Prof'l Conduct 1.6(b)(6) ("A lawyer may reveal [information relating to representation of a client] to the extent the lawyer reasonably believes necessary . . . to comply with other law or a court order[.]"); Ind. R. Prof'l Conduct 1.6(b)(6) (same); Mich. R. Prof'l Conduct 1.6(c)(2) ("A lawyer may reveal . . . [information protected by the client-lawyer privilege under applicable law] or [other information gained in the professional relationship that the client has requested be held inviolate or the disclosure of which would be embarrassing or would be likely to be detrimental to the client] when permitted or required by these rules, or when required by law or by court order[.]"); Okla. R. Prof'l Conduct 1.6(b)(6) ("A lawyer may reveal information relating to representation of a client to the extent the lawyer reasonably believes necessary. . . as permitted or required to comply with these Rules, other law or a court order."); S. Carolina R. Prof'l Conduct 1.6(b)(7) ("A lawyer may reveal information relating to the representation of a client to the extent the lawyer reasonably believes necessary . . . . to comply with other law or a court order[.]"); Texas Disciplinary R. Prof'l Conduct 1.05(c)(4) ("A lawyer may reveal confidential information [which includes attorney-client privileged information and all information relating to a client or furnished by the client, other than privileged information, acquired by the lawyer during the course of or by reason of the representation of the client] . . . [w]hen the lawyer has reason to believe it is necessary to do so in order to comply with a court order, a Texas Disciplinary Rules of Professional Conduct, or other law."); Utah R. Prof'l Conduct 1.6(b)(6) ("A lawyer may reveal information relating to the representation of a client to the extent the lawyer reasonably believes necessary . . . . to comply with other law or a court order[.]"); W. Va. R. Prof'l Conduct 1.6(b)(6) (same); Wisc. Sup. Ct. R. 20:1.6(c)(5) (same).

[7] Ala. R. Prof'l Conduct 1.6 cmt.

[8] Intervenors' complaint also refers in several paragraphs to the duty of loyalty owed by attorneys to clients. *See* Compl. in Intervention ¶¶ 17, 24, 26, 34, 55, 68, 70-71, 72, 74. But the citations contained in these paragraphs make

3. To the Extent That the Rule May Be Deemed to Conflict With a State's Confidentiality Laws, Conflict Preemption Would Apply.

Even if the Rule were deemed to conflict with a state-law attorney ethics requirement – which intervenors have not demonstrated to be the case – the Rule would prevail over the state-law requirement due to conflict preemption. *See generally United States v. Zadeh*, __ F.3d __, No. 15-10195, 2016 WL 1612754, at *2 (5th Cir. Apr. 21, 2016) ("[C]onflict preemption takes two forms: (i) when compliance with both state and federal law is impossible, and (ii) when a state law stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress.") (footnotes, internal citations, and punctuation omitted). Intervenors err in contending that conflict preemption cannot result from conflict between state law and a federal regulation, but only between state law and a federal statute. Compl. in Intervention ¶¶ 19, 39. To the contrary, "[f]ederal regulations have no less preemptive effect than federal statutes." *Planned Parenthood of Houston & Se. Tex. v. Sanchez*, 403 F.3d 324, 336 (5th Cir. 2005) (citing *Fid. Fed. Sav. & Loan Ass'n v. de la Cuesta*, 458 U.S. 141, 152 (1982)); *see also Wyeth v. Levine*, 555 U.S. 555, 576 (2009) (noting that the Supreme Court "has recognized that an agency regulation with the force of law can pre-empt conflicting state requirements") (citing *Geier v. Am. Honda Motor Co.*, 529 U.S. 861 (2000); *Hillsborough Cnty. v. Automated Med. Labs., Inc.*, 471 U.S. 707, 713 (1985)). And here, the federal statute creates an exemption from reporting

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clear that by "duty of loyalty," intervenors are referring to an attorney's duty to avoid conflicts of interest. *See, e.g.*, *id*. ¶ 34 (citing Model Rule of Professional Conduct 1.7, "Conflict of Interest: General Rule"); *id*. (citing *United States v. Trevino*, 992 F.2d 64, 65 (5th Cir. 1993), which states in pertinent part: "Courts are particularly sensitive to claims of conflict of interest, because in such instances counsel breaches the all-important duty of loyalty to the client."); *id*. ¶ 68 (citing *Engel v. CBS, Inc.*, 145 F.3d 499, 504 (2d Cir. 1998), for the proposition that "[t]he ability to zealously represent one's client with undivided loyalty is the cornerstone of the legal profession," and *Ga. State Bd. of Pharm. v. Lovvorn*, 336 S.E.2d 238, 241 (Ga. 1985), for the proposition that "an attorney owes undivided loyalty to his client-undiluted by conflicting or contrarian obligations, and undiminished by interests of himself or of others"). An attorney's duty to avoid conflicts of interest is not pertinent here, as intervenors identify no law from the ten intervening states regarding this duty that they allege to be inconsistent with the Rule.

only for information subject to attorney-client privilege, not for the broader categories of information that may be subject to state confidentiality rules.

Furthermore, contrary to intervenors' view, *see* Compl. in Intervention ¶¶ 18-20, 39, the lack of an express statement on preemption "does not end [the Court's] inquiry" because "the absence of express pre-emption is not a reason to find no *conflict* pre-emption." *PLIVA, Inc. v. Mensing*, 564 U.S. 604, 618 n.5 (2011) (emphasis in original); *accord Crosby v. Nat'l Foreign Trade Council*, 530 U.S. 363, 372-73 (2000) ("Even without an express provision for preemption," state law must yield to federal law where, *inter alia*, "it is impossible for a private party to comply with both state and federal law"). Rather, all that is required for conflict preemption is that compliance with both state and federal law is impossible. *Geier*, 529 U.S. at 884 (explaining that "conflict pre-emption is different in that it turns on the identification of actual conflict, and not on an express statement of pre-emptive intent" and that "[w]hile pre-emption fundamentally is a question of congressional intent, [the Supreme Court] traditionally distinguishes between 'express' and 'implied' pre-emptive intent, and treats 'conflict' pre-emption as an instance of the latter") (internal citations and punctuation omitted); *Simmons v. Sabine River Auth. La.*, 732 F.3d 469, 473 (5th Cir. 2013) ("Conflict preemption occurs where compliance with both federal and state regulations is a physical impossibility. . . .") (citation and internal punctuation omitted).

Moreover, the prevalence of federal law over contrary state attorney confidentiality rules is not a novel occurrence; indeed, this issue has arisen frequently in tax reporting cases. *See, e.g., United States v. Goldberger & Dubin, P.C.*, 935 F.2d 501, 502-03, 505 (2d Cir. 1991) (rejecting contention that law firm's disclosure to IRS of names of persons making cash payments to firm exceeding $10,000 would violate attorney-client privilege under New York

law, and explaining that "in actions such as the instant one, which involve violations of federal law, it is the federal common law of privilege that applies"); *United States v. Blackman*, 72 F.3d 1418, 1421, 1424-26 (9th Cir. 1995) (rejecting as "specious" attorney's claim that both attorney-client privilege and attorney's "duty to maintain client confidences and secrets" justified refusal to identify client-payors, nature of services rendered to them, and fee arrangement; court concluded that "Congress cannot have intended to allow local rules of professional ethics to carve out fifty different privileged exemptions to the reporting requirements of" the IRS form); *United States v. Leventhal*, 961 F.2d 936, 940-41 (11th Cir. 1992) (rejecting allegation that disclosure of client information on IRS form would violate Florida Bar rules of professional conduct by revealing confidential information). In sum, even though intervenors fail to demonstrate that the Rule conflicts with any attorney ethics requirement imposed by the ten intervenor-states, if such a conflict existed, the Rule would prevail over this requirement due to conflict preemption.

B. Defendants Are Likely to Prevail on Intervenors' Tenth Amendment Claims.

Intervenors' second cause of action alleges that the Rule is inconsistent with the Tenth Amendment because the Rule "effectively commandeer[s]" the states' regulation of the practice of law. Compl. in Intervention ¶ 44. The Tenth Amendment provides that "[t]he powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people." U.S. Const. amend. X. The Supreme Court has held that federal law may violate the Tenth Amendment if the law commandeers either states themselves or state officials to administer federal programs. *See Printz v. United States*, 521 U.S. 898, 935 (1997); *New York v. United States*, 505 U.S. 144, 175-76 (1992). *New York* and *Printz*, according to the Supreme Court itself, held only that Congress cannot force the states to

enact a federal regulatory program, and also cannot co-opt state officers directly. *See Printz*, 521 U.S. at 935 ("We held in *New York* that Congress cannot compel the States to enact or enforce a federal regulatory program. Today we hold that Congress cannot circumvent that prohibition by conscripting the state's officers directly.").

The Rule does not "commandeer" a state or state officers in violation of *New York* and *Printz*. It does not compel any state "to enact or enforce" a federal program through state legislation. Nor does it "conscript[] the States . . . directly" to enforce federal legislation. *Cf. Reno v. Condon*, 528 U.S. 141, 149-50 (2000) (upholding the Driver's Privacy Protection Act of 1994 against similar challenges); *Texas v. United States*, 106 F.3d 661, 666 (5th Cir. 1997) ("We hold that in the absence of a federal statute or regulation or executive branch directive specifically compelling states to provide services to undocumented aliens, the federal government cannot be said to have commandeered state legislative processes in violation of *New York v. United States*."). Rather, the Rule only requires covered private entities to disclose information under prescribed circumstances. Because the Rule does not commandeer any state or state official to administer a federal regulatory program, intervenors are not likely to succeed on their Tenth Amendment claims.

C. Intervenors Are Not Likely to Succeed on Their Third Cause of Action Because Congress Exempted Only Information Covered By the Attorney-Client Privilege.

Intervenors' third cause of action alleges that the Rule is arbitrary and capricious because Labor "did not consider Congress's clear expression that the reporting and disclosure requirements established by LMRDA were not intended to interfere with the States' control over the practice of law, or the right and ability of employer-clients to have full confidentiality when consulting with their attorneys." Compl. in Intervention ¶ 49 (citing H. Conf. Rep. 86-1147, at

33 (1959)). But the cited House conference report does not support intervenors' contention. Rather, at the page cited, this report notes that in the LMRDA provision eventually codified as 29 U.S.C. § 434, "an attorney need not include in any report required by the act any information which was lawfully communicated to such attorney by any of his clients in the course of a legitimate attorney-client relationship." H. Conf. Rep. 86-1147, at 33 (App. 16-57); *see also* 29 U.S.C. § 434 (same). As noted above, however, *see supra* I.A.1, in interpreting this provision, the Fifth Circuit has held that it "roughly parallel[s] the common-law attorney-client privilege." *Fowler*, 372 F.2d at 332. And because intervenors have failed to show that any information required to be disclosed under the Rule falls within the protections of the traditional attorney-client privilege, they are not likely to succeed on their third cause of action.[9]

D. Defendants Are Likely to Prevail on Intervenors' Fourth Cause of Action Because the LMRDA Clearly Contemplates Non-Privileged Disclosures Related to the Attorney-Client Relationship, and the Department's Interpretation Receives *Chevron* Deference.

Intervenors' fourth cause of action alleges that (1) the LMRDA is not ambiguous on the issue of whether Section 203(b)'s reporting requirement contemplates that "confidential communications between employer-clients and their attorney(s) must be reported or otherwise disclosed," Compl. in Intervention ¶ 54, and (2) even if the LMRDA is ambiguous on this issue, the Rule's interpretation of this ambiguity should not be afforded *Chevron* deference, *id.* ¶¶ 53, 55. Neither allegation has merit.

[9] Intervenors also cite *Neinast v. Texas*, 217 F.3d 275, 281 (5th Cir. 2000), which states in pertinent part that in applying the first step of *Chevron U.S.A. v. Nat. Res. Def. Council*, 467 U.S. 837 (1984), under which a court "address[es] whether Congress has clearly spoken on a precise issue," the court's "operating premise must be that an agency, or . . . an executive office with delegated power to promulgate rules, cannot have greater power to regulate state conduct than does Congress." *Neinast*, 217 F.3d at 281. However, intervenors fail to identify any provision of the Rule that fails to take into account such a clear, unambiguous statement by Congress.

1. The LMRDA Contemplates Disclosures of Non-Privileged Information Related to the Attorney-Client Relationship.

It is well settled that in assessing the validity of an agency's construction of a statute, the Court examines whether "Congress has directly spoken to the precise question at issue," and "[i]f the intent of Congress is clear, 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." *BNSF Ry. Co. v. United States*, 775 F.3d 743, 751 (5th Cir. 2015) (quoting *Chevron*, 467 U.S. at 842-43). However, if "the statute is silent or ambiguous with respect to the specific issue," the Court proceeds to the second step of *Chevron* analysis, asking whether the agency's interpretation "is based on a permissible construction of the statute." *Chevron*, 467 U.S. at 843. "An agency's interpretation is permissible if it is reasonable. The question of reasonableness is not whether the agency's interpretation is the only possible interpretation or whether it is the most reasonable, merely whether it is reasonable *vel non*." *ConocoPhillips Co. v. U.S. EPA*, 612 F.3d 822, 831 (5th Cir. 2010) (citation omitted).

Intervenors claim that the LMRDA unambiguously precludes the disclosures that the Rule requires. Compl. in Intervention ¶ 54. But the LMRDA in fact expressly requires employers and consultants to report non-privileged information regarding agreements pursuant to which the consultant "undertakes activities where an object thereof is, directly or indirectly," to persuade employees regarding the exercise of their rights to organize and bargain collectively. 29 U.S.C. § 433(b). *See id*. § 433(a)(4) (requiring an employer to file "a report . . . showing in detail the date and amount of each such . . . agreement[] or arrangement and the name, address, and position, if any, in any firm or labor organization of the person to whom it was made and a full explanation of the circumstances of all such payments, including the terms of any agreement or understanding pursuant to which they were made"); *id*. § 433(b) (requiring a consultant to

provide "a detailed statement of the terms and conditions of such agreement[s] or arrangement[s]," an annual statement setting out "its receipts of any kind from employers on account of labor relations advice or services, designating the sources thereof," and "its disbursements of any kind, in connection with such services and the purposes thereof"). As discussed above, Congress exempted only privileged information from this mandate.

The Rule is consistent with this statutory text. As explained in Defendants' response to Plaintiffs' application for a preliminary injunction, the Rule permissibly resolves a statutory ambiguity regarding the types of indirect persuader activity that are subject to reporting. *See* Def. Opp. to Pl. Application (Mot.) for Prelim. Inj. at 7-22 (ECF No. 46). It requires employers and consultants to provide information about the terms of their relationship but, like the statute, does not require them to reveal privileged information. *See, e.g.*, 81 Fed. Reg. at 15,992. And, as explained above, *see supra* I.A.1, the Fifth and Sixth Circuits have already rejected attempts by attorneys to extend Section 203(c)'s exemption to cover information not falling within the traditional protections afforded to privileged attorney-client communications to cover information not traditionally considered privileged, such as a client's name or the basic fact of legal representation. Contrary to intervenors' claim, Labor has permissibly interpreted the statutory text.

2. Intervenors Fail to Demonstrate That Ordinary Principles of *Chevron* Deference Do Not Apply Here.

Intervenors mistakenly rely on *King v. Burwell*, 135 S. Ct. 2480, 2489 (2015), to suggest that this case warrants an "exception[]" to the *Chevron* doctrine because it presents "questions of 'deep economic and political significance.'" Compl. in Intervention ¶ 53. In *King*, the Supreme Court concluded that the IRS lacked authority to determine whether tax credits created under the Patient Protection and Affordable Care Act were available on certain federal exchanges. 135 S.

Ct. at 2489. The Court reasoned that Congress had not intended to delegate that authority, given that the IRS had "no expertise in crafting health insurance policy of this sort" and that the issue had "deep economic and political significance." *Id.* (citation and internal punctuation omitted). "[H]ad Congress wished to assign that question to an agency," the Court held, "it surely would have done so expressly." *Id.*

Here, the Department of Labor *does* have expertise in the field of labor relations, and Congress *did* expressly delegate rulemaking authority to the agency. The Act gives the Secretary "authority to issue, amend, and rescind rules and regulations prescribing the form and publication of reports required to be filed under [the LMRDA] and such other reasonable rules and regulations . . . as [Labor] may find necessary to prevent the circumvention or evasion of such reporting requirements." 29 U.S.C. § 438. The narrow *King* exception does not apply. *See, e.g.*, *United Auto., Aerospace & Agric. Implement Workers of Am. v. Dole*, 869 F.2d 616, 617-21 (D.C. Cir. 1989) (Ginsburg, J.) (affording *Chevron* deference to the Secretary's interpretation of the Act). The Court should apply the familiar *Chevron* standard under which, given a statutory ambiguity, courts defer to an agency's interpretation of the statute if that interpretation is based on a permissible construction of the statute.

II. Intervenors Fail to Carry Their Burden to Show Irreparable Harm.

"Perhaps the single most important prerequisite for the issuance of a preliminary injunction is a demonstration that if it is not granted the applicant is likely to suffer irreparable harm before a decision on the merits can be rendered." 11A Charles Alan Wright, Arthur R. Miller & Mary Kay Kane, *Federal Practice and Procedure* § 2948.1 (3d ed. 2013). As the Supreme Court has explained, because "[a] preliminary injunction is an extraordinary remedy," a court must consider the actual "effect on each party of the granting or withholding" of relief, and

do so "[i]n each case." *Winter*, 555 U.S. at 24. To show a threat of irreparable harm, a party must demonstrate "a *significant threat* of injury from the impending action, that the injury is *imminent*, and that money damages would not fully repair the harm." *Humana, Inc. v. Jacobson*, 804 F.2d 1390, 1394 (5th Cir. 1986) (emphasis added).

Here, intervenors allege that they will suffer irreparable injury absent preliminary injunctive relief because they state that the Rule "forc[es] state officials, through the rules of ethics and professional conduct that they administer, to choose between a federal rule or complying with State law." Compl. in Intervention ¶ 66. This allegation is doubly incorrect. First, it is not state officials who would be required to make a choice if a conflict existed between the Rule and compliance with state attorney-ethics requirements; rather it would be attorneys who are subject to the respective rules. Second, as explained above, intervenors have failed to demonstrate that the Rule conflicts with any of the ten intervenor-states' laws regarding the confidentiality of information relating to attorney representation of clients. Rather, each such law contains either an express or implied exception to the general restriction on disclosing information relating to the representation of a client when such disclosure is necessary to comply with other law.

Additionally, intervenors contend that the Rule burdens attorneys in terms of time required to determine whether they are complying with both the Rule and state ethics rules. Compl. in Intervention ¶ 67. Initially, even if this contention were correct – which it is not – intervenors fail to explain how this result would result in injury to the state-intervenors, rather than to attorneys. More importantly, however, because all of the intervenor states' laws relating to disclosing information about client representation contain an exception when such disclosure is necessary to comply with other law, no significant amount of time will be required to ascertain

whether an attorney is in compliance with state and federal law.

Finally, intervenors allege that compliance with the Rule will undermine the duties of confidentiality and loyalty as embodied in state law governing the conduct of attorneys. Compl. in Intervention ¶¶ 68-71. But as explained above, this allegation has no merit. To the extent that the Rule applies, attorneys comply with the ten states' laws regarding confidentiality of information by making such disclosures as are necessary to comply with the Rule. Furthermore, as the materials cited by intervenors regarding attorneys' duty of loyalty make clear, *see id*. ¶¶ 70-71, the duty referred to is the duty by attorneys to avoid conflicts of interest. However, intervenors have identified no law regarding attorney conflicts of interest that they allege to be inconsistent with the Rule. Intervenors thus fail to satisfy their burden of demonstrating that they face a significant threat of imminent irreparable harm absent injunctive relief.

III. The Balance of Harms and Public Interest Do Not Favor Entry of a Preliminary Injunction.

As explained above, intervenors' contention that the ten intervenor states, or attorneys licensed to practice in these states, cannot comply with both the Rule and state law, Compl. in Intervention ¶¶ 72, 74-76, is incorrect. The Rule therefore inflicts no cognizable harm on intervenors.

Enjoining the Rule would significantly harm the public, however. Where, as here, an injunction is sought against a regulation promulgated by a federal agency, there is "inherent harm to an agency in preventing it from enforcing regulations that Congress found it in the public interest to direct that agency to develop and enforce." *Cornish v. Dudas*, 540 F. Supp. 2d 61, 65 (D.D.C. 2008); *accord Nat'l Propane Gas Ass'n v. DHS*, 534 F. Supp. 2d 16 (D.D.C. 2008); *Hunter v. FERC*, 527 F. Supp. 2d 9, 18 (D.D.C. 2007) ("Given . . . the harm that issuing an injunction would cause to [an agency's] enforcement authority, the Court finds that the public

interest would not be served by issuing an injunction at this time."). Moreover, the public interest would be undermined if the Court were to enjoin a rule that seeks to bring greater transparency to attempts to influence employees' decisions about whether to organize and bargain collectively. As in other aspects of public life such as campaign finance or lobbying, Congress has required the public to be provided with sufficient information to enable well-informed choices to be made. *See, e.g.*, *Citizens United v. FEC*, 558 U.S. 310, 371 (2010) (upholding disclosure provisions imposed by federal election law, and explaining that "disclosure permits citizens and shareholders to react to the speech of corporate entities in a proper way. This transparency enables the electorate to make informed decisions and give proper weight to different speakers and messages."). Here, Labor has issued a rule tailored to the Act's requirement that persuader activity be disclosed and that supports the overall purpose of the Act. The agency's mission, and the public interest, would be thwarted if intervenors' request for a preliminary injunction were granted.[10]

CONCLUSION

For the foregoing reasons, Defendants respectfully request that the Court deny intervenors' application for a preliminary injunction.

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Respectfully submitted,

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[10] It is irrelevant that the Rule departs from Labor's prior interpretation of the LMRDA. *See* Compl. in Intervention ¶ 73. "[F]ederal courts must defer even to new, course-reversing agency positions when 'the new policy is permissible under the statute, . . . there are good reasons for it, and . . . the agency *believes* it to be better, which the conscious change of course adequately indicates.'" *Entergy Mississippi, Inc. v. NLRB*, 810 F.3d 287, 293 (5th Cir. 2015) (quoting *FCC v. Fox Television Stations*, 556 U.S. 502, 515 (2009)) (emphasis in *Fox*) (ellipses in *Entergy*).

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CERTIFICATE OF SERVICE

On June 9, 2016, I electronically submitted the foregoing document with the clerk of court for the U.S. District Court, Northern District of Texas, using the electronic case filing system of the court. I hereby certify that I have served all counsel and/or pro se parties of record electronically or by another manner authorized by Federal Rule of Civil Procedure 5(b)(2).

/s/ Daniel Riess
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