IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF TEXAS

ASSOCIATED BUILDERS AND CONTRACTORS OF SOUTHEAST TEXAS, *et al*,	§	
Plaintiffs	§	NO. 16-CV-00425
vs.	§	
ANNE RUNG, ADMINISTRATOR, OFFICE OF FEDERAL PROCUREMENT POLICY, OFFICE OF MANAGEMENT AND BUDGET, et al.	§	
Defendants.	§	

PLAINTIFFS' EMERGENCY MOTION FOR TEMPORARY RESTRAINING ORDER AND PRELIMINARY INJUNCTION AND BRIEF IN SUPPORT THEREOF, WITH REQUEST FOR EXPEDITED BRIEFING SCHEDULE AND HEARING

Plaintiffs Associated Builders and Contractors of Southeast Texas, *et al*, hereby move on an emergency basis for a temporary restraining order and preliminary injunction against Defendants pursuant to Federal Rule of Civil Procedure 65, to prevent Defendants from implementing or enforcing Executive Order 13673 issued by the President on July 31, 2014. *See* Ex. 1, 79 Fed. Reg. 45309 (Aug. 5, 2014), as amended, 80 Fed. Reg, 58807 (Aug. 26, 2016) ("the Executive Order"). Plaintiffs specifically seek to enjoin the final rule promulgated by the Federal Acquisition Regulatory ("FAR") Council. *See* Ex. 2, 81 Fed. Reg. 58562 (Aug. 25, 2016) ("FAR Rule"). Plaintiffs also seek to enjoin the United States Department of Labor's ("DOL's") guidance regarding the FAR Rule, incorporated by reference therein. *See* Ex. 3, 81 Fed. Reg. 58654 (Aug. 25, 2016). The foregoing Rule and Guidance are scheduled to go into

effect on **October 25, 2016**, absent preliminary injunctive relief, causing irreparable harm to Plaintiffs' government contractor members.

As further explained in Plaintiffs' Brief in support of and made part of this Motion, as well as Plaintiffs' previously filed Complaint [ECF 1], the unprecedented Executive Order, FAR Rule, and DOL Guidance exceed the authority of the President, FAR Council, and DOL, violate and are preempted by numerous acts of Congress, infringe Plaintiffs' First Amendment and Due Process rights under the Constitution, and are arbitrary and capricious and not in accordance with applicable law. This Court is therefore authorized to enjoin the foregoing orders and actions pursuant to the Administrative Procedure Act, 5 U.S.C. § 706, and related statutes.

As further demonstrated below, and in comments made part of the Administrative Record as well as the attached Affidavits, the standards for temporary restraining order and/or preliminary injunction are met here. Plaintiffs are likely to succeed on the merits; Plaintiffs will suffer irreparable harm in the absence of an injunction preserving the status quo; the balance of harms favors the Plaintiffs; and an injunction that preserves the status quo of many decades pending a final ruling on the merits is in the public interest.

Because of the October 25, 2016 effective date of the FAR Rule, which the FAR Council has arbitrarily failed and refused to delay in response to reasonable requests from the regulated business community, an expedited briefing schedule and hearing are requested. A proposed order is also attached.

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I. BRIEF IN SUPPORT OF MOTION - INTRODUCTION

Under the guise of increasing efficiency and cost savings in federal contracting, the Executive Order, FAR Rule, and DOL Guidance impose new regulatory burdens on government contractors that exceed and contradict Congress's carefully balanced labor and employment law statutory scheme. Specifically, the Executive Order, FAR Rule, and DOL Guidance compel prospective and existing contractors to publicly disclose and declare whether they have been found to have violated any of fourteen federal labor or employment laws, even though such "violations" have not been finally adjudicated by any court and even if the claimed violations are still being contested or have been settled without a hearing, and without any judicially approved finding of an actual violation of any law.

The potential consequences of such compelled speech are severe. The public disclosures in and of themselves will cause irreparable harm to the reputation of Plaintiffs' members immediately upon their filing, while serving no permissible government interest and indeed conflicting with Congressional intent underlying the labor laws. The disclosures extend far beyond any information previously deemed relevant to government contractors' responsibility to perform government work. Nevertheless, the Executive Order, FAR Rule, and DOL Guidance will now require federal contracting officers for the first time to determine whether the alleged violations of fourteen different labor and employment laws should disqualify contractors from being awarded or continuing to perform government contracts. As further described below, a burdensome new regulatory regime is being created to implement this misguided policy, which again exceeds the Executive's authority and violates the Due Process rights of government contractors, at considerable cost and with no benefits to taxpayers.

II. STATEMENT OF FACTS

A. Executive Order 13673

On July 31, 2014 President Barack Obama issued Executive Order 13673. As subsequently amended, the Executive Order purports to "increase efficiency and cost savings in the work performed by parties who contract with the Federal Government by ensuring that they understand and comply with labor laws." 79 Fed. Reg. 45309.

The Executive Order requires that "[f]or procurement contracts for goods and services, including construction, where the estimated value of the supplies acquired and services required exceeds $500,000, each agency shall ensure that provisions in solicitations require that the offeror represent, … whether there has been any administrative merits determination, arbitral award or decision, or civil judgment, as defined in guidance issued by the Department of Labor, rendered against the offeror within the preceding 3-year period for violations of any of the following labor laws and Executive Orders (labor laws)": (1) the Fair Labor Standards Act; (2) the Occupational Safety and Health Act of 1970; (3) the Migrant and Seasonal Agricultural Worker Protection Act; (4) the National Labor Relations Act; (5) the Davis-Bacon Act; (6) the Service Contract Act; (7) Executive Order 11246 of September 24, 1965 (Equal Employment Opportunity); (8) Section 503 of the Rehabilitation Act of 1973; (9) the Vietnam Era Veterans' Readjustment Assistance Act of 1974; (10) the Family and Medical Leave Act; (11) Title VII of the Civil Rights Act of 1964; (12) the Americans with Disabilities Act of 1990; (13) the Age Discrimination in Employment Act of 1967; (14) Executive Order 13658 of February 12, 2014 (Establishing a Minimum Wage for Contractors); and (15) "equivalent State laws, as defined in guidance issued by the Department of Labor." 79 Fed. Reg. 45309.

Pursuant to the Executive Order, contracting officers are required to consider the information provided by the offeror in determining "whether an offeror is a responsible source

that has a satisfactory record of integrity and business ethics, after reviewing the guidelines set forth by the Department of Labor and consistent with any final rules issued by the Federal Acquisition Regulatory (FAR) Council," notwithstanding the fact that the "violations" that require reporting may not be final decisions or determinations, are not confined to performance of past government contracts, and/or have not been preceded by a hearing or been made subject to judicial review. *Id.*[1]

The Executive Order imposes similar requirements on subcontractors for any subcontract where the estimated value exceeds $500,000. The Executive Order further requires the FAR Council to "propose such rules and regulations and issue such orders as are deemed necessary and appropriate to carry out [the Executive Order], and shall issue final regulations in a timely fashion after considering all public comments, as appropriate." *Id.*[2] The Executive Order further requires DOL to issue guidance to assist agencies in determining whether the disclosed determinations were issued for "serious, repeated, willful, or pervasive violations" of the fourteen labor laws. *Id*. Many of the laws themselves do not recognize such terminology with regard to violations of their provisions.

The Executive Order also provides that contractors and subcontractors who enter into contracts for non-commercial items over $1 million agree not to enter into any mandatory pre-

[1] Prior to the issuance of the Executive Order, federal agency contracting officers generally made "responsibility determinations" relating to integrity and business ethics solely as to serious crimes or acts of fraud or similarly serious civil matters involving offerors. *See, e.g.,* CRS Report R40633, *Responsibility Determinations Under the Federal Acquisition Regulation*, at 6 (Jan. 4, 2013). As conceded in the preamble to the new FAR Rule, the government previously recognized that "contracting officers generally lack the expertise and tools to assess the severity of labor law violations brought to their attention and therefore cannot easily determine if a contractor's actions show a lack of integrity and business ethics." 81 Fed. Reg. at 58564.

[2] The FAR Council is a federal agency charged with assisting in the direction and coordination of Government-wide procurement policy and Government-wide procurement regulatory activities in the Federal Government, in accordance with the Office of Federal Procurement Policy ("OFPP") Act, 41 U.S.C § 1301, *et seq.* Defendants in this case are the agency representatives of the statutorily designated members of the FAR Council, chaired by the Administrator of the Office of Federal Procurement Policy.

dispute arbitration agreement with their employees or independent contractors on any matter arising under Title VII of the Civil Rights Act, as well as any tort related to or arising out of sexual assault or harassment.

The Executive Order also requires that all covered contractors inform their employees in each paycheck of their number of hours worked, overtime calculations (for non-exempt employees), rates of pay, gross pay and additions or deductions from pay, and whether they have been classified as independent contractors.

B. The FAR Rule and DOL Guidance Implementing The Executive Order.

On August 25, 2016, following public comment on a proposed rule, including strong opposition from Plaintiffs and many other groups representing government contractors, the FAR Council published the final FAR Rule that is being challenged in Plaintiffs' Complaint, setting an effective date of October 25, 2016. 81 Fed. Reg. 58562. That same day, DOL published its Guidance further implementing the Executive Order. 81 Fed. Reg. 58654.

As called for by the Executive Order, but in violation of the Constitution and other applicable law, the FAR Rule and DOL Guidance require federal contractors and subcontractors for the first time to disclose any "violations" of the federal labor laws set forth in the Executive Order prior to any procurement for federal government contracts/subcontracts exceeding $500,000, in addition to requiring updated disclosures of labor law violations every six months while performing covered government contracts.[3] The FAR Rule and DOL Guidance make clear that the required disclosures include non-final administrative merits determinations, regardless of the severity of the alleged violation, or whether a government contract was involved, and

[3] The FAR Rule requires the violations to be disclosed by contractors, on the government's public website, the Federal Awardee Performance and Integrity Information System (FAPIIS). 81 Fed. Reg. 58565.

regardless of whether a hearing has been held or an enforceable decision issued. 81 Fed. Reg. 58668.

Specifically, for any alleged violation of the National Labor Relations Act, DOL's Guidance states that covered contractors must publicly disclose, *inter alia*, any complaint against them issued by the General Counsel of the National Labor Relations Board (NLRB), even if said complaint has not yet been adjudicated before an Administrative Law Judge or the Board itself, and even if no court has yet enforced any order of the Board as to the complaint. 81 Fed. Reg. 58668. The General Counsel of the NLRB issues more than 1200 such unfair labor practice complaints each year, many of which are ultimately dismissed as lacking in merit, in whole or in part, by an Administrative Law Judge or by the NLRB. Even those complaints ultimately found to have merit by the NLRB are frequently denied enforcement by courts of appeals. *See* www.nlrb.go/news-outreach/graphs-data/charges-and-complaints/.

For alleged violations of the Fair Labor Standards Act, Davis-Bacon Act, Service Contract, FMLA, or Executive Order 13658, covered contractors must publicly disclose, *inter alia*, non-final determinations by DOL's Wage Hour Division, including WH-56 "Summary of Unpaid Wages" or any Wage Hour Division letter, notice or other document assessing civil monetary penalties, even if such forms or documents have not yet been adjudicated before an Administrative Law Judge or Administrative Review Board, and even if no court has yet enforced any WH order. 81 Fed. Reg. 58666. DOL initiates more than 11,000 of these Wage Hour "cases" against employers each year. *See* www.dol.gov/whd/statistics/statstables.htm. A substantial percentage of them are ultimately dismissed or settled without any finding of merit. 81 Fed. Reg. 58666.

For alleged violations of the Occupational Safety and Health Act, covered contractors must report citations, which are non-final determinations by OSHA, *inter alia*, even though they have not been adjudicated before an Administrative Law Judge or OSHA Review Commission, and even if no court has yet enforced any such determination: an order of reference filed with an administrative law judge. 81 Fed. Reg. 58667. OSHA issues many thousands of citations against employers each year, 75 percent of which are identified by the agency as "serious" violations. *See* www.osha.gov/oshstats/. It is very common, however, for such citations to be reclassified to "other than serious" by OSHA after they are contested.

For alleged violations of laws enforced by the Office of Federal Contract Compliance Programs (OFCCP), DOL's Guidance states *inter alia* that covered contractors must publicly disclose such non-final determinations as a show cause notice for failure to comply with the requirements of Executive Order 11246, Section 503 of the Rehabilitation Act, the Vietnam Era Veterans' Readjustment Assistance Act of 1972, or the Vietnam Era Veterans' Readjustment Assistance Act of 1974. 81 Fed. Reg. 58667.

For alleged violations of discrimination laws enforced by the Equal Employment Opportunity Commission (EEOC), DOL's Guidance states that covered contractors must disclose any non-final letter of determination that reasonable cause exists to believe that an unlawful employment practice (including retaliation) has occurred or is occurring. 81 Fed. Reg. 58665. The EEOC issues more than 3000 reasonable cause notices each year, but litigates fewer than 150 such cases per year, and a significant percentage of such cases are ultimately found to lack merit. *See* www.eeoc.gov.

The FAR Rule further requires each contracting agency's contracting officers to determine whether companies' reported violations of the identified labor laws render such

offerors "non-responsible" based on "lack of integrity and business ethics." The FAR Rule, like the Executive Order, requires each contracting agency to designate an agency labor compliance advisor to assist contracting officers in determining whether a company's actions rise to the level of a lack of integrity or business ethics. The Rule also requires each contractor/subcontractor who is forced to report violations of labor laws to demonstrate "mitigating" efforts and/or enter into remedial agreements or else be subject to a potential finding of non-responsibility for contract award, suspension, debarment, contract termination, or nonrenewal.

The DOL's Guidance further defines the terms ''serious,'' ''repeated,'' 'willful,'' and ''pervasive'' for all of the above referenced labor law violations, but does so in a manner that creates a different set of criteria than those appearing in the statutes themselves. 81 Fed. Reg. 58723-24.

Absent injunctive relief by this Court, the stated effective date of the FAR Rule is October 25, 2016. For the first six months following the implementation of the Rule, October 25, 2016 to April 24, 2017, prime contractors (including a number of Plaintiffs' members) will be compelled to make disclosures on solicitations (and resulting contracts) with an estimated value of $50 million or more. Starting on April 25, 2017, the prime contractor disclosure requirements will apply to all solicitations (and resulting contracts) with an estimated value of merely $500,000 or more. Starting on October 25, 2017, subcontractor disclosures are required for any solicitation (or resulting contract) valued at $500,000 or more.[4]

[4] According to published reports, the necessary electronic portal on which government contractors are supposed to file their newly required disclosures is not yet available for use. *See* Clark, *Contractors Group Files Suit Against 'Fair Pay and Safe Workplaces,'* posted at www.govexec.com/contracting/2016/10/. For this and other reasons, numerous government contractor associations have asked the FAR Council to delay the effective date of the new Rule. *Id*. The FAR Council has so far not agreed to any delay in the opening phase of the Rule's requirements, which remains Oct. 25, 2016.

III. LEGAL STANDARD FOR GRANTING A TEMPORARY RESTRAINING ORDER OR PRELIMINARY INJUNCTION.

The standards for securing a temporary restraining order or preliminary injunction are substantively the same. Plaintiffs must demonstrate (1) a substantial likelihood of success on the merits of their case; (2) a substantial threat of irreparable injury; (3) that the threatened injury outweighs any damage that the injunctive order might cause the Defendants; and (4) that the order will not be adverse to the public interest. *Women's Med. Ctr. v. Bell,* 248 F .3d 411, 418-20, n.15 (5th Cir. 2001); *Dallas Cowboys Cheerleaders v. Scoreboard Posters, Inc.,* 600 F.2d 1184, 1187 (5th Cir. 1979); *Barton v. Huerta,* 2014 WL 4088582, at *I (N.D. Tex. 2014), *affd,* 613 F.App'x 426 (5th Cir. 2015). To preserve the status quo, federal courts in this Circuit have regularly enjoined federal agencies from implementing and enforcing new regulations pending litigation challenging them. *See, e.g., Texas v. U.S.,* 787 F.3d 733 (5th Cir. 2015) (enjoining executive order inconsistent with immigration statutes)*; Bayou Lawn & Landscape Servs. v. Sec'y of Labor*, 713 F.3d 1080 (11th Cir. 2013) (affirming preliminary injunction of new DOL rule during pendency of the action); *Nat'l Fed'n of Ind. Bus. v. Perez,* Case No. 5:16-cv-00066-C (N.D. Tex. June 27, 2016), appeal pending (5th Cir.) (preliminarily enjoining DOL's "persuader" rule as violative of Congressional intent under the LMRDA). Here, all four factors strongly support granting injunctive relief, as will be shown in the remainder of this brief.

IV. STANDING AND RIPENESS

Plaintiffs have standing to bring this action, and it is ripe for review. As set forth in attached affidavits, Plaintiffs are Texas and/or national trade associations whose members regularly bid on and are awarded government contracts exceeding the threshold amounts covered by the Executive Order and the new FAR Rule. Many of the Plaintiff associations' members will be irreparably harmed by the Executive Order and the FAR Rule in their exercise of First

Amendment and Due Process rights as bidders and awardees of government contracts exceeding the threshold amounts covered thereby. *See* Ex. 4, Affidavit of ABC Vice President Ben Brubeck; Ex. 5, Affidavit of NASCO Executive Director Stephen Amitay; s*ee* additional ABC and NASCO comments submitted to the OFPP at Exs. 6-7; *See* also numerous comments opposing the Rule and Guidance at www.regulations.gov.

The association Plaintiffs have standing to bring this action on behalf of their members under the three-part test of *Hunt v. Washington State Apple Advertising Commission*, 432 U.S. 333, 343 (1977), because (1) Plaintiffs' members would otherwise have standing to sue in their own right; (2) the interests at stake in this case are germane to Plaintiffs' organizational purposes; and (3) neither the claims asserted nor the relief requested requires the participation of Plaintiffs' individual members. *See* Brubeck and Amitay Affidavits.

As further explained below, Plaintiffs' government contractor members will be immediately and irreparably harmed if the Rule is allowed to go into effect. They will be compelled to disclose so-called "violations" of the fourteen labor laws incorporated under the FAR Rule, even where such violations have not yet been finally adjudicated or have been settled without a hearing or final decision by a court. Such disclosures will be immediately required for all bidders on covered government contracts, which include Plaintiffs' members. Thus, the infringement of the First Amendment rights of Plaintiffs' employer members will occur immediately after October 25, 2016 for all solicitations of $50 million or more, and after April 25, 2017 for all solicitations merely $500,000 or more. The Executive Order, FAR Rule, and DOL Guidance are therefore ripe for review. *See Texas v. Dept. of Interior*, 497 F.3d 491 (5th Cir. 2007) (finding challenge to final administrative regulations ripe for review).

V. ARGUMENT

A. Plaintiffs Have A Substantial Likelihood Of Success On The Merits.

In their Complaint, Plaintiffs challenge the Executive Order, FAR Rule, and DOL Guidance on multiple independent grounds, each of which on its own is enough to render these government actions void and unenforceable.[5] Each of these grounds is discussed below.

1. The Executive Order, FAR Rule, and DOL Guidance Violate the First Amendment.

As explained above, any bidder on a solicitation occurring after the new FAR Rule goes into effect will suffer an infringement of their First Amendment rights in the form of "compelled speech." This is so because the Executive Order, FAR Rule, and DOL Guidance impose an immediate, public disclosure requirement that obligates federal contractors and their subcontractors for the first time to publicly disclose any "violations" of the fourteen federal labor laws occurring since October 25, 2015, regardless of whether such alleged violations occurred while performing government contracts, and regardless of whether such violations have been finally adjudicated after a hearing or settled without a hearing, or even occurred at all.

It is well settled that the First Amendment protects not only the right to speak but also the right not to. For this reason, government compulsion of speech has been repeatedly been found to violate the Constitution. *See Riley v. National Federation of the Blind of North Carolina, Inc*., 487 U.S. 781, 797 (1988) (overturning law requiring fundraisers to disclose retained revenues to potential donors); *Wooley v. Maynard*, 430 U.S. 705 (1977); *W.Va. State Bd. of Educ. v.*

[5] The unlawful Executive Order is subject to judicial scrutiny because it is being enforced by Executive Branch officials, *i.e*., the Defendants. The FAR Council, a federal agency operating within the Executive Branch, has implemented the President's unlawful Executive Order by issuing the new FAR Rule. The DOL, a federal agency also operating within the Executive Branch, has implemented the President's unlawful Executive Order by issuing the Guidance incorporated by reference in the new Rule. Therefore, the Executive Order may be challenged by Plaintiffs. *See Chamber of Commerce v. Reich*, 74 F.3d 1322, 1324 (D.C. Cir. 1996) (permitting a challenge to the constitutionality of an executive order based on the DOL's implementation of a rule enforcing the unconstitutional executive order).

Barnette, 319 U.S. 624 (1943); *Rumsfeld v. Forum for Academic & Institutional Rights, Inc*., 547 U.S. 47, 61 (2006). *See also Texas State Troopers Ass'n v. Morales*, 10 F. Supp.2d 628 (N.D. Tx. 1998) ("[T]he First Amendment requires that the State not dictate the content of speech absent necessity, and then, only by means precisely tailored.").

Under the DOL Guidance, the FAR Rule will require contractors/subcontractors to report that they have violated one or more labor laws and to publicly identify the "labor law violated" along with the case number and agency that has allegedly so found. FAR Rule 22.2004-2, 81 Fed. Reg. 58641. Far from being narrowly tailored, the disclosure requirement forces contractors to disclose an unprecedented list of court actions, arbitrations, and "administrative merits determinations," even where there has been no final adjudication of any violation at all, and regardless of the severity of the violation. 81 Fed. Reg. at 58664. As noted above at pp. 5-7, thousands of "administrative merits determinations" are issued against employers of all types each year, many of which are later dismissed or settled and most of which are issued without benefit of a hearing or review by any court. The arbitration decisions and civil determinations, including preliminary injunctions, that will have to be reported under the FAR Rule are likewise not final and are subject to appeal. The Executive Order's unprecedented requirement, as implemented by the FAR Rule and DOL Guidance, thus compels contractors to engage in public speech on matters of considerable controversy adversely affecting their public reputations, and thereby infringing on contractors' rights under the First Amendment.

In *National Association of Manufacturers v. SEC*, 748 F.3d 359 (D.C. Cir. 2014), on rehearing, 800 F.3d 518 (D.C. Cir. 2015), rehearing *en banc* denied, 2015 U.S. App. LEXIS 19539 (D.C. Cir. Nov. 9, 2015), the D.C. Circuit held that a similarly compelled public reporting requirement violated the First Amendment. There, an SEC rule required private businesses to

disclose their use of "conflict minerals" (minerals obtained from war zones). The court found that using such minerals, and disclosure of such use, was "controversial" in nature. The court therefore required that the government bear a heavy burden to prove that forcing businesses to speak publicly about such activities in the form of public reports was narrowly tailored to support a compelling government interest. Rejecting the government's claim that similar reports were "standard," the appeals court found that the government failed to meet its burden because the claim that the compelled reports would achieve the purported government interest was based on speculation. 800 F.3d. at 530. The appeals court further took issue with the government's attempt to force companies to "stigmatize" themselves by filing the required reports, stating: "Requiring a company to publicly condemn itself is undoubtedly a more 'effective' way for the government to stigmatize and shape behavior than for the government to have to convey its views itself, but that makes the requirement more constitutionally offensive, not less so." *Id*.

The Executive Order, FAR Rule, and DOL Guidance share the same constitutional defect as the conflict minerals rule in *NAM v. SEC,* only more so. The Order, Rule, and Guidance compel government contractors to "publicly condemn" themselves by stating that they have violated one or more labor or employment laws. The reports must be filed with regard to merely *alleged* violations, which the contractor may be vigorously contesting or has instead chosen to settle without an admission of guilt, and therefore without a hearing or final adjudication. The disclosures are much broader than required to achieve the Executive Order's stated interest of disclosing matters demonstrating lack of integrity and business ethics. By DOL's own admission, many of the reported violations will not be used to make that determination. 81 Fed. Reg. 58664.

It must also be noted that the FAR Council and DOL have failed to support the basic premise of the Executive Order and the new Rule, namely that public disclosure of non-

adjudicated determinations of labor law violations on private projects correlates in any way to poor performance on government contracts. The studies cited by the FAR Council for this premise, 81 Fed. Reg. at 58564, did not examine the universe of administrative merits determinations, regardless of severity. Whatever attenuated relationship they claimed to show between labor law compliance and performance, none of the studies purported to show a relationship between *non-adjudicated allegations* of labor law violations and performance. Instead, the various studies cited in the Rule's preamble rely on the most severe findings of labor violations by agencies and courts, the vast majority of which are based on final, adjudicated decisions, not mere complaints or allegations. In any event, the Executive Order, the FAR Rule, and DOL have expanded their brief far beyond any claimed impact on government procurement and instead rely entirely on speculation in claiming that the burdensome new disclosures of non-final determinations demonstrate any likelihood of poor performance on government contracts.

Finally, it is settled in this circuit that government contractors are entitled to the same First Amendment protections as other citizens, and the government's procurement role does not entitle it to compel speech as the price of maintaining eligibility to perform government contracts. *See O'Hare Truck Service v. City of Northlake*, 518 U.S. 712 (1996) (First Amendment applied to government contractor's right to placement on list of contractors eligible for awards); *see also Board of County Commissioners v Umbehr,* 518 U.S. 668, 685 (1996); *Perry v. Sindermann*, 408 U.S. 593, 597 (1972) (holding that "the government may not deny a benefit to a person on a basis that infringes his constitutionally protected interests – especially, his interest in freedom of speech."). *See also Oscar Renda Contracting, Inc., v. City of Lubbock, Tex*., 463 F.3d 378 (5th Cir. 2006) (applying these holdings to bidders for new contracts). It must be observed that the Executive Order, FAR Rule, and DOL Guidance require reports of

violations to be filed by existing government contractors as well as those who have "commercial relationships" with the government, in addition to new bidders. 80 Fed. Reg. at 30553.

For all of the foregoing reasons, the Executive Order, the FAR Rule, and the DOL Guidance, must be found to violate the First Amendment and must be preliminarily enjoined to prevent irreparable harm to Plaintiffs' members from the compelled speech that is in no way narrowly tailored to achieve any compelling government interest.

2. The Executive Order, FAR Rule and DOL Guidance Violate the Due Process Rights Of Government Contractors and Offerors

Courts have long held that contractors and offerors are entitled to due process before being disqualified from performing government contracts. *See Old Dominion Dairy Prods., Inc. v. Sec'y of Def.*, 631 F.2d 953 (D.C. Cir. 1980), applying the due process clause of the Fifth Amendment. As the court there held, government contractors and bidders have a "liberty" interest in the right to be "free from stigmatizing governmental defamation having an immediate and tangible effect on its ability to do business." *Id*. The FAR Rule violates the due process rights of Plaintiffs' government contractor members by compelling them to report and defend against non-final agency allegations of labor law violations without being entitled to a hearing at which to contest such allegations.

As a matter of Constitutional due process, under every one of the statutes incorporated by reference in the Executive Order, FAR Rule, and DOL Guidance, any employer faced with an administrative merits determination has a right to a hearing before an Administrative Law Judge, appeal to the head(s) of the agency involved, and judicial review before enforcement of any such determination takes place. See, e.g., *Brennan v. Winters Battery Mfg. Co*., 531 F.2d 317, 324-25 (6th Cir. 1975). The FAR Rule disregards government contractors' due process rights, however, by directing contracting officers to consider as potentially disqualifying any violations that have

been found by an administrative agency (or court), including those determinations that have not yet been contested in a hearing or judicially reviewed.

Reporting by "other sources" creates related due process concerns. Based on "similar information obtained through other sources," the DOL's Guidance permits contracting officers to take remedial measures up to and including contract termination and referral to the agency's suspending and debarring official. 81 Fed. Reg. at 58718. This allows a contractor to be punished as a consequence of an unknown source's allegation of a labor law violation. The masked source could be a labor union seeking to organize the contractor, filing baseless labor law claims in the hopes that a complaint will be issued that forces the contractor to file a public notice of "violation." Congress could not have envisioned this faceless "other source" reporting requirement in any of its 14 labor law schemes, and the Constitution's due process clause certainly forecloses it. For this reason as well, the Executive Order, FAR Rule, and DOL Guidance must be vacated.

3. The Executive Order, FAR Rule, and DOL Guidance, Separately and Together, Significantly Exceed The President's, FAR Council's, And DOL's Authority And Are Otherwise Preempted By Federal Labor Laws.

As explained above, the public disclosure and disqualification requirements now being imposed on federal contractors and subcontractors are nowhere found in or authorized by the statute on which the Executive Order, FAR Rule, and DOL Guidance relies, the Federal Property and Administrative Services Act (FPASA), 40 U.S.C. 101 and 121. During the course of many decades, neither Congress, nor the FAR Council, nor the DOL has deemed it necessary, practicable or appropriate for government contracting officers to make responsibility determinations based on alleged violations of private sector labor and employment laws. Instead, in those instances where Congress has decided to permit the suspension or debarment of

government contractors, it has done so expressly in a select category of labor laws that directly apply to government contracts, and even then only after final adjudications of alleged violations by the DOL, subject to judicial review, with full protection of contractors' due process rights.

It is well settled that "when Congress has directly addressed the extent of authority delegated to an administrative agency, neither the agency nor the courts are free to assume that Congress intended the Secretary to act in situations left unspoken." *Texas v. Department of Interior*, 497 F.3d at 502, citing *Nat'l R.R. Passenger Corp. v. Nat'l Ass'n of R.R. Passengers*, 414 U.S. 453 (1974) ("When a statute limits a thing to be done in a particular mode, it includes the negative of any other mode."). As the Fifth Circuit has further held: "[A]dministrative agencies and the courts are 'bound, not only by the ultimate purposes Congress has selected but by the means it has deemed appropriate, and prescribed, for the pursuit of those purposes.'" *Quoting MCI Telecomms. Corp. v. AT&T Co*., 512 U.S. 218, 231, n.4 (1994). *See also Middlesex Cnty Sewerage Auth. v. Nat'l Sea Clammers Ass'n,* 453 U.S. 1, 20-21 (1981) ("When the remedial devices provided in a particular Act are sufficiently comprehensive, they may suffice to demonstrate congressional intent to preclude the remedy of suits under [other federal laws]." *See, e.g., Ragsdale v. Wolverine World Wide, Inc.,* 535 U.S. 81, 91 (2002) (overturning DOL's exercise of generally delegated rulemaking authority, where the agency "exercise[d] its authority in a manner that is inconsistent with the administrative structure that Congress enacted into law").

In the present case, the Executive Order, FAR Rule, and DOL Guidance unlawfully arrogate to contracting agencies the authority to require contractors to publicly disclose mere allegations of labor law violations, and then to disqualify or coerce contractors based on their alleged violations of such laws. By these actions, the Executive Branch has departed from

Congress's explicit instructions dictating how violations of the labor law statutes are supposed to be addressed.

The Supreme Court overturned a very similar government action in *Wisconsin Dept. of Ind. v. Gould,* 475 U.S. 282, 286 (1986). There a state attempted by law to disqualify government contractors who had been found by judicially enforced orders to have violated the NLRA on multiple occasions over a five-year period. The Supreme Court held that the NLRA foreclosed both "regulatory or judicial remedies for conduct prohibited or arguably prohibited by the [NLRA]." *Id.*[6] As has occurred here, the government defendant in *Gould* defended its disqualification policy by asserting that the agency was merely exercising its spending power as a market participant and that the government could choose with whom it would contract without violating the NLRA's provisions. Rejecting that defense, the Supreme Court held in *Gould* that the government's attempt to disqualify otherwise eligible contractors from performing work for the government was entitled to no exemption from NLRA preemption under the "market participant" doctrine. Instead, the Court found the government's actions were "regulatory" in nature because they disqualified companies from contracting with the government on the basis of conduct unrelated to any work they were doing for the government. *Id.* at 287-288. The holding in *Gould* has been applied equally to the Executive Branch of the federal government. *See Chamber of Commerce v. Reich*, 74 F.3d at 1344 (applying NLRA preemption to federal executive order "encroaching on NLRA's regulatory territory."). These cases require that the Executive Order, FAR Rule, and DOL Guidance be vacated.

[6] The facts of *Gould* actually presented a closer case than is present here because the state only disqualified contractors who were found by "judicially enforced orders" to have violated the NLRA. The current Executive Order and FAR Rule are much more egregious in their violation of federal labor laws, because they allow disqualification of government contractors without waiting for judicial review and enforcement of final agency action.

For similar reasons, none of the other labor laws of general applicability (such as the FLSA, OSHA, and the anti-discrimination laws) referenced in the Executive Order and FAR Rule can be used by the government to disqualify contractors from performing government services. Each of these laws contain "unusually elaborate enforcement provisions." *Kendall v. City of Chesapeake*, 174 F.3d 437, 433 (4th Cir. 1999). None of them include any provision authorizing the federal government to disqualify contractors from performing federal work in response to alleged violations of those labor laws.

The Executive Order, FAR Rule, and DOL Guidance are even more directly in conflict with those labor laws that already specify debarment procedures, after full hearings and final adjudications, for contractors who violate the requirements specifically directed at government contracting, *i.e.*, the DBA, SCA, Rehabilitation Act, VEVRAA, EO 11246, and EO 13658. It cannot be true that Congress gave explicit instructions to suspend or debar government contractors who violate these government-specific labor laws, only after a full hearing and final decision, but intended to leave the door open to government agencies to disqualify contractors from individual contract awards without any of these procedural protections. The DOL Guidance does not offer any support for its overbroad claims in this regard. 81 Fed. Reg. 58658-59.

4. The New Rule And Guidance Are Arbitrary And Capricious And Entitled To No Deference.

The APA, 5 U.S.C. § 706(2)(A), directs reviewing courts to "hold unlawful and set aside agency action, findings, and conclusions found to be . . . arbitrary and capricious, an abuse of discretion, or otherwise not in accordance with law."

As explained above, the challenged Rule and Guidance are preempted or contradicted by longstanding labor laws. The FAR Council and the DOL have also failed to give an adequate

explanation for imposing the drastic new requirements set forth in the Rule and Guidance. *See Encino Motorcars*, 2016 U.S. LEXIS 3924, 84 U.S.L.W. 4424 (giving no deference to agencies that change course without taking cognizance of "reliance interests" of the regulated community; and where the policy reversal results in "unexplained inconsistencies.").

The Rule and Guidance do not adequately take into consideration the costs the Rule will impose on contractors and subcontractors, and the entire procurement process. Thus, under FAR Rule and DOL Guidance, complaints issued by a NLRB Regional Director must be reported, even though the allegations in them are based solely on investigatory findings without judicial or quasi-judicial safeguards. Similarly, EEOC determination letters that are issued at the nascent stages of the administrative process must be reported even though they are subject to reversal months or years down the road. These and other non-final findings by a single agency official do not constitute reportable "violations" under any reasonable definition and should not be considered at all in contracting decisions. Furthermore, to contest even decisions by full agency boards, an employer must generally exhaust the administrative process through the agency before challenging the agency action in federal court. *See NLRB v. United Food & Commercial Workers Union, Local 23*, 484 U.S. 112 (1987).

The Fifth Circuit's recent decision in *Gate Guard Services v. Perez*, 792 F.3d 554 (5th Cir. 2015), is instructive. Five years after the DOL investigated Gate Guard for supposedly violating the FLSA, the court awarded the company attorneys' fees as a result of DOL's frivolous and "oppressive" conduct investigating and litigating the matter. *Id*. at 562). The court found among other misconduct that the DOL deliberately shredded investigation notes, employed an investigator unqualified to undertake the investigation, surprised an employee at the facility when it was known company attorneys would not be present, inflated the damages

calculation by about $4 million, and continued litigating the case "despite overwhelming contradictory evidence." *Id*. at 562-63.

Absent injunctive relief, Plaintiffs' members will be required to report pending "violations" like those in *Gate Guard*, even though years later they may be vindicated—such as by demonstrating to a court that the government's case wholly lacked merit. *See also, e.g., Heartland Plymouth Court MI, LLC v. NLRB,* No. 15-1034, 2016 U.S. App. LEXIS 17688 (D.C. Cir. Sept. 30, 2016) (awarding attorneys fees to employer victim of "oppressive" and "bad faith" administrative determination of the NLRB after years of litigation stemming from an unjustified complaint); *S. New England Tel. Co. v. NLRB*, 793 F.3d 93, 97 (D.C. Cir. 2015) (vacating NLRB decision years later, citing "[c]ommon sense" in resolving the dispute); *EEOC v. Propak Logistics, Inc.*, 884 F. Supp. 2d 433, 441 (W.D.N.C. 2012), *appeal dismissed*, Case No. 12-2249 (4th Cir. Feb. 22, 2013) (finding that the doctrine of laches barred an EEOC lawsuit initiated 7 years after the filing of the underlying EEOC charge), 746 F.3d 145 (4th Cir. 2014) (ordering the EEOC to pay attorney's fees).

These examples of enforcement agency conduct that has later been rejected by the courts illustrate the fallacy and danger of the Guidance's definition of "violation." It remains true that, under the Executive Order and Far Rule, a court's vindication of a contractor's position may well come too late. The damage to a contractor's business and reputation stemming from a reportable "violation" later reversed cannot be undone.

5. The Executive Order, Rule and Guidance Force Massive And Unnecessary Costs On Contractors, Government Agencies, And Taxpayers.

The Rule and Guidance impose significant additional costs and expenses on Plaintiffs and their members, as contractors will incur substantial cost in "looking back" at their "violations" for a period of three years before a contract is offered, which then must be updated every six

months. These new costs will require many Plaintiffs' members to charge higher prices, which may put them at a competitive disadvantage for government bids. Even worse, once contractors have disclosed the violations they will be required to spend additional monies explaining why the allegations are not true (in two forums) and/or identifying any mitigating circumstances that exist.

In response to a recent survey conducted by Plaintiff ABC, more than half the respondents said the FAR Rule's onerous requirements, including reporting alleged violations that firms are still contesting, will force them to abandon the pursuit of federal contracts. 91 percent of respondents said the Rule will impose a significant or extreme burden on their firms. As further detailed in the comments filed by Plaintiff NASCO, NASCO's own survey of its membership established that very few members currently are able to track the information now being sought by the FAR Rule, and that the resources needed to do so will be tremendous. Expenditures will rise for in-house and outside legal counsel, expensive information technology systems, and expanded human resource personnel, negatively affecting the cost, availability, quality, and delivery of these vital protective services.

Unions have already used the new FAR Rule and Guidance as a bargaining chip against NASCO members, by threatening to file questionable unfair labor practice charges with the NLRB if the employer refuses to accede to its demands. The threat of a charge carries more weight than before because if the charges mature into a complaint issued by a NLRB Regional Director, the employer will risk losing the contract. About 87% of NASCO survey respondents have collective bargaining agreements with labor organizations; several have dozens of such agreements. All survey respondents are concerned that the rule if finalized would be used to strong-arm them in negotiations.

6. The Paycheck "Transparency" Requirement Is Unlawful and Arbitrary

The challenged Rule also requires for the first time that contractors provide a document informing individuals of their independent contractor status, in addition to a wage statement that requires burdensome information to be provided regarding wage rates, benefits, and exempt status In addition, DOL's Guidance acknowledges that the determination of independent contractor status under each particular law is governed by that law's definition of "employee", thereby leaving employers uncertain as to what definition should be used. *See* 81 Fed. Reg. at 58713. The burdens imposed by these new requirements do not increase the economy or efficiency of procurement, are not authorized by statute, and are arbitrary and capricious. They should be set aside.

7. The Executive Order and The FAR Council Rule Violate The Federal Arbitration Act.

The Executive Order and the Rule provides that contractors and subcontractors who enter into contracts for non-commercial items over $1 million must agree not to enter into any mandatory pre-dispute arbitration agreement with their employees or independent contractors on any matter arising under Title VII of the Civil Rights Act, as well as any tort related to or arising out of sexual assault or harassment.

The Federal Arbitration Act ("FAA") provides that "[a] written provision in any…contract evidencing a transaction involving commerce to settle by arbitration a controversy thereafter arising out of such contract or transaction . . . shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract." 9 U.S.C. § 2. This provision establishes "a liberal federal policy favoring arbitration agreements." *Moses H. Cone Memorial Hospital v. Mercury Constr. Corp.*, 460 U.S. 1, 24 (1983).

The FAA "requires courts to enforce agreements to arbitrate according to their terms." *CompuCredit Corp. v. Greenwood*, 132 S. Ct. 665, 669 (2012); *American Express Co. v. Italian Colors Restaurant*, 133 S. Ct. 2304, 2312, n. 3 (2013). The Court emphasized in *CompuCredit* that this requirement applies "even when the claims at issue are federal statutory claims, unless the FAA's mandate has been overridden by a contrary congressional command." 132 S. Ct. at 669 (citations omitted). The Court stressed that a "congressional command" must be found in an unambiguous statement in the statute, and cannot be gleaned from ambiguous statutory language. *Id*. at 670-73.

By prohibiting the arbitration of certain claims arising under Title VII of the Civil Rights Act, as well as any tort related to or arising out of sexual assault or harassment, in the absence of any congressional command that would override the requirement that arbitration agreements be enforced in accordance with their terms, the Executive Order and the Rule violate the FAA.

B. Plaintiffs Meet The Remaining Three Criteria For A Preliminary Injunction.

1. Plaintiffs Will Suffer Irreparable Harm Unless The New Rules Are Enjoined.

An employer who fails to comply with the Executive Order, as implemented by the FAR Rule and DOL Guidance, is subject to disqualification from government contracts. Once the FAR Rule goes into effect, Plaintiffs' government contractor members' only means of avoiding losing such potential work will be to disclose alleged violations even if the alleged violations have not been fully adjudicated and resolved. Based on the Administrative Record evidence discussed above and the attached declarations, such compelled speech infringes the First Amendment rights of bidders and contractors. Ex.'s 4 and 5, Affidavits of Ben Brubeck and Stephen Amitay; Ex.'s 6 and 7, Supplemental Comments filed by ABC and NASCO.

Once First Amendment rights have been chilled, there is no effective remedy, and it is well established in the Fifth Circuit that infringement of First Amendment rights, "standing alone," constitutes irreparable harm. *See Texans for Free Enter. v. Tex. Ethics Comm'n*, 732 F.3d 535 (5th Cir. 2013) ("We have repeatedly held, … that "the loss of First Amendment freedoms, for even minimal periods of time, unquestionably constitutes irreparable injury.") (quoting *Elrod v. Burns*, 427 U.S. 347, 373, 96 S.Ct. 2673, 49 L.Ed.2d 547 (1976). Accord, *Opulent Life Church v. City of Holly Springs Miss*., 697 F.3d 279, 295 (5th Cir. 2012) The Executive Order and FAR Rule present an imminent and non-speculative threat to Plaintiffs' members' First Amendment rights by virtue of the fact that their public reports of alleged violations may be used by their competitors and enemies to gain competitive advantage over Plaintiffs and their members. First Amendment violations of the sort imposed by the New Rules have been found to constitute irreparable harm justifying preliminary injunctive relief. *See also Nat'l Solid Waste Mgmt. Ass'n v. City of Dallas*, 903 F. Supp. 2d 446, 470 (N.D. Tex. 2012) ("When an alleged deprivation of a constitutional right is involved, most courts hold that no further showing of irreparable [harm] is necessary."). The same principles apply to the Fifth Amendment violations of due process outlined above, which similarly deprive Plaintiffs' members of their liberty reputational interests and again constitute irreparable harm.

2. The President, FAR Council, And The DOL Will Not Be Harmed By A Preliminary Injunction.

An order for injunctive relief in the present case will simply preserve the status quo and temporarily retain the same rules and guidelines in effect for government contractor selection that have been in place for decades. There is no evidence that employees or the general public will be harmed as a result of this relief. Thus, there is no harm in requiring federal agencies to continue to follow their existing practices for selecting contractors until this matter can be

concluded. In this regard, mere delay of government enforcement does not constitute sufficient harm to deny injunctive relief. *See Texas v. United States*, 809 F.3d at 186.

3. The Public Interest Will Be Furthered By Injunctive Relief.

Injunctive relief is necessary to protect the public interest. Public policy demands that governmental agencies be enjoined from acting in a manner contrary to the law. *See, e.g., Texas v. United States,* 809 F.3d at 186. Beyond that, it is in the public interest to ensure the delivery of economical and quality services from government contractors to federal government agencies, which will be harmed by the arbitrary and unnecessary burdens imposed by the Executive Order, FAR Rule, and DOL Guidance.

VI. CONCLUSION – SCOPE OF PRAYED FOR RELIEF

For the reasons stated in their Complaint and in this Brief, Plaintiffs pray that the status quo be preserved and that Defendants be preliminary enjoined from implementing and enforcing the Executive Order, FAR Rule, and DOL Guidance in all jurisdictions where Plaintiffs' members and the U.S. government do business, *i.e.*, nationwide. *See Texas v. United States*, 809 F.3d 134, 188 (5th Cir. 2015); *see also Texas v. U.S.*, 787 F.3d 733 (5th Cir. 2015) (authorizing nationwide injunctions against unlawful federal regulations and/or executive orders). Plaintiffs pray for all other relief, in law or in equity, to which they are justly entitled.

Dated October 13, 2016

Respectfully submitted,

/s/G. Mark Jodon

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CERTIFICATE OF CONFERENCE

I hereby certify that I have complied with the meet and confer requirement in Local Rule CV-7(h). Plaintiffs' attorney conferred with counsel for Defendants via email and telephone regarding the Plaintiffs' Emergency Motion for Temporary Restraining Order and Preliminary Injunction and Request for oral Argument And Expedited Consideration. Counsel for Defendants stated that the Defendants opposed the requested injunction. The discussions conclusively ended in an impasse, leaving an open issue for the court to resolve. LR CV-7(i).

/s/G. Mark Jodon
Counsel for Plaintiffs

CERTIFICATE OF SERVICE

I hereby certify that the foregoing Emergency Motion for Temporary Restraining Order and Preliminary Injunction has been served by electronic mail on the following, this 13th day of October, 2016:

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