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

ASSOCIATED BUILDERS AND CONTRACTORS OF SOUTHEAST TEXAS, *et al,*	§ §	
PlaintijOUTH		NO. 16-CV-00425

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

effect on **October 25, 2016**, absent preliminary injunctive relief, causing i

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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*.

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

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/. 8 1 a b o e a l n i e

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 A id ( )Tj0.03 Tw0.002 Twl-2(dr)3(sgf)3(i)-2.07 Tw

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

The standards for securing a temporary restraining order or preliminary injunction

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.

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

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

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*

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

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

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

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

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 S(t)-uc04fs8(en)-4(t)-[lim)15(ina(i)4(l)-[l6(a)6(r)-5(is)1(in)2(g)12

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 Acccpetitorsec

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.

Dated October 13, 2016

CERTIFICATE OF SERVICE

I hereby certify that the foregoing Emergency Motion for Temporary Restraining Order and