

**IN THE UNITED STATES DISTRICT COURT  
FOR THE EASTERN DISTRICT OF ARKANSAS**

**ASSOCIATED BUILDERS AND  
CONTRACTORS OF ARKANSAS;  
ASSOCIATED BUILDERS AND  
CONTRACTORS, INC.; ARKANSAS STATE  
CHAMBER OF COMMERCE/ASSOCIATED  
INDUSTRIES OF ARKANSAS; ARKANSAS  
HOSPITALITY ASSOCIATION;  
COALITION FOR A DEMOCRATIC  
WORKPLACE; NATIONAL ASSOCIATION  
OF MANUFACTURERS; and CROSS,  
GUNTER, WITHERSPOON & GALCHUS,  
P.C., on behalf of themselves and  
their membership and clients**

**PLAINTIFFS,**

**v.**

**THOMAS E. PEREZ, et al,**

**DEFENDANTS.**

**Case No. 4:16CV-00169 (KGB)**

**PLAINTIFFS' BRIEF IN SUPPORT OF THEIR UNOPPOSED MOTION TO STAY  
FURTHER PROCEEDINGS OR ALTERNATIVELY TO DENY PENDING CROSS-  
MOTIONS WITHOUT PREJUDICE**

Plaintiffs hereby respectfully move the Court, pursuant to Rules 7(b) and 41(a)(2) of the Federal Rules of Civil Procedure, for an Order staying this litigation, or, in the alternative, deny the pending cross-motions for summary judgment without prejudice. As grounds for this Motion, Plaintiffs submit as follows:

As the Court has previously been made aware, the District Court for the Northern District of Texas recently granted summary judgment to the Plaintiffs in *NFIB v. Perez*, No. 16-cv-00066, ECF #135 (Nov. 16, 2016). Also in November, a new President was elected who appears

to have different views on the challenged Rule from the previous administration.<sup>1</sup> As a result of these developments, in the parallel case of *LabNet v. U.S. Department of Labor*, 16-CV-00844 (D. Minn. Dec. 6, 2016), the District Court for the District of Minnesota this week announced that it is staying all proceedings in order to learn what the new Administration's plans are with regard to the challenged Rule and the defense of that litigation. *Id.* at ECF #100.

For the same reasons, this Court should hold the present proceeding in abeyance, exercising its inherent authority to control the disposition of its cases. *See Landis v. North Am. Co.*, 299 U.S. 248, 254 (1936); *Dietz v. Bouldin*, 136 S. Ct. 1885, 1888-89 (2016). First, the relief sought by Plaintiffs has been obtained by virtue of the Order in *NFIB v. Perez* granting summary judgment and permanently vacating the challenged Rule. That Order has not yet been appealed by the Defendants, but if it is affirmed on appeal then the present case would become moot. It is also possible that the new Administration will choose not to prosecute further any appeal from the *NFIB* decision or the related cases such as this one. As noted above, the President-elect's nominees for Attorney General and Secretary of Labor have expressed opposition to the current administration's regulatory agenda, including specifically the Persuader Rule. Staying this case to determine the impact of the recent developments in the Texas court and in the White House would prevent a waste of governmental resources, both executive and judicial.

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<sup>1</sup> *See, e.g.*, Gayle Cinquegrani, *Trump Could Rewrite Rules for Employers*, Bloomberg BNA, available at <https://www.bna.com/trump-rewrite-rules-n57982082985/> (last visited Dec. 6, 2016). The President-Elect's announced nominee for Attorney General, Senator Jeff Sessions, vigorously opposes and co-sponsored legislation to block the rule. *See* S.J.Res.35 - A joint resolution providing for congressional disapproval under chapter 8 of title 5, United States Code, of the final rule of the Department of Labor relating to "Interpretation of the 'Advice' Exemption in Section 203(c) of the Labor-Management Reporting and Disclosure Act". The President's announced nominee for Secretary of Labor, Andy Puzder, according to published reports, has likewise expressed opposition to the Obama administration's regulatory agenda. "Trump Names Andrew Puzder," [www.washingtonpost.com](http://www.washingtonpost.com) (Dec. 8, 2016).

There is ample precedent for the requested action. The United States Court of Appeals for the District of Columbia recently granted a similar motion, holding proceedings in that matter in abeyance until February 21, 2017. *See United States House of Representatives v. Burwell*, USCA Case Number 16-5202, Document 1649251 (D.C. Cir. Dec. 5, 2016). In its Motion to the court of appeals, the plaintiffs made clear that

[p]arties frequently request such abeyances in pending matters due to elections that produce changes in Presidential Administrations and corresponding changes in Administration policies. *See, e.g., California, et al. v. Env'tl. Prot. Agency*, No. 08-1178 (D.C. Cir.) (staying briefing for several months to permit President Obama to reconsider determinations promulgated by EPA under President Bush); *Env'tl. Prot. Agency v. New Jersey*, Pet. Cert., No. 08-512 (S. Ct.) (several extensions granted by the Supreme Court; petition for writ of certiorari voluntarily dismissed approximately two weeks after President Obama's election); *New Jersey v. Env'tl. Prot. Agency*, No. 08-1065 (D.C. Cir.) (case held in abeyance for seven years, beginning shortly after President Obama's inauguration, to permit Administration to review regulations promulgated under President Bush); *Mississippi v. Env'tl. Prot. Agency*, 744 F. 3d 1334, 1341 (D.C. Cir. 2013), Clerk's Order No. 08-1200 (D.C. Cir. Mar. 19, 2013) (granting abeyance motion after President Obama's election to permit agency to review and reconsider Bush Administration rule); Richard J. Lazarus, *The Transition and Two Court Cases*, 26 *The Environmental Forum* 12, at 14 (Feb. 2009) [(available at <https://www.law.harvard.edu/faculty/rlazarus/docs/columns/ELIDraftColumnProofJanFeb09Corrected.pdf>)].

The interests of the Government, and indeed even the Secretary of Labor and the Director of the Office of Labor-Management Standards, Defendants in this action, will certainly change with the incoming Administration. As has been reported, the President-Elect's Administration is unlikely to take the same stance on the rule as the current Administration. A stay in the proceedings would offer the Parties the opportunity to discuss how the new Administration plans to proceed (or not) with this litigation. These discussions could result in a resolution between the Parties, a change in position by the Government, or a concession by the Government that the rule is unlawful.

During the stay, the status quo would be maintained as the rule has already been declared unlawful and set aside. Thus, there would be no prejudice to the Government in staying the

proceedings. Moreover, the relief sought by Plaintiffs has been granted by another court, rendering further proceedings in this action unnecessary (in the absence of a final judgment reversing the United States District Court for the District of Texas). Finally, a stay, followed by a status report from the Parties in March, would preserve valuable public resources in that both the executive and judicial branches would not be engaged in unnecessary litigation.

Defendants do not oppose this Motion. As such, the Court should hold the current proceedings in abeyance and require the Parties to submit a status report in March 2017, to reflect any further developments with regard to the *NFIB* case and/or the litigation stance of the new Administration with regard to the Persuader Advice Rule.

Respectfully submitted,

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**CERTIFICATE OF SERVICE**

The undersigned hereby certifies that the foregoing was filed with the Court via the Court's CM/ECF System, and thus served upon all parties of record on this 12th day of December, 2016.

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