UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

FRAGOMEN DEL REY BERNSEN & LOEWY LLP,	
Plaintiff,	
v.	
ELAINE L. CHAO, Secretary of Labor, and the U.S. DEPARTMENT OF LABOR,	
Defendants.	

Civ. No. 08-1387 (RMU)

REPLY MEMORANDUM OF LAW IN FURTHER SUPPORT OF PLAINTIFF'S MOTION FOR PRELIMINARY INJUNCTION

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PRELIMINARY STATEMENT

The Department has now tacitly conceded that its attorney-client consultation ban, which it announced on June 2 when it initiated the special mass audit of Fragomen clients, is unconstitutional. The Department prospectively rescinded most elements of that unlawful ban on Friday, August 29, a few hours before the deadline for responding to Fragomen's motion, apparently realizing that this policy cannot be defended. However, the Department did not rescind all of the elements of the ban, and has refused to undo actions against Fragomen—including the 100 percent audit initiative—that are products of the unconstitutional policy.

This case is very much alive, and the harm to Fragomen worsens with each day the Department pursues its abusive and unconstitutional mass audit initiative. This Court should reject the Department's bid to shield its improper conduct from judicial scrutiny by purporting to change course and calling this case "moot," when the Department continues to ban some attorney-client consultations and views with great suspicion the consultations it now supposedly permits.

In particular, the Department still enforces a ban on "résumé screening" that prevents immigration attorneys from making assessments and communicating legal advice to employers about applicant qualifications at the time résumés initially are received. This continuing ban—which is another recent creation that departs from settled past practice—prohibits attorneys from sharing "assessments" of particular applications with clients and thereby implicates *all* of the issues raised in Fragomen's moving brief concerning the permissibility of the Department's attempt to regulate employers' consultations with their attorneys. There is thus a continuing live controversy as to whether, as argued in Fragomen's moving papers, the Department's restrictions on employers' attorneys (a) exceed the agency's statutory authority, (b) contravene the PERM regulations, and (c) violate the APA and the Constitution.

The Department's assertion that its position is consistent with past policy is demonstrably incorrect. The Department cites BALCA decisions upholding restrictions on employers' attorneys engaging in *direct* contacts with U.S. applicants, an issue not implicated here. Notably, the Department fails to bring to the Court's attention the line of BALCA cases decided as recently as last year reaffirming that 20 CFR 656.10(b)(2)(ii)—the provision on which the Department now relies—has *no* application to attorneys who do not also represent the alien. The BALCA Deskbook, created by the Department to guide administrative judges, has long identified this as the correct interpretation of the regulation. But neither the leading line of cases nor the BALCA Deskbook is even mentioned in the Department's brief.

Moreover, the Department's latest pronouncement—the August 29 "Restatement" of the now "supersede[d]" prior guidance (the "August 29 Restated Bulletin")—illustrates the arbitrary and capricious nature of the Department's actions in this case. The "Restatement" stresses that "good faith recruitment requires that an employer's process for considering U.S. workers who respond to certification-related recruitment closely resemble the employer's *normal* consideration process." (Emphasis added.) Yet at the same time, the labor certification regime the Department has erected expressly *requires* that employers *deviate* from normal hiring procedures in numerous respects. As one immigration law treatise explains:

> In the real world, an employer wants to hire the best person for the job. The employer advertises for what he or she wants in a position and hires the best person, many times based on a combination of subjective and objective considerations. The world of foreign labor certification, however, is very different. The basic labor certification process does not involve advertising for or hiring the ideal person. Rather, the employer must consider as qualified a U.S. worker who meets the minimum objective requirements for the position. For this reason, the information on DOL Form ETA 9089 must specify the actual

> minimum requirements of the position, not the ideal requirements and not a range of years of experience, but the minimum number of years of experience accepted.[1]

The legally required deviations from normal hiring procedures and evaluation standards underscore (a) the importance of an employer's right to consult attorneys "throughout the labor certification process" (20 CFR 656.10(b)(1)), and (b) how the Department's *forbidding* of deviations creates a self-contradictory bureaucratic trap. The Department professes now to permit attorney-client consultations, but at the same time it regards them as deviations from the normal process and punishes employers who deviate. Thus, hundreds of Fragomen-filed applications languish in audit solely because Fragomen encouraged its clients to do no more than the Department now pretends to permit.

The Department's refusal to cancel the unconstitutional special audit is causing Fragomen grave and irreparable harm for which a preliminary injunction is urgently needed. The Department's violation of Fragomen's rights has continued unabated even after the firm filed its complaint and this motion. A week after the filing, the Department's affiant on this motion disseminated *directly* to the firm's clients an optional certification form that was described as an opportunity for clients to have some cases removed from the special mass audit. To take advantage of the procedure, the firm's clients had to attest, among other things, that their cases did not violate the (now-abandoned) attorney-client consultation ban. The Department sent the forms directly to clients, in violation of an agreement between the Department and Fragomen—and the express requirement of the Department's own regulations, *see* 20

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[1] Mailman and Yale-Loehr, 4-44 *Immigration Law and Procedure* § 44:12[5][e] (2007 ed.). The complexity of the labor certification process and its deviation from the "normal" hiring process are well documented. *See* Supplemental Declaration of Michael D. Patrick dated September 9, 2008 ("Supp. Patrick Decl.") Exs. A, B.

CFR 656.10(b)(1)—that any such forms be sent to Fragomen, the clients' designated legal representative. A cover note repeated the Department's legally defective accusations of wrongdoing by Fragomen. This occurred just days before the Department acknowledged that the consultation ban was illegal and withdrew it.[2] The Department's evident violation of Fragomen's rights requires the immediate intervention of this Court to prevent further retaliation for Fragomen's constitutionally protected conduct and its effort to vindicate its legal rights.

ARGUMENT

I. FRAGOMEN IS LIKELY TO PREVAIL ON THE MERITS.

A. Fragomen's claims are not moot.

1. The Department has not rescinded the special mass audit initiative that was based directly and entirely on the unconstitutional attorney-consultation ban.

As the Department acknowledges, a request for injunctive relief is not moot if "there is some present harm left to enjoin." *See* Defendants' Opposition Brief filed 8/29/08 ("DOL Opp.") 16; *Ctr. for Arms Control and Non-Proliferation v. Pray*, 531 F.3d 836, 839 n.1 (D.C. Cir. 2008). Here, the Department instituted well over 2,000 special audits in retaliation for Fragomen's exercise of constitutionally protected rights, and those audits continue unabated. An injunction is necessary to stop the substantial harm that Fragomen is still suffering.[3]

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[2] Furthermore, in an apparent attempt to maximize the damage to the firm's reputation, the Department's affiant sent the certification forms even to clients that could not possibly benefit from them, either because they had no pending labor certification applications at all or because they had too few cases in audit to permit any to be removed under the certification standards. *See* Supp. Patrick Decl., ¶¶ 8-15 & Ex. C; Declaration of Aaron R. Marcu dated September 9, 2008, Exs. A, B.

[3] The Department's claim of mootness is particularly astonishing in light of the July 16, 2008 Agreement Fragomen was compelled to enter into, and that the Department itself describes as still in force. *See* DOL Opp. 39. That Agreement imposes a prohibition of "dissuasion" by (continued…)

The causal link between the Department's unconstitutional attorney-consultation ban and the 100 percent audit is undeniable, and is spelled out in the very documents the Department recently repudiated. In the June 2 Press Release in which the audits were announced, the Department accused Fragomen of "improperly instruct[ing]" its clients to contact Fragomen to discuss U.S. applicants' qualifications, and asserted that "there is no legitimate reason [for an employer] to consult with immigration attorneys before hiring apparently qualified U.S. workers…." Complaint Ex. D. The June 4 Information Paper likewise stated, under the subheading "Why are we doing this?," that "there is no legitimate reason [for an employer] to consult with immigration attorneys before hiring apparently qualified U.S. workers." Complaint Ex. E. A section subheaded "What incident/incidents prompted this audit?," identified Fragomen's allegedly "improper[] instruct[ion]" of its clients as the triggering incident. *Id.*

The continued public attacks on Fragomen, and the deep-freeze of its clients' applications through a special audit program, are stark examples of impermissible retaliation. *See, e.g.*, *Ramirez v. Arlequin*, 447 F.3d 19, 22 (1st Cir. 2006) (government may not impose burdens on persons to punish them for exercising constitutional rights). The Department now implicitly concedes that the prohibition it imposed violated the First Amendment, but insists on proceeding with an initiative instigated solely based on that prohibition. The Department can disclaim any future intent to enforce its attorney-client consultation ban, but the continuing prosecution of the special audits perpetuates a live controversy.[4]

Fragomen attorneys that the Department now concedes is impermissible. *See* Complaint Ex. G, ¶ 6. The Department recognized in the agreement that Fragomen would be litigating the legality of this restriction. *See id.* ¶ 8.

[4] Moreover, it is not at all clear that the Department intends to abandon the restrictions in the June guidance that it has purported to rescind. In fact, the Department continues to maintain that (continued…)

2. The Department's continuing prohibition of résumé assessment and screening by counsel still exceeds the agency's authority, contravenes the PERM regulations, and violates the APA and the Constitution.

In the August 29 Restated Bulletin, the Department continues to insist that employers' attorneys may not assess or screen applicants' résumés before the employer's personnel reviews them. *See* DOL Opp. Ex. A. According to the Department, attorneys may not communicate to their clients any "assessment of, or comments on, the qualifications of any applicants" at the time the résumés initially are received. *Id.* Before doing any assessing or advising, the employer's attorneys must wait until the employer's staff has done an initial résumé review. *Id.*

By precluding attorneys from performing assessments of whether applicants' qualifications satisfy the regulatory criteria and from advising employers about their "assessments" and "comments" during a particular phase of the labor certification process, the Department is interfering with attorneys' providing advice to their clients about the application of the law to particular facts. Such analysis is at the heart of an attorney's proper role. *See Upjohn Co. v. United States*, 449 U.S. 383, 390 (1981) (noting that "[t]he first step in the resolution of any legal problem is ascertaining the factual background and sifting through the facts with an eye to the legally relevant").

As explained in Fragomen's moving papers (Fragomen Memo of Law dated 8/8/08 ("Fragomen Moving Brief") 4-7; Patrick Decl. ¶¶ 12-25), an immigration lawyer's assessment of

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the attorney-client consultations it now purports to permit are a deviation from the typical non-labor certification hiring process and create a "reasonable suspicion of bad faith recruiting." DOL Opp. 34; Carlson Decl. ¶ 37 (asserting that the Department will continue to enforce "requirement that recruitment be conducted through a normal recruiting process"); *id*. ¶ 26 (asserting that an employer who forms preliminary view that applicant is qualified and then, per Fragomen's suggestion, consults Fragomen for advice warrants further scrutiny because such an employer has "raised questions" about whether it followed the "normal recruitment process").

the qualifications of an applicant is fundamentally a legal judgment. The labor certification process requires applicants to be evaluated based on a standard of "minimal" qualifications that was created by the Department's legal regulations and deviates in numerous respects from the standards employers apply in their typical recruiting. The Department openly admits this practical reality.[5] Employers retain counsel precisely because they need help in ensuring that their determinations comport with an unfamiliar legal definition of "qualified," as well as "able, willing, and available."[6]

The Department now appears to concede, as it must, that it may not restrict attorney-client communication at *any* stage of the PERM process. *See* 20 CFR 656.10(b)(1) ("[e]mployers may have agents or attorneys represent them throughout the labor certification process"); DOL Opp. Ex. A p. 2 ("Attorneys … may … provide advice throughout the consideration process on any and all legal questions concerning compliance with governing statutes, regulations, and policies."). Consequently, contrary to the Department's assertion that "there are no restraints on the advice that attorneys may provide their clients concerning the labor certification process," the Department's résumé-screening ban suffers from the same legal infirmities as the consultation ban the Department has already abandoned. The résumé screening ban is a content-based speech restriction that violates the First Amendment, s*ee U.S. v. Playboy Ent. Group,* 529 U.S. 803, 817 (2000) ("Content-based regulations are presumptively invalid

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[5] *See* August 29 Restated Bulletin (acknowledging that "the permanent labor certification program imposes recruitment standards on the employer that may deviate from the employer's normal standards of evaluation"; in view of these deviations, "the Department understands and appreciates the legitimate role attorneys and agents play in the permanent labor certification process").

[6] *See* Supp. Patrick Decl. ¶¶ 3-4 and Exs. A, B (providing further background on labor certification process to illustrate the legal issues that permeate the PERM process and the assessment of applicant qualifications).

….") (citation omitted); exceeds the Department's authority, *see* Fragomen Moving Brief 12-15; and is inconsistent with the language, structure, and purpose of the governing regulations, *see id.* pp. 17-21 and Part I-B below. Thus, the continuing ban on résumé screening is a live issue implicating all of the legal arguments raised in Fragomen's moving papers.

B. The Department's Interpretation of Section 656.10(b)(2) Violates the APA.

The APA authorizes a reviewing court to "compel agency action unlawfully withheld" and "hold unlawful and set aside agency action" that is "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." 5 U.S.C. § 706. The Department's refusal to cancel the mass audit despite rescinding the guidance on which it relied to justify this initiative exemplifies arbitrary and unlawful agency conduct.

1. Fragomen Has Been Subjected to Final Agency Action.

The Department's publicly announced decision to "audit[] all permanent labor certification applications" filed by Fragomen because the firm "improperly instructed clients … to contact their attorney before hiring apparently qualified U.S. workers" (Compl. Ex. D) was a final agency action that warrants judicial review. The Department's administrative assault on Fragomen and the concrete injury it has inflicted highlight the need for immediate judicial intervention, without which Fragomen lacks any legal or administrative recourse.

Judicial review must await "final agency action" because "[j]udicial intervention into the agency process denies the agency an opportunity to correct its own mistakes and to apply its expertise." *FTC v. Standard Oil Co.*, 449 U.S. 232, 242 (1980). However, an agency can correct its mistakes only when the aggrieved party "'enjoys an opportunity to convince the agency to change its mind.'" *Reliable Automatic Sprinkler Co. v. C.P.S.C.*, 324 F.3d 726, 732 (D.C. Cir. 2003) (citation omitted). Citing the rule that permits *the employer* to challenge the denial of a PERM application, the Department contends that the mass audit is not final agency action

because *Fragomen* can "seek further administrative review." (DOL Opp. 22, citing 20 CFR 656.26(a).) But Fragomen is not the employer with respect to the vast majority of the applications subject to the mass audit; rather, it is a third party that advises employers on the PERM regulations. As such, Fragomen may not invoke the administrative review provision the Department cites and therefore cannot challenge the Department's actions within the agency.[7]

Moreover, Fragomen cannot count on employer-clients to vindicate its interests through the administrative process. While the mass audit implicates *all* alien labor certification applications filed by Fragomen, a single client will only have a limited number of applications captured in the audit, and, in any event, is likely to be deterred from suing for fear of retaliation. An employer-client lacks an incentive remotely comparable to Fragomen—whose professional integrity and client relationships are under public attack—to challenge the Department's authority to institute the audits. Furthermore, the singling-out of Fragomen increases the likelihood that clients will employ different immigration counsel rather than challenge the audits. Because Fragomen "will be afforded no additional opportunity to make the arguments to the agency that they now present in this petition," the Department's mass audit is final agency action against Fragomen. *CropLife America v. EPA*, 329 F.3d 876, 882 (D.C. Cir. 2003); *see Standard*

[7] For this reason, the government's heavy reliance on *University of Medicine & Dentistry v. Corrigan*, 347 F.3d 57 (3d Cir. 2003)—where the plaintiff hospitals were directly regulated by the Department of Health and Human Services—is misplaced. Moreover, the "audits" in *Corrigan* were conventional, after-the-fact assessments of past billing issues and thus did not have the immediate, deterrent effect on plaintiff's ability to retain and attract business that the PERM "audits" here have. *See id.* at 61.

Oil, 449 U.S. at 241-42 (agency action is not "definitive" statement of position where aggrieved party can challenge legal basis for the action within the agency).[8]

In addition, Fragomen is challenging the constitutionality of the mass audit initiative and the policy on which it is based, not the outcome of an individual audit. *See McNary v. Haitian Refugee Center, Inc.* 498 U.S. 479, 491-94 (1991); *Chang v. U.S.*, 327 F.3d 911, 922-24 (9th Cir. 2003); *Walters v. Reno*, 145 F.3d 1032, 1051-52 (9th Cir. 1998); *cf. Califano v. Sanders*, 430 U.S. 99, 109 (1977) ("[W]hen constitutional questions are in issue, the availability of judicial review is presumed."). That policy is final agency action because "[t]here is not the slightest doubt" that the Department "directed regulated entities to comply" with its guidance. *Barrick Goldstrike Mines, Inc. v. Browner*, 215 F.3d 45, 48 n.3 (D.C. Cir. 2000); *see id.* (concluding that guidance on EPA's website interpreting regulation was final and noting that "the issuance of a guideline or guidance may constitute final agency action"); DOL Opp. Ex. A ("Where the Department finds evidence of potentially improper attorney, agent, or foreign worker involvement in considering U.S. worker applicants, the Department *will* audit[.]") (emphasis added). Furthermore, as explained below in Part I-B(3), Fragomen's claims include a challenge to implementation of a final agency rule that was promulgated in violation of the APA.[9]

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[8] In addition, the Department's unconstitutional restriction of Fragomen's ability to give legal advice is likely to lead in some cases to employers' incorrectly concluding that a PERM case may not be filed because of a misunderstanding about the legal requirements. There will be no alternative opportunity for judicial review in these situations because the PERM application will never be filed in the first place. *See* Supp. Patrick Decl. ¶¶ 5-7.

[9] *See State of Montana v. Clark*, 749 F.2d 740, 744 (D.C. Cir. 1983) ("Unless we are to consider the notice and comment process a meaningless gesture, the order … reissuing [the regulation] constitutes final agency action and is reviewable under the Administrative Procedure Act, 5 U.S.C. § 704."); *see also Reno v. Catholic Social Services, Inc.*, 509 U.S. 43, 57 (1993) (agency action may be deemed final if its effects have been "felt in a concrete way by the challenging parties"; promulgation of a rule satisfies this requirement if it thrusts upon the plaintiff "the

(continued…)

The other factors the Department cites (DOL Opp. 19) as relevant to finality also support the availability of judicial review under *Standard Oil*. First, the issues raised by Fragomen are pure questions of law that are "fit for judicial resolution." *Standard Oil*, 449 U.S. at 239 (citation omitted). The primary questions presented are whether the Department may continue to pursue audits that were expressly initiated on an unconstitutional basis and whether its post-hoc rationale for continuing the audits violates statutory authority, the APA, and the Constitution. Second, these legal questions should be decided now because Fragomen has no other means to obtain relief, and the Department's mass audit has "had a 'direct and immediate … effect on [Fragomen's] day-to-day business.'" *Id*. (citation omitted). As explained below in Part II-A, the Department's public attack already has caused Fragomen to lose current and prospective business, "'an actual, concrete injury'" (*AT&T v. EEOC*, 270 F.3d 973, 975 (D.C. Cir. 2001)) that threatens the very existence of the firm. Patrick Supp. Decl. ¶¶ 16-26. Because the Department's actions could put Fragomen out of business before it can even demonstrate that it did nothing wrong, the Department has inflicted harm that far exceeds the "disruptions that accompany any major litigation" (*Standard Oil*, 449 U.S. at 243) and have imposed costs that are not an acceptable "social burden … of living under government" (*id.* at 244). The Department's special mass audit initiative is final and thus reviewable under *Standard Oil*, 449 U.S. at 239.

2. The Department's Decision To Audit Fragomen-Filed Applications En Masse Is Subject to Review Pursuant to its Explicit Public Justifications for the Audit.

The Department insists that it has "unfettered discretion" to institute audits for any reason and in any manner without any possibility of legal challenge. (DOL Opp. 23.) As the Court of

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immediate dilemma to choose between complying with newly imposed, disadvantageous restrictions and risking serious penalties for violation") (citations omitted).

Appeals has explained, however, an enforcement decision that otherwise would be unreviewable is subject to judicial review if "the agency itself has provided a meaningful standard for the agency to follow in exercising its enforcement power." *Block v. SEC*, 50 F.3d 1078, 1082 (D.C. Cir. 1995) (citation omitted).[10] This condition is satisfied here.

In promulgating 20 CFR 656.10(b)(2), the Department itself has produced a standard against which the Court may judge the exercise of audit discretion. "It is well settled that an agency, even one that enjoys broad discretion, must adhere to voluntarily adopted, binding policies that limit its discretion." *Padula*, 822 F.2d at 100. Because the Department expressly initiated the mass audit of Fragomen applications based on its (now-abandoned) interpretation of Section 656.10(b)(2) (*see* Compl. Exs. D & F), and because the Department expressly seeks to perpetuate the mass audit based on its August 29 interpretation of Section 656.10(b)(2) (*see* DOL Opp. 10; Carlson Decl. ¶ 38), that provision and the administrative authorities construing it provide standards against which the Court may judge the propriety of the Department's conduct.

Section 656.10(b)(2) imposes limitations on the role of an *alien's* attorney or agent in the PERM process, but omits employers' attorneys from its proscriptions. (*See* Fragomen Moving Brief 17-21 and Part I-B(4) below.) BALCA's interpretation of that provision confirms this policy.[11] Moreover, because the Department's restrictions on attorney-client communications

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[10] *See also Padula v. Webster*, 822 F.2d 97, 100 (D.C. Cir. 1987) ("Judicially manageable standards may be found in formal and informal policy statements and regulations as well as in statutes.").

[11] The BALCA Deskbook, created in "a concerted effort to bring a sense of unity to the Secretary's regulations and consistency to the evaluation process by this Agency," Preface, BALCA Deskbook (1992), similarly reads Section 656.10(b)(2)'s proscriptions as limited to an *alien's* attorney or agent, *see id*. Chapter 3, Section II. *See Padula*, 822 F.2d at 100 ("[I]nternal guidelines and rules not formally promulgated have occasionally been held to bind agency conduct.").

implicate the scope of the agency's statutory authority (*see* Fragomen Moving Brief 12-17), and the Constitution (*see id.* pp. 27-36), the Immigration and Nationality Act and the First Amendment also provide meaningful standards to guide judicial review.

Lastly, the APA itself provides meaningful standards here, because the Department's insistence on maintaining the audits after repudiating their triggering rationale is the epitome of arbitrary and capricious agency action. Under the APA, litigation-induced, post-hoc explanations for agency action are insufficient to save it from invalidation. *See National Fuel Gas Supply Co. v. FERC*, 468 F.3d 831, 839 (D.C. Cir. 2006) ("[w]e will neither supply our own justifications for an order nor uphold an order based on [agency's] post hoc rationalizations"); *America's Community Bankers v. FDIC*, 200 F.3d 822, 835 (D.C. Cir. 2000) (no deference to "'some post hoc rationale developed as part of a litigation strategy'") (citation omitted).

Fragomen's targeted challenge to the Department's action may be resolved by reference to well-established legal standards and therefore is amenable to judicial review.

3. 20 CFR § 656.10(b)(2)(i) Is a Legislative Rule Promulgated in Violation of the APA's Notice-and-Comment Requirements.

Fragomen demonstrated in its opening brief (pp. 21-26) that the Department's prohibition on attorney-employer communications violated APA rulemaking requirements because the only words in the regulations that reference a possible limitation on the role of the employer's attorney were inserted into the final version of Section 656.10(b)(2)(i) without notice and comment. The Department responds that "20 CFR § 656.10(b)(2)(i) … was merely an interpretive rule which is not subject to formal rulemaking, and which is not being enforced or relied on by the Department in this case." DOL Opp. 24. Neither contention has merit.

The Court of Appeals has "identified four factors, any one of which, if present, would identify a supposed interpretive rule as really legislative." *Syncor Int'l Corp. v. Shalala*, 127

F.3d 90, 96 (D.C. Cir. 1997). The most relevant here are the following: (1) "'whether the agency has published the rule in the Code of Federal Regulations'" and (2) "'whether the rule effectively amends a prior legislative rule.'" *Id.* at 96 n.8 (citation omitted). It cannot be disputed that the language at issue—the four words referencing employers' attorneys—was "published … in the Code of Federal Regulations" and "amends" the language of a prior rule also published in the Code of Federal Regulations. *Id*. *Compare* 20 CFR § 656.10(b)(2)(i) *with* NPR, 67 Fed. Reg. at 30,494. Thus, Section 656.10(b)(2)(i), with its disputed language, is a legislative rule.[12]

The Department further asserts (DOL Opp. 27) that the four words impose no legal obligations on Fragomen or employers, and now contends that it "has not purported to rely on or enforce the language in section 656.10(b)(2)(i) at any time in its interaction with Plaintiff." DOL

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[12] Relying on *Ace Property & Casualty Insurance Co. v. Federal Crop Insurance Corp.*, 517 F. Supp. 2d 391 (D.D.C. 2007), the Department argues that the addition of the four words was an interpretive rule because that language merely "clarif[ied]" the Department's supposedly longstanding position, embodied in Section 656.10(b)(2)(ii), that the employer's attorney cannot "'interview[]' or 'consider[]' U.S. workers for the job offered to the alien." DOL Opp. 26-27. The Department's reliance on *Ace Property* is misplaced. In that case, the agency amended the regulation at issue to clarify the ambiguity in the regulation's use of the word "may" in reference to an administrative limitation period. *Id*. at 404-05. In addition, the clarified regulation reflected the "consistent[] interpret[ation]" of the agency. *Id*. at 405.

Here, by contrast, the original NPR version of Section 656.10(b)(2)(i) included no similarly ambiguous language; rather, it expressly restricted the role of an *alien's* agents and attorneys in the labor certification process, but made no mention of the *employer's* attorney. *See* 67 Fed. Reg. at 30,494. And, contrary to the Department's contentions, *see, e.g.*, DOL Opp. 33, the Department had not consistently read analogous restrictions on employers' attorneys into Section 656.10(b)(2). *See* Part II-B(4) below. That is not surprising, given that the immediately preceding subsection expressly affirms that "[e]mployers may have agents or attorneys represent them throughout the labor certification process." 20 CFR 656.10(b)(1). Far from clarifying the prior rule, the inserted language, to the extent it may be read to support restrictions on the employer-attorney relationship, would reflect a radical change in the role of the employer's attorney in assisting the employer through every phase of the certification process. Effecting such a change without notice and comment would violate the APA.

Opp. 28. But the very policy statements on which the Department premised the audits cite Section 656.10(b)(2)(i) as authority for the restrictions on attorney-client communications.[13]

The Department's post-hoc litigation arguments do not comport with the justifications it offered when it engaged in the actions challenged in this case. In announcing the Fragomen mass audit, the Department reasoned that its "regulations *specifically* prohibit an employer's immigration attorney or agent from *participating in* considering the qualifications of U.S. workers …, unless the attorney is normally involved in the employer's routine hiring process." Compl. Ex. D (emphasis added); *see also* Compl. Ex. E (same); Compl. Ex. F (referencing both 20 CFR 656.10(b)(2)(i) and (ii) as the basis of its action). This explanatory language clearly borrowed the operative terms of Section 656.10(b)(2)(i) to buttress the Department's original assertion of authority. Subsection (b)(2)(i), like the Department's explanatory materials, discusses "participat[ing] in" the recruiting process and contains the only "specific[]" regulatory reference to the employer's attorney or agent. S*ee* 20 CFR 656.10(b)(2)(i). In contrast, Section 656.10(b)(2)(ii) contains none of this operative language. Therefore, the Department's public statements and guidance contradict its current, post-hoc litigation focus solely on subsection (ii), reflecting the Department's belated attempt to dissociate its audit decision from subsection (b)(2)(i) now that its procedural infirmities have come to light.

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[13] *See* Compl. Ex. F ("[T]he types of actions prohibited by 20 CFR 656.10(b)(2)(i) and (ii) include" the "preliminary screening [by the employer's attorneys] of applications before the employer does so" and attempts by the employer's counsel "to dissuade an employer from its initial determination that a particular applicant is minimally qualified…."); DOL Opp. Ex. A ("[T]he types of actions prohibited by 20 CFR § 656.10(b)(2)(i) and (ii) include" the "preliminary screening [by the employer's attorneys] of applications before the employer does" and the "withhold[ing] [by the employer's attorneys] from the employer [of] any resumes or applications that it receives from U.S. workers.").

4. Section 656.10(b)(2)(ii) Does Not Support the Department's Audits.

Section 656.10(b)(2)(ii) affords no more basis for the Department's audit decision than paragraph (i), for three reasons.[14] First, the Department's position ignores the structure of Section 656.10(b), which governs "Representation." Subsection (b)(1) protects the employer's right to consult with counsel "throughout the labor certification process." Subsection (b)(2)(i) then addresses alien influence on the recruitment process, providing that neither aliens nor any lawyers or agents for aliens should take certain actions the Department considers disruptive to recruitment. The Department would like to interpret subsection (b)(2)(ii) as if it were numbered (b)(3)—an independent regulation about "representation" unconnected to the subsection (b)(2)(i) regulation on alien influence. It is unreasonable to read subsection (b)(2)(ii) as curtailing the employer's right to consult with its own counsel because that reading would conflict with the immediately preceding provisions of the regulation that protect that right "throughout" the labor certification process and omit employers' attorneys from the alien-attorney-targeted interviewing and consideration prohibition in paragraph (i). *See* Fragomen Moving Brief 17-21. The Department's interpretation thus contravenes "the familiar rule of construction that, where possible, provisions of a statute should be read so as not to create a conflict." *Louisiana Pub. Serv. Comm'n v. FCC*, 476 U.S. 355, 370 (1986). The reading urged by the Department also violates the rule that a listing of certain categories of persons covered by

[14] The Department suggests (DOL Opp. 30) that Fragomen waived any challenge to its interpretation of Section 656.10(b)(2)(ii) because Fragomen's opening papers did not address it separately from the rest of Section 656.10(b)(2). This contention is frivolous. Fragomen challenged "The Secretary's Interpretation of Section 656.10(b)(2)" as violating statutory authority, the APA, and the First Amendment. *See* Fragomen Moving Brief 12, 17, 27. As a subsection of Section 656.10(b)(2), paragraph (ii) falls squarely within Fragomen's claims for relief. *See Yee v. City of Escondido*, 503 U.S. 519, 534 (1992) (distinguishing legal claim, which may be waived, from separate *arguments* in support of that claim, which are not waivable).

a prohibition—here, the identification in paragraph (i) of a class of lawyers who may not "consider" applicants, namely the aliens' lawyers—should be presumed to exclude categories of persons who are not listed (*expressio unius est exclusio alterius*), such as the employers' lawyers.

Second, the Department's reading of subsection (b)(2)(ii) departs from the provision's plain language. Subsection (b)(2)(ii) refers to who may "interview or consider" U.S. workers. That language does not purport to restrict *communication* between the employer and its counsel at any point.[15] Furthermore, the reference in paragraph (ii) to the employer's representative being "the person who normally interviews or considers applicants" *outside* the labor certification context highlights the need for the employer's representative—who is apt to be unfamiliar with the unusual requirements of the process—to consult its immigration counsel "throughout the labor certification process," 20 CFR 656.10(b)(1), including with respect to whether U.S. job applicants are qualified under the regulations. There is nothing in the language of either subsection (b)(2)(i) or (ii) that provides the Department authority to restrict the legal advice an employer may obtain from its counsel "throughout the labor certification process."

Third, the Department's argument contradicts its own previous position on the scope of subsection (b)(2)(ii). While the Department alleges that BALCA has employed a "long-standing

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[15] Moreover, the reference to the individual who actually "considers" the workers plainly implies the actual hiring decision-maker. 20 CFR 656.10(b)(2)(ii). The Department nonetheless asserted, in its initial justification for the mass audit, that its regulations prohibit an employer's attorney from "*participating in* considering" a U.S. worker's qualifications. (Compl. Ex. E (emphasis added)). The Department's initial emphasis on "participat[ion]," which implies *any* role in the consideration process, including the provision of legal advice to the employer, is far broader than subsection (b)(2)(ii)'s restriction on the individuals permitted to actually "consider" the U.S. worker. The Department's "participating in considering" language does not appear in paragraph (ii) at all; that language appears solely in paragraph (i)'s preamble sentence which, as Fragomen has demonstrated, also fails to support the Department's justification for its audits. *See* Fragomen Moving Brief 17-21.

and consistent interpretation of section 656.10(b)(2)(ii) to prohibit employers' attorneys from interviewing and considering U.S. workers," DOL Opp. 30, it ignores actual BALCA precedent and the BALCA Deskbook, which contains the interpretation of subsection (b)(2)(ii) that the Department provides to BALCA judges. These materials illustrate, in stark contrast to the Department's current suggestion, that the Department has long considered subsection (b)(2)(ii) as an attempt to set boundaries on the employer's counsel only when that counsel interacted directly with the U.S. worker applicant (for example, by interviewing him for the position) and when the employer's counsel was also representing the *alien*.[16]

Specifically, pre-PERM BALCA decisions concluded that the predecessor provisions to subsections (b)(2)(i) and (ii) did not apply at all to the conduct of an attorney "represent[ing] only the Employer." *In re Rojas*, 87-INA-685 (BALCA 1988). BALCA reasoned that the prohibition in paragraph (i) extends only to "the alien and the alien's agent or attorney" except where such individual "also represents the employer" under paragraph (ii). *Id*. Accordingly, BALCA concluded that paragraph (ii) similarly "applies only if the Employer's attorney is also the Alien's attorney under" paragraph (i). *Id*.; *see also In re Physicians, Inc*., 87-INA-716 (BALCA 1988) (paragraph (ii) "does not apply … because the agent does not represent Alien"). Notably, BALCA has reaffirmed this interpretation after PERM. *See In re Staffing Services*, 2005 INA-00062 (BALCA 2007) (paragraph (ii), "which limits who can represent the employer in interviews with U.S. applicants, applies only if the employer's attorney is also the alien's

[16] Fragomen has never claimed, nor sought, to interview or in any manner directly contact prospective U.S. workers; it has simply sought to give legal advice to its clients. Therefore, cases such as *Taam Shabbos*, 90-INA-97 (BALCA 1991) or *Rian Cleaners*, 96-INA-00012 (BALCA 1997), cited by the Department, are inapposite because they involve direct contact between the prospective U.S. worker and the employer's agent.

attorney under" paragraph (i)).[17] Moreover, this reading is the one espoused by the Department in the BALCA Deskbook.[18]

Finally, even if the language of subsection (b)(2)(ii) lends itself to different meanings, the Department's attempt to use that provision to restrict attorney-client communications would still

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[17] The BALCA authorities cited by the Department are readily distinguishable and fail to undermine the longstanding interpretation applied in *Rojas*. First, no case cited by the Department even addresses the *Rojas* holding that subsection (b)(2)(ii) is inapplicable to an attorney who does not represent the alien. Whether that is because the argument was overlooked or because it was factually inapplicable due to a "dual representation" situation, it is clear that no case can stand for or against a proposition it never considered.

Second, the majority of cases upon which the Department relies rest on the "good faith requirement" that is "implicit" in the alien labor certification regulations. *See In re Tom O'Brien Nissan, Inc.*, 1997-INA-0435 (BALCA 1999). That good faith requirement focuses on the "chilling effect" that may arise from an attorney's ***direct contact*** with prospective U.S. applicants. *See, e.g., id*. (finding employer's agent's contact with U.S. workers too "limited" to create "chilling effect" in violation of "good faith" requirement); *In re Techknits, Inc.*, 92-INA-0001 (BALCA 1993) (concluding that employer's attorney's role in "contacting the applicants … may well have had a chilling effect in the recruitment of U.S. workers"); *In re K & S Sportswear*, 91-INA-52 (BALCA 1992) (violation of good faith where employer's attorney "was actually in charge of contacting the applicants"). The Department implicitly acknowledges this important distinction in the August 29 Restated Bulletin, which discusses "chilling effect" concerns only in the context of interviewing applicants. Neither the Department's initial explanation for the mass audits nor its post-hoc position alleges any direct contact between Fragomen and U.S. applicants as support for the audits. *See* Compl. Exs. D-F; DOL Opp. Ex. A.

Third, in at least one case, *In re Sharon Lim Lau*, 90-INA-103 (BALCA 1992), BALCA found a recruiting violation because the employer's attorney was also "the Alien's attorney[]," a conclusion consistent with *Rojas*.

Finally, the decision in *In re Scan, Inc.*, 97-INA-247 (BALCA 1998), indicates that the attorney represented the alien as well as the employer. *See id*. (recounting certifying officer's conclusion that attorney's involvement violated regulations because "[i]t is clearly adverse to the interests of U.S. workers for the *alien's attorney* to have any involvement in the recruitment process") (emphasis added). The expansive reading of *Scan, Inc.* urged by the Department here has not been followed by subsequent BALCA cases. Instead, BALCA has reaffirmed the interpretation in *Rojas* and the BALCA Deskbook. *See In re Staffing Services*, 2005 INA-62 (BALCA 2007).

[18] Chapter 3, Section II of the BALCA Deskbook states that subsection (b)(2)(ii), "which limits who can represent the employer in interviews with U.S. applicants, applies only if the employer's attorney is also the alien's attorney under [subsection (b)(2)(i)]." (Citing *Rojas*, 87–INA–685 (Mar. 11, 1988)).

suffer from the various other infirmities Fragomen has identified, including unconstitutionality. *See* Fragomen Moving Brief 27-37. As a result, the doctrine of constitutional avoidance requires rejection of the Department's interpretation. *See, e.g., Tex. Office of Pub. Util. Counsel v. FCC*, 183 F.3d 393, 443 n.95 (5th Cir. 1999) ("[A] court will reject an agency interpretation of a statute that would ordinarily receive deference under *Chevron* step-two if it believes the agency's reading raises serious constitutional doubts.") (citation omitted).

5. *Chevron* Deference Does Not Extend to the Agency's Novel and Unprecedented Interpretation of 20 CFR § 656.10(b)(2)(ii).

In a final attempt to salvage the mass audit of Fragomen, the Department contends that its "interpretation [of Section 656.10(b)(2)] is entitled to *Chevron* deference and must therefore be upheld because its construction 'is based on a permissible interpretation of the statute.'" DOL Opp. 31 (citing *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 843 (1984)). The Department's interpretation of Section 656.10(b)(2)(ii) is not entitled to *Chevron* deference because, as explained in Fragomen's opening brief, Congress did not authorize the Department to restrict the employer's right to consult counsel for advice. *See* Fragomen Moving Brief 12-17. Moreover, courts will not accord *Chevron* deference to agency interpretations that "raise[] serious constitutional doubts." *Tex. Office of Pub. Util. Counsel*, 183 F.3d at 443 n.95. Nor is *Chevron* deference available for agency interpretations that are inconsistent with the longstanding view of the agency—here, BALCA's consistent exclusion of employers' attorneys from the employer-representative provision (*see* Part I-B(4) above)—at least where, as here, the agency has failed to provide "a reasoned analysis for the change." *Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 42 (1983).

6. The 100 Percent Special Audit of Fragomen's Alien Labor Certification Applications Is Improper.

The Department attempts to defend the mass audit of Fragomen as "[p]roperly [i]nstituted" (DOL Opp. 34) even though the Department has tacitly acknowledged that the basis for it was legally indefensible. This epitomizes arbitrary and capricious agency action.

As the Department tacitly acknowledged by rescinding the Guidance on which the mass audit was based, the audit trigger—the prohibition on attorney-client consultations—infringes a First Amendment right (*see* Fragomen Moving Brief 27-36). Yet the Department refuses to acknowledge the consequences of its admission—that the Fragomen-targeted mass audit is fruit of the poisonous tree. Instead, the Department strains to find a post-hoc reason to keep all of the Fragomen applications mired in audit, providing further evidence that the agency is engaging in unlawful retaliation against Fragomen for exercising its constitutional rights.[19]

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[19] A particularly offensive form of this retaliation is illustrated in Dr. Carlson's declaration, in which he accuses Fragomen of "frivolously invoking the attorney-client privilege," and declares that it would be unnecessary for the Department to audit *all* Fragomen applications if Fragomen would only volunteer the identities of the Fragomen clients with "the most problematic applications." Carlson Declaration ¶¶ 31, 38. Defendants apparently have ignored the authorities Fragomen's counsel has called to their attention. *See, e.g.*, D.C. Rule Prof. Conduct 1.6 (prohibiting disclosure of "information gained in the professional relationship that … would be likely to be detrimental, to the client"); D.C. Legal Ethics Opinion 288 (opining that a lawyer *must* resist a Congressional subpoena for client billing records until "the point that the lawyer has made and pressed every appropriate objection to the Congressional subpoena and has no avenues of appeal available"); D.C. Legal Ethics Opinion 223 (opining that a lawyer must protect a client's secrets from disclosure if there is even a "colorable basis" for doing so, and that sometimes even a client's name or the fact of representation may be a secret that the lawyer must protect). It may be that a correct appreciation of the attorney's ethical duty of confidentiality would not deter the Department from its heavy-handed tactics; but, regardless of Dr. Carlson's subjective understanding, it is clear that the Department is currently penalizing hundreds of Fragomen clients not because Fragomen acted unethically, but because Fragomen continues to act ethically.

C. The Mass Audit Violates Fragomen's Fifth Amendment Due Process Rights.

The Department's targeting of all Fragomen labor certification applications for audit and its issuance of a press release casting unfounded aspersions on Fragomen's professional integrity, without providing Fragomen any notice or opportunity to respond, violated Fragomen's procedural due process right to engage in its chosen vocation under the D.C. Circuit's controlling opinion in *Trifax Corp. v. District of Columbia*, 314 F.3d 641 (D.C. Cir. 2003).

The Department attempts to distinguish *Trifax* on the ground that Fragomen was not formally precluded from participating in the labor certification process. DOL Opp. 37. The *Trifax* Court emphasized, however, that the impact of *reputational* injury on the ability of a company to pursue its business can be just as significant as that of formal preclusion:

> [I]t would be odd if broad preclusion, equivalent in every practical sense to formal debarment, did not also constitute a deprivation simply because the harm was reputational … [W]e have held on several occasions that government stigmatization that broadly precludes individuals or corporations from a chosen trade or business deprives them of liberty in violation of the Due Process Clause.

Trifax, 314 F.3d at 643-44. Here, the Department's actions created precisely this type of broad stigmatization. The Department's ill-conceived actions defamed Fragomen in the eyes of clients, the immigration bar, and the public at large, drastically damaging the firm's ability to continue practicing immigration law. Fragomen's constitutionally protected "liberty to engage in its chosen business" thus has been violated. *Trifax*, 314 F.3d at 642.[20]

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[20] The Department does not deny that Fragomen received neither notice nor an opportunity to respond prior to the Department's press release and initiation of the Fragomen-targeted audit, but argues that no process is due "in the context of the decision to initiate an audit." DOL Opp. 38. This case does not involve *an* audit, however; it involves an unprecedented public announcement that the Department was singling out one law firm based on suspected improper conduct and was auditing every single application filed by that law firm. These actions caused Fragomen immense reputational injury, threatening the firm's very existence. *See* Patrick Decl. ¶ 37; Supp.

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II. THE EQUITIES FAVOR PRELIMINARY INJUNCTIVE RELIEF.

A. Plaintiff Has Established Irreparable Harm.

There are several independently sufficient bases for finding irreparable harm here.

First, the continuing pendency of the special audits and the continuing enforcement of the résumé screening ban are continuing First Amendment violations that inflict irreparable injury as a matter of law. *See Chaplaincy of Full Gospel Churches v. England*, 454 F.3d 290, 301 (D.C. Cir. 2006) (harm caused by a regulation that limits speech is presumed to be irreparable).[21]

Second, the harm Fragomen has suffered is anything but "merely theoretical." (DOL Opp. 39.) The Department inflicted an enduring stigma on Fragomen by announcing the special audit program in a widely disseminated press release, and accusing Fragomen in that press release of engaging in misconduct by providing advice to its clients.[22] The firm has lost business

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Patrick Decl. ¶¶ 16-26; Fragomen Moving Brief pp. 10, 37. This is precisely the type of injury to which *Trifax* applies. *See Trifax*, 314 F.3d at 644.

[21] The July 16 Agreement between the Department and Fragomen demonstrates another way Fragomen continues to be injured by the Department's unconstitutional restrictions. *See* Fragomen Moving Brief 10; Complaint Ex. G. The Department forced Fragomen to agree not to consult with its clients about applicant qualifications after any preliminary assessment by a client that an applicant may be qualified. The Department has effectively conceded the unconstitutionality of the consultation ban, but it has not relieved Fragomen of the unconstitutional contractual condition. The July 16 Agreement, which remains in effect, thus impermissibly conditions receipt of a government benefit on Fragomen's relinquishment of its First Amendment right to engage in attorney-client communication. *See DKT Memorial Fund v. Agency for Int'l Dev.*, 887 F.2d 275 (D.C. Cir. 1989); Fragomen Moving Brief 34-36.

[22] The Department's attempt (*see* Carlson Decl. ¶ 29 n.1) to downplay the harm to Fragomen by citing the number of Fragomen-filed applications that were already in audit for reasons unrelated to the special mass audit lacks merit. The publicly announced special audit initiative against Fragomen has caused incalculable reputational and economic damage—harms that Fragomen has not suffered from the standard audit regime. Moreover, contrary to the Department's suggestion, the special audit initiative has substantially increased the rate of audits of Fragomen-filed applications (49% v. 100%), a change that itself is having a marked, adverse impact on Fragomen's business. In addition, cases that were already in audit will be subjected to further

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and the opportunity to compete for new business, and has suffered a total economic impact estimated at more than $20 million. The accompanying Supplemental Declaration of Michael D. Patrick recounts specific examples of competitors' opportunistically seeking to exploit Fragomen's scarlet-letter status and numerous instances of major clients' abandoning Fragomen as a provider of immigration services. *See* Patrick Decl. ¶¶ 29, 53-56; Supp. Patrick Decl. ¶¶ 16-26. Furthermore, because audits create lengthy delays, the mass audit program against Fragomen places the firm at an extreme competitive disadvantage in the industry. The firm's very ability to continue doing business remains in jeopardy.

Third, Fragomen's economic injuries are irreparable because sovereign immunity limits its ability to recover monetary damages here. *See, e.g., Feinerman v. Bernardi*, 558 F.Supp.2d 36, 39, 51 (D.D.C. 2008) (loss of income is *per se* irreparable if sovereign immunity limits recovery of damages); *Woerner v. U.S. Small Bus. Admin.*, 739 F.Supp. 641, 650 (D.D.C. 1990).

Fourth, the economic harm Fragomen is suffering is inherently difficult to quantify, given that Fragomen will not even be aware in many instances of how competitors in business pitches will invoke the "taint" caused by the Department's actions as a reason to use them instead of Fragomen. *See* Supp. Patrick Decl. ¶¶ 17-20 and Ex. D; *CSX Transp. v. Williams*, 406 F.3d 667, 673 (D.C. Cir. 2005); *Lee v. Christian Coalition of Am., Inc.*, 160 F. Supp. 2d 14, 31 (D.D.C. 2001) (monetary loss may be irreparable if it is "very difficult to calculate" or if the "very existence of the business" is threatened) (citation omitted).

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delay of several months as a result of the issuance of supplemental audit notices as part of the mass audit program. *See* Supp. Patrick Decl. ¶¶ 24-26.

Fifth, the damaged and destroyed client relationships Fragomen has suffered are irreparable harm. *See, e.g., Merrill Lynch v. Wertz,* 298 F. Supp. 2d 27, 34 (D.D.C. 2002); *Morgan Stanley DW Inc. v. Rothe,* 150 F. Supp. 2d 67, 78 (D.D.C. 2001).

B. Preliminary Relief Will Not Harm the Department or the Public Interest.

Fragomen is not challenging the Department's ability to conduct regular audits, and the Department cannot claim a public interest in enforcing a special audit program and résumé screening ban that are unconstitutional. *See Joelner v. Vill. of Wash. Park,* 378 F.3d 613, 620 (7th Cir. 2004). Invalidation of both of these unconstitutional initiatives clearly is in the public interest. The Department makes generic references to "potential harm to the entire labor certification process," DOL Opp. 41, and "the danger in permitting aliens unfettered access to the American employment sector," *id. p.* 42. The Department provides no link, however, between these vague principles and its conduct in this case. There is no evidence that Fragomen has made any attempt to abuse the labor certification process, or that the Fragomen-targeted audits or the Department's unlawful policies are effective or necessary in protecting that process.

CONCLUSION

For the reasons stated above and in Fragomen's Moving Brief, the Court should enjoin Defendants from engaging in their unconstitutional and unlawful conduct in accordance with the relief set forth in the previously submitted Motion and proposed order.

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