IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF PUERTO RICO

LORI CHAVEZ-DEREMER, SECRETARY OF LABOR, U.S. DEPARTMENT OF LABOR, Plaintiff-Counterclaim Defendant, v. SUFFOLK ADMINISTRATIVE SERVICES, LLC; PROVIDENCE INSURANCE CO., I.I.; ALEXANDER RENFRO; WILLIAM BRYAN; ARJAN ZIEGER, Defendants-Counterclaim Plaintiffs.	Civil No.: 3:24-cv-01512 (CVR)

BRIEF IN OPPOSITION TO MOTION TO DISMISS FIRST AMENDED COUNTERCLAIM FOR DECLARATORY AND INJUNCTIVE RELIEF

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PLAINTIFF MISREPESENTS DEFENDANTS' PLEADING BURDEN AS TO THEIR FIRST AMENDMENT CLAIMS

It is well settled that a government official cannot use her power to punish or suppress rights protected by the First Amendment. *NRA v. Vullo*, 602 U.S. 175, 188 (2024). Actionable punishment or suppression includes not just direct action against a person who engages in protected activity, but also indirect action against the person which targets his business relations. *Id.* at 190. Such indirect actions can be actionable punishment or suppression to the extent they pressure (1) the person to abandon his protected activity, for fear of losing the business relations, or (2) the business relations to dissociate themselves from supporting the person engaging in the protected activity. *Id*. at 198. *See also NRA, et al. v. City of Los Angeles*, 441 F.Supp.3d 915 (C.D. Calif. 2019) (denying motion to dismiss as to First Amendment speech and association claims by both the NRA and its business partners).

Here, the Defendants are being targeted by the DOL in this suit based upon their vendor relationships with businesses which are exercising rights protected by the First Amendment. Indeed, the DOL does not dispute the factual allegations of the *First Amended Counterclaim for Declaratory and Injunctive Relief* [Doc. 62] ("*Counterclaim*") alleging:

1. Data Marketing Partnership, L.P. ("DMP") and LP Management Services, LLC ("LPMS") have exercised, and continued to exercise, their First Amendment rights of petition seeking the protection of single employer employee welfare plans under the Employee Retirement Income Security Act ("ERISA") by (a) requesting an advisory opinion ("AO Request") confirming such protection; and (b) filing suit against the DOL in the U.S. District Court for the Northern District of Texas, styled as *Data Marketing Partnership, LP, et al. v. DOL, et al.,* Civil Action No. 4:19-cv-00900-O ("Texas Suit"), for a court order providing such protection.

2. The DOL learned that the Defendants provide essential vendor services to the Partnership Plans through the AO Request and initiated the Anjo Investigation subpoenaing documents from the Defendants almost immediately thereafter.

3. The DOL conditioned a reasonable settlement of the Anjo Investigation, which would have obviated the need for this suit, upon the withdrawal by DMP and LPMS of the AO Request, and the dismissal by DMP and LPMS of the Texas Suit.

4. This suit was filed against the Defendants seeking $40 million and an injunction enjoining the Defendants "from ever acting as a fiduciary, service provider, or trustee to any plan covered by … ERISA"[1], including the Partnership Plans[2], when DMP and LPMS refused to withdraw the AO Request or dismiss the Texas Suit.[3]

Similar to the vendors in *Vullo*, therefore, this suit has the intent and effect of pressuring (a) DMP and LPMS to abandon the AO Request and Texas Suit, lest they lose vendor services provided by the Defendants essential to the operation of the Partnership Plans, or (b) pressuring the Defendants to disassociate from DMP and LPMS, thereby causing DMP and LPMS to

[1] *Complaint* ¶ 97.

[2] Plaintiff has admitted that the Defendants are service providers for both the Employer Plans and the Partnership Plans. *Response in Opposition to Defendants' Motion to Transfer* [Doc ¶ 49], p. 3. Plaintiff nevertheless falsely claims in Footnote 1 of the *Complaint* [Doc. 1] that this action only involves the Employer Plans. The relief sought by Plaintiff, which includes the Partnership Plans, as well as the allegations of a Multiple Employer Welfare Arrangement ("MEWA"), which necessarily include the Partnership Plans, contradict this false claim.

[3] In its *Motion to Dismiss*, the DOL has made the false suggestion that it was ultimately the idea of DMP and LPMS to join the two cases for settlement discussions when it stated "DMP and LPMS suggested settling the *Data Marketing* case, not the Secretary. Only after DMP and LPMS suggested settlement did the Secretary propose a resolution of both the Anjo Investigation and the *Data Marketing* case." [Doc. 60-1], pg. 24. To be clear – DMP and LPMS sought settlement of the Texas Suit without any reference to the Anjo Investigation. As admitted here by the DOL, it was their request to join the two cases for purposes of settlement, thus admitting that the DOL understood the two cases were significantly related.

discontinue the Partnership Plans, and rendering the AO Request and Texas Suit moot. This suit, and the actions of the DOL preceding this suit, thus clearly implicate First Amendment rights of petition and association not only for DMP and LPMS, but also for the Defendants.[4]

The only defenses offered by the DOL to its behavior have effectively been "so what"; the law provides free passes for this behavior. As set forth below, the DOL could not be more wrong in its callousness to the protective reach of the First Amendment or its behavior in seeking to quash rights protected by the First Amendment, as to the Defendants, LPMS, and DMP.

I. THE DOL ARGUES FACTS NOT ALLEGED IN THE *COUNTERCLAIM*

Rule 12(b)(6) simply does not allow for the consideration of facts not alleged in the pleading sought to be dismissed *See Foley v. Wells Fargo Bank, N A.*, 772 F.3d 63, 72 (1st Cir. 2014) ("[C]ourts [reviewing a Rule 12(b)(6) motion] usually consider only the complaint, documents attached to it, and documents expressly incorporated into it").

One of the primary arguments asserted by the DOL here for dismissal of the *Counterclaim* is that its actions against the Defendants in the Anjo Investigation and this suit are "so obviously correct as to render the charge of improper motivation implausible."[5] The facts cited by the DOL in support of this argument, however, are nowhere to be found in the *Counterclaim*. Instead, such facts are found only in the *Motion to Dismiss* itself. [6] No evidence is cited by the DOL to support

[4] DMP and LPMS have sought to intervene in this suit to protect their First Amendment rights of petition, but this Court denied their motion in a docket order [Doc. 63] dated August 14, 2025. This order has been appealed by DMP and LPMS to the First Circuit.

[5] *Motion to Dismiss,* p. 18.

[6] *Motion to Dismiss*, p. 18 ("the Department was investigating the service providers SAS and PIC, along with the other individuals named as defendants here, for their services related to the Employer Plans, to determine if they were engaging in any violations of ERISA"); *Motion to Dismiss,* pp. 23-24 ("… the obvious explanation for the Secretary's actions is that she was pursuing her lawful investigatory authority … and conducting a thorough investigation. Upon a determination of ERISA violations, the Secretary made a good faith attempt at resolving the claims in a way that would protect the Employer Plans and their participants").

these facts. To the extent the DOL seeks dismissal of the *Counterclaim* by citing any contrary motivation for the Anjo Investigation or this suit to that alleged by the Defendants, such arguments cannot be considered by this Court.

II. THE DOL OVERSTATES DEFENDANTS' BURDEN OF ALLEGING A FIRST AMENDMENT VIOLATION AT THE PLEADING STAGE

The First Circuit has held that "[a] dismissal on the pleadings will be upheld only if it appears beyond doubt that plaintiff can prove no set of facts in support of its claims which would entitle it to relief." S*ee Gaskell v. Harvard Coop. Soc'y,* 3 F.3d 495, 497–98 (1st Cir.1993). Courts in the First Circuit are especially reticent to dismissing First Amendment claims based solely upon the pleadings. *See, e.g., Huffman v. City of Boston*, Civil Action No. 21-cv-10985, 2022 WL 2308937 at *6 (D.Mass. June 27, 2022) ("As Plaintiffs rightly point out… asking more of plaintiffs at the pleading stage would make First Amendment retaliation claims all but impossible …"). See also *Rhodes v. Robinson*, 408 F.3d 559, 568 (9th Cir. 2005) ("[A]t the pleading stage, we have *never* required a litigant, *per impossible,* to demonstrate a total chilling of his First Amendment rights .. to perfect a retaliation claim.").

Here, Defendant's *Counterclaim* pleads the essential elements of a First Amendment retaliation claim by alleging facts of (1) constitutionally protected conduct; (2) adverse actions by the DOL, and (3) a causal link between the protected activity and the adverse actions. *Staples v. Gerry*, 923 F.3d 7, 15 (1st Cir. 2019). To the extent the DOL alleges otherwise, it seeks to hold the Defendants to a higher burden than required at this early stage of this suit.

III. DEFENDANTS SUFFICIENTLY PLEAD RIGHTS PROTECTED BY FIRST AMENDMENT

A. The Defendants Sufficiently Plead Right of Association with DMP and LPMS

The U.S. Supreme Court has "long understood as implicit in the right to engage in activities protected by the First Amendment a corresponding right to associate with others in pursuit of a wide variety of political, social, economic, educational, religious, and cultural ends." *Roberts v.*

Jaycees, 468 U.S. 609, 622 (1984). In *Citizens United v. FEC*, 558 U.S. 310, 363-64 (2010), the Court rejected the notion that commercial identity matters when it comes to First Amendment protections. See also *Burwell v. Hobby Lobby Stores*, 573 U.S. 682, 710-9 (2014).

The Counterclaim here alleges that, with the AO Request and Texas Suit, DMP and LPMS have exercised a right of petition protected by the First Amendment.[7] In doing so, they have advocated, on behalf of 30,000 individuals with group health insurance under the Partnership Plans, the protection of such Plans under ERISA.[8] There is likewise no dispute here that the Defendants provide essential vendor services to the Partnership Plans.[9] In doing so, the Defendants not only enable the continuation of the Partnership Plans, but also the advocacy efforts of DMP and LPMS to obtain ERISA protection for the Plans.

In arguing their associations with DMP and LPMS are protected by the First Amendment, the Defendants are making similar arguments which were made by business partners with contracts with the National Rifle Association ("NRA") in *NRA, et al. v. City of Los Angeles*, *supra*, cited by the Defendants in their *Counterclaim* but conspicuously omitted from Plaintiff's *Motion to Dismiss*. In that suit, business contractors doing business with the NRA challenged, along with the NRA, an ordinance requiring the disclosure by contractors with the City of Los Angeles of any contractual relationships with the NRA. The court held that the business partners had standing to sue for violation of their First Amendment rights of association to the extent the purpose of the ordinance was "to deter association with the NRA." *NRA, et al. v. City of Los Angeles,* 441 F.Supp.3d at 938.

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[7] *Counterclaim* ¶ 6.

[8] *Counterclaim* ¶¶ 1, 5.

[9] *Counterclaim* ¶¶ 3, 55-57, 62-63.

As alleged in the *Counterclaim*, the purpose of the Anjo Investigation and this suit has been to pressure (1) DMP and LPMS to abandon the AO Request and the Texas Suit, for fear of losing the vendor services provided by the Defendants, or (2) the Defendants to disassociate from the Partnership Plans, thereby rendering the AO Request and the Texas Suit moot and stifling DMP/LMPS's First Amendment protected activity.[10] The Anjo Investigation and this suit thus clearly implicate the Defendants' First Amendment right to associate with DMP and LPMS and DMP and LPMS' First Amendment efforts to seek ERISA protections for the Partnership Plans. The linkage between the two is not conjecture on the part of the Defendants, but rather verifiable facts, simply supported by substantial documentary evidence, as well as by Plaintiff's admission in its *Motion to Dismiss* that Plaintiff, and not the Defendants, initiated "global settlement" discussions of two cases it now disingenuously claims to be unrelated.

B. The *Counterclaim* is Based Upon Expressive Association With DMP and LPMS

As alleged in the *Counterclaim*, the DOL only became aware of the vendor relationships between the Defendants and LMPS and DMP as a result of the AO Request, which almost immediately prompted the Anjo Investigation of the Defendants.[11] The Anjo Investigation included subpoenas directed to the Defendants which necessarily encompassed the services performed for the Partnership Plans sponsored by DMP and LPMS.[12] The Anjo Investigation prompted the Defendants to exercise their own First Amendment right of petition by filing a suit against the DOL in this court, styled as *Suffolk Administrative Services, et al. v. U.S. Department of Labor, et al*.,

[10] *Counterclaim* ¶ 4.

[11] *Counterclaim* ¶ 86.

[12] *Counterclaim* ¶ 87, Ex. F.

Cause No. 3:21-cv-01031, which was ultimately dismissed by this Court without prejudice, due to lack of ripeness without any findings as to the underlying claims.[13]

As further alleged in the *Counterclaim*, the Defendants were also active participants in global settlement discussions, suggested by the DOL, as to the Anjo Investigation, the AO Request, and the Texas Suit.[14] At that time, at least, the DOL acknowledged the importance of the association amongst the Defendants, DMP, and LPMS. Indeed, the DOL tied the Defendants' fate during these settlement discussions to the actions of DMP and LPMS.[15] The DOL did so despite the protests of the Defendants that (1) the Partnership Plans could not function in the event of their disassociation from the Plans, and (2) they were financially incapable of a settlement in excess of the $5.5 million being proposed by the DOL in the absence of concessions by DMP and LPMS as to their AO Request and the Texas Suit.[16]

The Defendants' association with DMP and LPMS and DMP and LPMS' advocacy efforts to obtain ERISA protection for the Partnership Plans has thus been unquestionably an expressive association which meets the *de minimis* threshold established by the Supreme Court. *City of Dallas v. Stanglin*, 490 U.S. 19 (1989). Under pressure from the DOL, the Defendants refused to disassociate from DMP and LPMS and their efforts. To the extent the DOL now argues otherwise, it grossly misrepresents the content and context of the Defendants' *Counterclaim*.

C. The *Counterclaim* is Based Upon Cognizable Harms to the Defendants

Again, as set forth in the *Counterclaim*, the Defendants allege that they have been (1) coerced by the DOL to end their vendor relationships with DMP and LPMS based upon the

[13] *Counterclaim* ¶ 106.

[14] *Counterclaim* ¶¶ 123-125.

[15] *Counterclaim* ¶¶ 125-133.

[16] *Counterclaim* ¶¶ 126, 130, 133-135.

exercise of DMP and LPMS of their First Amendment rights of petition in the AO Request and (2) been retaliated against in the filing of this suit based upon their refusal to sever their business relationships with DMP and LPMS and the refusal of DMP and LPMS to relinquish their First Amendment rights of petition.[17]

The First Amendment claims brought by the Defendants here are thus again similar to those brought by the business partners with the NRA in *NRA, et al. v. City of Los Angeles*. There, as here, the business partners alleged they were being chilled by the disclosure ordinance "from submitting bids to the City or entering into 'contracts or sponsorship' agreements with the NRA." *NRA, et al. v. City of Los Angeles,* 441 F.Supp.3d at 937.

In denying the 12(b)(6) motion filed by the City of Los Angeles, even as to the business partners of the NRA, the Court rejected the argument now made by the DOL that only the person who exercises rights protected by the First Amendment can sue for retaliation or suppression of such rights. *Id*. Specifically, the court allowed the business partners of the NRA to sue on their own behalf for First Amendment violations even though the actual target of the government's actions was the First Amendment rights of the NRA. *Id*. [18]

The court began its justification of this holding by noting that disclosure requirements are impermissible when they "become [ ] a means of facilitating harassment that impermissibly chills

[17] *Counterclaim* ¶ 4.

[18] A statement in a brief may be treated as a judicial admission. *Cerqueira v. Cerqueira,* 828 F.2d 863, 865 (1st Cir.1987). In light of the DOL's argument in its *Response in Opposition to Data Marketing Partnership, LP and LP Management Services, LLC's Motion to Intervene* ("*Intervention Response*") [Doc. 61], the DOL is now judicially estopped from arguing that the Defendants are not proper parties for prosecution of these claims as the DOL explicitly argued in its Response that DMP's and LPMS's asserted interests are adequately represented by the Defendants. *Intervention Response* at p. 11. *See also* Court's Docket Order [Doc. 63] ("In addition, the Court bases its ruling on the other grounds raised by the Secretary in her opposition to the motion to intervene, which are found to be persuasive.")

the exercise of First Amendment rights." *See John Doe No. 1 v. Reed*, 561 U.S. 186 (2010)). The court then cited two Ninth Circuit cases for the proposition that this prohibition extends to the First Amendment right of association.

First, the case cited *Competitive Politics v. Harris*, 784 F.3d 1307 (9th Cir. 2015). *See NRA, et al. v. City of Los Angeles*, 441 F.Supp.3d. at 935-7. In that case, the Ninth Circuit held that a disclosure requirement intended to chill political speech or harass a certain speaker does create an actual burden on the First Amendment right of association. *Competitive Politics*, 784 F.3d at 1313 ("compelled disclosure can also infringe First Amendment rights when the disclosure requirement is itself a form or harassment intended to chill protected expression").

Second, the court cited *Americans for Prosperity Foundation v. Becerra*, 903 F.3d 1000 (9th Cir. 2018). *See NRA, et al. v. City of Los Angeles,* 441 F.Supp.3d at 936-8. In that case, the Ninth Circuit observed: "'To assess the possibility that disclosure will impinge upon protected associational activity' … we consider 'any deterrent effect on the exercise of First Amendment rights.'").

Based upon these Ninth Circuit cases, the court found that Competitive Politics and Americans for Prosperity together "hold that the First Amendment right of association can be burdened … through an actual chilling effect … by a government intent to harass a certain speaker." *NRA, et al. v. City of Los Angeles,* 441 F.Supp.3d at 937. The court thus held that the burden placed upon the business partners by the ordinance gave them a cause of action under the First Amendment which survived the City's 12(b)(6) motion to dismiss. *Id*. at 942-3.

Here, the Defendants have pleaded in detail the burden which they have experienced in the Anjo Investigation and this suit based upon their business relationships and expressive association with DMP and LPMS. As set forth further below, they have otherwise pled how these

burdens were motivated to harass and coerce the Defendants, DMP, and LPMS based upon the exercise by DMP and LPMS of their First Amendment rights of petition to the DOL. This Court should thus follow the lead of the court in *NRA v. City of Los Angeles* and deny the DOL's 12(b)(6) motion to dismiss the *Counterclaim.*

IV. THE DOL'S ERISA CLAIMS AGAINST DEFENDANTS DO NOT EXCUSE ITS VIOLATION OF THE FIRST AMENDMENT

The DOL has argued in repeated filings with this Court that the allegations in this suit are separate and apart from the AO Request and Texas Suit. Such arguments, however, are best presented as part of a motion or summary judgment before this Court rather than a motion to dismiss filed under 12(b)(6) of the Federal Rules of Civil Procedure. After all, the documents obtained by the DOL during the Anjo Investigation are not before this Court. Without such documents it cannot be determined whether, as alleged in the *Counterclaim*, this suit (1) is inextricably intertwined with the AO Request and the Texas Suit, and (2) seeks relief which would prevent the Defendants from providing vendor services to the Partnership Plans sponsored by DMP and LPMS, despite the contrary allegations of the *Complaint* [Doc. 1].

That the allegations of ERISA violations against the Defendants in this suit are allegedly justified, a claim disputed by the Defendants, does not otherwise refute the allegations in the *Counterclaim* that this suit is motivated by an intent by the DOL to retaliate against the exercise, and/or to suppress the further exercise, of the rights of petition by DMP and LPMS in the AO Request and Texas Suit. **"**Otherwise lawful government action may nonetheless be unlawful if motivated by retaliation for having engaged in activity protected by the First Amendment." *O'Brien v. Welty*, 818 F.3d 920, 932 (9th Cir. 2016). Indeed, the U.S. Supreme Court in *Vullo* specifically observed that, even assuming the NRA vendors had acted unlawfully, such assumption did not insulate the government from First Amendment scrutiny. *NRA v. Vullo*, 602 U.S. at 196.

This holding is also supportive of the Defendants' claims as recognized by the application of the First Amendment protection to vendors of the NRA in *NRA, et al v. City of Los Angeles.* If the purpose of enforcement action is to retaliate against or suppress the exercise of First Amendment rights, therefore, the legality of the enforcement action does not override the First Amendment violations by the government agency pursuing such enforcement action. *Id*.

V. DEFENDANTS SUFFICIENTLY ALLEGE ACTIONS BY THE DOL WHICH WOULD CHILL A PERSON OF ORDINARY FIRMNESS FROM CONTINUING TO EXERCISE FIRST AMENDMENT RIGHTS

First Amendment jurisprudence is clear that, even conduct that "fall[s] short of a direct prohibition against the exercise of First Amendment rights" can be actionable if it has a "deterrent, or 'chilling,' effect." *Board. of Cnty. Comm'rs, Wabaunsee Cnty., Kan. v. Umbehr*, 518 U.S. 668, 674 (1996) (quoting *Laird v. Tatum*, 408 U.S. 1, 11 (1972)). The relevant inquiry is not whether the defendant was successful in completing the retaliatory act as intended, or whether the act was successful in preventing the plaintiff from engaging in further speech; rather, it is whether the act as actually completed "would likely deter a person of ordinary firmness from the exercise of First Amendment rights." *Constantine v. Rectors & Visitors of George Mason Univ.*, 411 F.3d 474, 500 (4th Cir. 2005) (internal quotation marks omitted); *see also Gomez v. Vernon*, 255 F.3d 1118, 1127 (9th Cir. 2001) ("[A] retaliation claim may assert an injury no more tangible than a chilling effect on First Amendment rights.").

"[T]hreats alone can constitute an adverse action if the threat is capable of deterring a person of ordinary firmness from engaging in protected conduct." *Hill v. Lappin*, 630 F.3d 468, 474 (6th Cir. 2010). Even an unsuccessful attempt to have someone physically harmed in retaliation for protected speech would likely have a substantial chilling effect. *See Santiago v. Blair*, 707 F.3d 984, 992 (8th Cir. 2013). "'Any form of official retaliation for exercising one's freedom of speech, including prosecution, threatened prosecution, bad faith investigation, and legal harassment,

constitutes an infringement of that freedom.'" *Izen v. Catalina*, 398 F.3d 363, 367 n.5 (5th Cir. 2005) (citing *Smith v. Plati*, 258 F.3d 1167, 1176 (10th Cir. 2001)).

Try as the DOL may argue to the contrary, the First Amendment does not limit the types of actions which if taken by a government agency may constitute a violation of the First Amendment. The only limitation is whether the action is capable of deterring a person of ordinary firmness from exercising their First Amendment rights.

Here, the First Amendment claims by the Defendants against the DOL encompass both threats and action. The threats included the Anjo Investigation, and the filing of this suit should DMP and LPMS not withdraw the AO Request or dismiss the Texas Suit. The action included the filing of this suit when DMP and LPMS refused to withdraw the AO Request or dismiss the Texas Suit. That DMP and LPMS have not relinquished their First Amendment rights of petition is not, of course, determinative of whether the DOL acted unlawfully. The threat of the loss of vendor services essential to the continued operation of the Partnership Plans, which is the specific relief sought by the DOL in this suit, would likely deter any reasonable company from continuing to exercise their First Amendment rights.

VI. DEFENDANTS SUFFICIENTLY PLEAD CAUSAL CONNECTION BETWEEN THEIR PROTECTED RIGHTS AND PLAINTIFF'S ADVERSE ACTION

The First Circuit has observed that a First Amendment violation may be satisfied by circumstantial evidence that the constitutionally protected conduct was the driving factor that caused the retaliation. *Rosaura Bldg. Corp. v. Mun. of Mayagüez*, 778 F.3d 55, 67 (1st Cir. 2015), "'Close' temporal proximity between a plaintiff's protected activity and the state's retaliatory conduct can 'raise an inference of causation.'" *Rivera-Corraliza v. Puig-Morales*, 794 F.3d 208, 226 (1st Cir. 2015).

Contrary to the argument of the DOL, the *Counterclaim* specifically alleges that the DOL's First Amendment violations were "intentional."[19] The *Counterclaim* is also replete with facts showing a causal connection between this suit and the AO Request and Texas Suit and the Anjo Investigation. The Anjo Investigation was initiated by the DOL against the Defendants almost immediately after learning that the Defendants were providing services to the Partnership Plans.[20] It was the DOL which suggested tying settlement negotiations as to the Anjo Investigation with settlement negotiations as to the AO Request and Texas Suit.[21] The reason for this suggestion became clear when the DOL conditioned a favorable settlement of the Anjo Investigation against the Defendants upon the withdrawal by DMP and LPMS of the AO Request, and the dismissal by DMP and LPMS of the Texas Suit.[22] Only when DMP and LPMS refused to withdraw the AO Request and dismiss the Texas Suit, did the DOL (1) renew its extortive settlement demand of nearly *$10 million more* to settle with the Defendants than it had demanded to settle with the Defendants *and* DMP/LPMS and (2) file this suit against the Defendants seeking $40 million and an injunction enjoining the Defendants from ever acting as a fiduciary, service provider, or trustee to any plan covered by Title I of ERISA.[23]

In short, the factual allegations of the *Counterclaim* are more than sufficient to show a plausible causal connection between this suit and the AO Request, the Texas Suit, and the Anjo Investigation. It was the DOL itself, through its actions with respect to the Defendants, which established the requisite causal connection.

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[19] *Counterclaim* ¶¶ 162-163.

[20] *Counterclaim* ¶¶ 86-87.

[21] *Counterclaim* ¶¶ 123-124.

[22] *Counterclaim* ¶¶ 125-126, 133.

[23] *Counterclaim* ¶ 135.

PLAINTIFF MISREPRESENTS DEFENDANTS' PLEADING BURDEN AS TO THEIR APA CLAIMS

I. APA DOES NOT PROVIDE THE DOL THE DISCRETION TO VIOLATE THE LAW

The DOL's *Motion to Dismiss* broadly argues that the Administrative Procedure Act ("APA") does not apply to actions "committed to agency discretion by law."[24] It is settled law, however, that this discretion does not extend to constitutional violations, as alleged by the *Counterclaim* here. *See Rueda Vidal v. Dept. of Homeland Security,* 536 F.Supp.3d 604, 618 (C.D.Cal. 2021). Discretion likewise does not extend to agency action contrary to established law or congressional intent, as alleged by the *Counterclaim* here with respect to the DOL's enforcement of ERISA as to the Partnership Plans.[25] *See Electricities of North Carolina, Inc. v. Southeastern Power Admin.*, 774 F.2d 1262, 1267 (4th Circ. 1985) *See also Cardoza v. CFTC*, 768 F.2d 1542, 1547 (7th Cir. 1985) (claiming reviewal authority when not to do so would "frustrate Congressional intent"). Contrary to the DOL's position, discretion is not a defense to the *Counterclaim*.

II. FINAL AGENCY ACTION FORMS THE BASIS OF THE *COUNTERCLAIM*

The DOL's *Motion to Dismiss* also broadly argues that there has been no final agency action with respect to the Anjo Investigation or this suit.[26] This argument incorrectly presumes that the *Counterclaim* turns entirely upon the merits of the Anjo Investigation and this suit. It does not. The *Counterclaim* is based upon the DOL's motivation in instituting the Anjo Investigation and this suit, which is to (1) chill the First Amendment rights of the Defendants, DMP, and LPMS; and (2) abrogate its enforcement responsibilities under ERISA. As noted above, otherwise lawful conduct by the government may still be unlawful if motivated by an unlawful purpose.

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[24] *Motion to Dismiss*, p. 19.

[25] *Counterclaim* ¶¶ 167-168.

[26] *Motion to Dismiss*, pp. 21-22.

In this respect, the U.S. Supreme Court decision in *Bennett v. Spear*, 520 U.S. 154 (1997) is instructive. There the Court held that "two conditions must be satisfied for agency action to be 'final.'" *Id* at 177. "First, the action must mark the "consummation" of the agency's decisionmaking process." Id. at 177-78. "And second, the action must be one by which 'rights or obligations have been determined, 'or from which 'legal consequences will flow.'" Id. at 178.

Here, the decision to file suit against the Defendants was arguably the consummation of the DOL's decision-making process as to the Anjo Investigation. This conclusion is supported by the analysis in *Alpine Securities Corp. v. SEC*, Case No. 2:18-cv-00504, 2024 WL 4681816 at * 13 (D. Utah Nov. 5, 2024):

> "…the decision to file an enforcement action in federal court arguably represents the conclusion of the agency's deliberations and that judicial action is necessary. Once an agency initiates a judicial action, the progress of the enforcement proceedings are outside of its exclusive control and further decisionmaking is lodged in the court. And any judgment that would be entered in the action would be entered by the court, rather than the agency."

See also AT&T v. E.E.O.C., 270 F.3d 973, 975 (D.C. Cir. 2001)("there clearly would be final agency action if the Commission filed a lawsuit against AT&T").

Legal consequences also have plainly flowed from the DOL's decision to file this suit. The Defendants do not find themselves defending against an ordinary enforcement action by the DOL; they find themselves defending an enforcement action brought by the DOL in violation of the First Amendment and ERISA. As such, the decision to file this suit is a final agency action reviewable under the APA.

CONCLUSION

For the reasons set forth herein, the Defendants respectfully request that this Court enter an order (1) denying Plaintiff's *Motion to Dismiss*; and (2) awarding such other and further relief to which the Defendants may be justly entitled. Alternatively, the Defendants request the

opportunity to file an amended Counterclaim to cure any pleading deficiencies identified in the *Counterclaim* by the Court.

WE HEREBY CERTIFY that on this date, we electronically filed the foregoing with the Clerk of the Court using the CM/ECF system, which will send notification of such filing to all attorneys of record.

RESPECTFULLY SUBMITTED.

In San Juan, Puerto Rico this 22nd day of September 2025.

HALLETT & PERRIN, P.C.

/s/ Edward P. Perrin, Jr.

Edward P. Perrin, Jr. (*Pro Hac Vice*)
Texas Bar No. 15796700
eperrin@hallettperrin.com
James N. Henry, Jr. (*Pro Hac Vice*)
Texas Bar No. 0079396
jhenry@hallettperrin.com
1445 Ross Ave., Suite 2400
Dallas, Texas 75202
Tel. (214) 953-0053
Fax: (214) 922-4142

Attorneys for Defendants-Counterclaim Plaintiffs Suffolk Administrative Services, LLC and Providence Insurance Co., I.I.

WAGNER LAW GROUP

/s/ Stephen Rosenberg

Stephen Rosenberg (*Pro Hac Vice Application Pending*)
BBO # 558415
SRosenberg@wagnerlawgroup.com
125 High Street
Oliver Street Tower
Boston, Mass.02110
Tel: 617.357.5200
Fax: 617.357.5250

Attorneys for Defendant-Counterclaim Plaintiff Alexander Renfro

FREEMAN MATHIS & GARY, LLP

/s/ Jonathan Crumly
Jonathan Crumly (*Pro Hac Vice*)
Georgia Bar No. 199466
Jonathan.Crumly@fmglaw.com
100 Galleria Parkway, Suite 1600
Atlanta, Georgia 30339-5948
Tel: 770.818.0000
Fax: 770.937.9960

Robert G. Chadwick, Jr. (*Pro Hac Vice*)
Texas Bar No. 04056075
Bob.Chadwick@fmglaw.com
Emaan Bangash (*Pro Hac Vice*)
Texas Bar No. 2412655
7160 Dallas Parkway, Suite 625
Plano, Texas 75024
Tel: 469.895.3003
Fax: 888.356.3602

Attorneys for Defendants-Counterclaim Plaintiffs William Bryan and Arjan Zieger

O'NEILL & BORGES, LLC

/s/ Antonio L. Roig-Lorenzo
Antonio L. Roig-Lorenzo
USDC No. 207712
antonio.roig@oneillborges.com
250 Muñoz Rivera Ave., Ste. 800
San Juan, PR 00918-1813
Telephone: 787-764-8181
Fax: 787-753-8944

/s/ Alberto J. Bayouth-Montes
Alberto J. Bayouth-Montes
USDC No. 228313
alberto.bayouth@oneillborges.com
250 Muñoz Rivera Ave., Ste. 800
San Juan, PR 00918-1813
Telephone: 787-764-8181
Fax: 787-753-8944

Local Counsel for all Defendants-Counterclaim Plaintiffs