CASE NO. 06-56662

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

SERVICE EMPLOYEES INTERNATIONAL UNION,
LOCAL 1877, AFL-CIO,

Defendant/Counter-Claimant/Appellant,

vs.

ARAMARK FACILITY SERVICES,

Plaintiff/Counter-Defendant/Appellee.

On Appeal from the United States District Court, Central District of California
Case No. CV 06-0608 GPS

Honorable George P. Schiavelli

BRIEF OF AMICUS CURIAE NATIONAL IMMIGRATION LAW CENTER IN SUPPORT OF APPELLANT

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I. INTRODUCTION

Amicus Curiae National Immigration Law Center (NILC) has had ample experience dealing with the adverse impact that the Social Security Administration ("SSA") no-match letters have had on all U.S. workers. Because employers often mistake no-match letters from the SSA as a notice about an employee's authorization to work in the United States, immigrant and native-born workers alike have unjustly suffered adverse employment actions. NILC, through its legal assistance programs, has assisted employees and organizations in correcting no-match discrepancies and educating employers and employees about their responsibilities in responding to no-match letters.

Each year SSA sends letters to employers advising them that there is a discrepancy between their Wage and Tax Statement and the SSA's records. These letters are commonly referred to as SSA "no-match" letters. While the letters are sent only for the purpose of properly crediting employee earnings, many employers were confused about the implications of the letters.

Because of this early confusion among employers about the SSA no-match letters, several workers' rights and immigrants' rights organizations including *amicus curiae* advocated with the SSA throughout the years to

include protective language in the no-match letters to prevent adverse employment actions against workers – similar to the unjust firing of the janitors by the employer in the matter between Service Employees International Union, Local 1877 and Aramark Facility Services. The SSA did add protective language in their no-match letters to provide guidance to employers about not taking adverse actions based on the no-match letter and to inform workers about their rights if employers did act unlawfully.

Despite the protective language, employer misuse of the SSA no-match letters has caused great harm to low-wage workers nationwide. A large proportion of employers who receive the SSA no-match letter employ low-wage immigrant workers, and many no-match names are Latino or Asian, or of other nationalities who use compound names or whose names are frequently misspelled by employers. Although workers and their union representatives usually never see the lists, employers sometimes use them as a reason to fire or suspend employees temporarily without pay. The letters have also been used to undermine or eliminate organizing activity at worksites or to simply fire long-term workers only to replace them with new hires at lower wages.

Amicus Curiae supports the reversal of the district court's order vacating the labor Arbitrator's Award because the court erroneously

concluded that the no-match letter from the SSA is evidence of an employee's authorization to work in the United States and that the Award therefore violates public policy. If allowed to stand, the district court's order would contravene the various federal agencies' guidance on this issue, and would have a great and harmful impact on both foreign born and native born workers in the United States, by facilitating employer misuse of SSA no-match letters to discriminate against, retaliate against and otherwise impinge on workers' rights.

II. STATEMENT OF AMICUS CURIAE

Amicus Curiae National Immigration Law Center (NILC) is a national legal advocacy organization whose mission is to advance and promote the rights of low-income immigrants and their family members. NILC has a national reputation for its expertise in the complex intersection of the employment and public benefits rights of immigrants. NILC has litigated key immigration-related employment law cases, trained over 10,000 advocates, attorneys, and government officials on how to identify and combat citizenship and national origin discrimination as well helping protect the employment rights of all employees, regardless of immigration status. Through policy analysis, advocacy, and impact litigation, NILC appeared as amicus curiae in *Hoffman Plastic Compounds, Inc. v. Nat'l Labor Relations*

Bd., 535 U.S. 137 (2002), and has also appeared as co-counsel in post-*Hoffman* cases such as *Rivera, et al. v. Nibco, Inc.*, 364 F.3d 1057, reh'g and reh'g in banc denied, 384 F.3d 322 (9th Cir. 2004), and *Singh v. Jutla*, et al., 214 F. Supp. 2d 1056 (N.D. Cal. 2002).

III. ARGUMENT

A. THE DISTRICT COURT'S MISUNDERSTANDING OF THE PURPOSE OF SOCIAL SECURITY ADMINISTRATION NO-MATCH LETTERS RESULTED IN AN ERRONEOUS ORDER VACATING THE LABOR ARBITRATION AWARD.

1. The Purpose of the SSA No-Match Letter is to Ensure that the SSA is Properly Crediting Workers' Earnings.

Each year employers are required to file Wage and Tax Statements (Form W-2) with the SSA and the Internal Revenue Service (IRS) to report the wages and taxes for their employees for the previous calendar year.[1] In 2005, the SSA processed about 235 million W-2s sent by about 6.6 million employers that totaled approximately $4 trillion in reported wages.[2]

The SSA sends out "no-match" letters when the names or Social Security Numbers (SSN) listed on an employer's W-2 report do not agree

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[1] Social Security Administration, *Social Security Online, Employer W-2 Filing Instructions & Information* available at http://www.ssa.gov/employer/gen.htm.

[2] *Basic Information Brief: SSA "No-Match" Letters* (National Immigration Law Center, Oct. 2006), available at http://www.nilc.org/immsemplymnt/SSA-NM_Toolkit/index.htm).

with the SSA's records.[3] The purpose of the SSA no-match letter is to notify workers and their employers that the employees are not receiving proper credit for their earnings because of this discrepancy, which can affect future retirement or disability benefits administered by the SSA.

There are three types of no-match letters: (1) the letter SSA sends directly to workers; (2) the letter SSA sends to employers about individual employees; and (3) the letter SSA sends to employers about a group of workers. No-match letters are sent on a rolling basis throughout the year. SSA is required to process 98.5 percent of wage reports by September of each year.

B. SOCIAL SECURITY ADMINISTRATION NO-MATCH LETTERS ARE NOT INDICATORS OF AUTHORIZATION TO WORK IN THE UNITED STATES.

1. SSA No-match Letters are Not a Method by Which Employers Verify a Worker's Employment Authorization or Immigration Status.

The notion that SSA no-match letters indicate that an individual is not authorized to work in the United States is simply incorrect. First, as discussed above, these no-match letters are sent by SSA solely for the purpose of indicating that there is a discrepancy between the workers' SSN

[3] *Id.*; *see also* Social Security Administration, *Social Security Online, Questions?* No. 20 (updated March 15, 2007), available at http://ssa-custhelp.ssa.gov/cgi-bin/ssa.cfg/php/enduser/std_alp.php.

and/or the name on file with the agency based on the information reported in the employer's W-2.

There are many reasons for "no-matches," none of which have anything to do with the immigration status or work authorization of workers, and the no-match letters themselves do not prove any wrong doing by either employers or employees.[4] Many of the mismatches are based, instead, on simple human error, for example clerical data entry mistakes and misspellings by the employee, the employer or the SSA; or life changes, such as name changes, marriage and divorce.

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[4] *See* Social Security Administration, DÉCOR Employer Letter, "Social Security Administration; Retirement, Survivors and Disability Insurance; Request for Employer Information." (If SSA does not have a worker's home address or if the home address it has is missing or incorrect, SSA sends the no-match letter to the worker's employer. These are known as "DECOR employer letters" available at www.nilc.org); *see also* Social Security Administration, DÉCOR Employee letter, "Social Security Administration; Retirement, Survivors and Disability Insurance; Request for Employee Information." (These are referred to by SSA officials as "DECOR employee letters."); DÉCOR letters are part of SSA's decentralized correspondence (DECOR) program. *See also* Social Security Administration, EDCOR Letter, "Social Security Administration; Retirement, Survivors and Disability Insurance; Employer Correction Request," available at www.nilc.org. (SSA's educational correspondence program (EDCOR). These are the letters that often result in large numbers of workers being fired at a time. For example, a construction company with 30 employees will receive the EDCOR letter if 10 of the 30 employees reported on W-2s result in mismatches. A manufacturer with 1,800 employees will receive the EDCOR letter if 9 of its 1,800 employees reported on W-2s result in mismatches.)

Second, SSA no-match letters are not and have never been reliable indicators of work authorization or immigration status. The SSA letters themselves emphasize to employers that SSA no-match letters do not "make any statement about any employee's immigration status."[5] In testimony in July of 2006 before the House Committee on Ways and Means, the Commissioner of Social Security emphasized that the source of SSA's database information is the Form W-2, and "there is no citizenship or immigration status information in that document." [6]

There is no way to accurately determine whether a SSA no-match letter is the result of a typographical error, out-of-date information, or some other legitimate reason, let alone an indicator of a person's immigration status. For these reasons, the district court erred in reversing the labor Arbitrator's Award.

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[5] Letter, Hurt, Assoc. Comm. for Central Op. SSA (Oct. 9, 2004); *see also* Sample DÉCOR Employer Letter, *supra*; Sample EDCOR Employer letter, *supra*.

[6] *See* Statement of The Honorable Jo Anne B. Barnhart, Commissioner Social Secuirty Administration, *Testimony Before House Committee on Ways and Means* (July 26, 2006), available at http://waysandmeans.house.gov/hearings.asp?formmode=view&id=5172.

2. **The SSA's Database Contains Millions of Inaccurate Records.**

Each year employers send a report based on Forms W-2 to SSA indicating their employees' annual earnings and corresponding deductions. SSA then matches each worker's name and SSN to the Numerical Identification File (NUMIDENT), which is SSA's primary database of SSN holders.[7] NUMIDENT is not an immigration database and consists of information collected from applications for initial or replacement SSNs.[8] This database contains only limited and incomplete immigration information.[9]

Moreover, the SSA's database is highly inaccurate. By its own estimates, approximately 17.8 million of its records contain discrepancies

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[7] *Report to Congress on the Basic Pilot Program* (U.S. Citizenship and Immigration Services, June 2004) hereinafter "USCIS Report" at 2.
[8] Kevin Jernigan, "Eligible to Work? Experiments in Verifying Work Authorization," *Migration Policy Institute Insight*, Nov. 2005, hereinafter "Jernigan" at 3.
[9] The database "contains information on name, date of birth, and citizenship status of persons issued Social Security cards, which enables SSA to confirm work authorization for U.S. citizens and some noncitizens who are permanently work authorized." USCIS Report, *supra* note 42, at 2. SSA collects immigration status information only on those persons who are work-authorized incident to status, such as lawful permanent residents, asylees and refugees. *Id.* at 4. There are many categories of individuals that are authorized to work who would not be captured in this database.

related to name, date of birth, or citizenship status.[10] SSA reports that of the approximately 46.5 million noncitizen records contained in SSA's database, 4.8 million contain discrepancies.[11]

If there is a match of the SSN and the first seven letters of the surname between NUMIDENT and the W-2, the earnings are posted to the worker's Master Earnings Record. About 10 percent of submissions cannot be matched. SSA then conducts a "front end" routine and a subsequent "back end" process to correct mistakes in the data and match the information. Neither of these processes involves the collection or use of immigration status data. The SSA no-match letter is generated as part of the "back end" process to try to match earnings.[12]

Inaccuracies in the SSA database have resulted in no-matches being generated for tens of thousands of U.S. native born workers and lawfully work authorized workers. In turn and as will be discussed, these no-matches have often resulted in employers misusing the information contained in the SSA no-match letter by discriminating against foreign born workers and

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[10] *Congressional Response Report: Accuracy of the Social Security Administration's NUMIDENT File* (Office of the Inspector General, Social Security Administration, Dec. 2006), available at www.socialsecurity.gov/oig/ADOBEPDF/audittxt/A-08-06-26100.htm.

[11] *Id.* at n. 5.

[12] *Social Security, Better Coordination Among Federal Agencies Could Reduce Unidentified Earnings Reports*, GAO-05-154 (GAO, Feb. 2005) at 7-8.

committing unfair and unjust employment actions simply because of an erroneous no-match letter.

3. The SSA and IRS Have Issued Guidelines for Employers on How to Respond to No-Match Letters.

Both the SSA and the IRS have issued guidelines for employers advising employers on how to respond to no-match letters. Employers are advised by the SSA to take the certain steps upon receipt of a no-match letter. First, employers should compare the information sent by SSA with its records to make sure the employer did not make any errors. Second, if there is no error with the employer's records, the employer should notify the employee of the discrepancy and ask the worker to check his/her Social Security card and inform the employer of any name or Social Security number difference between the employee's records and his/her card. If either of these two steps indicated that the employment records are incorrect, the employer should correct its records and submit only the corrected data to SSA. If no error exists with the employer's records, the employer should advise the employee to check with the local Social Security office and provide any new information to the employer. The employer should document its actions and retain its documentation for a period of three

years.[13] The SSA requires that no other action on behalf of the employer be taken with respect to the no-match and specifically advises against the employer taking any adverse action against a worker.

The IRS advises that employers take similar steps in response to a no-match letter.[14] The IRS guidelines advise that an SSN discrepancy or "no-match" letter will not trigger a penalty against an employer. In addition, the IRS, like the SSA, stressed that employers should not make inferences about a worker's immigration status based on no-match letters.[15]

Neither the SSA nor the IRS required Aramark to fire the janitors in response to the no-match letter. Moreover, Aramark is a signatory to a union collective bargaining agreement (CBA) which requires the employer to have "just cause" before firing any workers covered by the CBA. ER 15-

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[13] *See* Social Security Administration, *Employer W-2 Filing Instructions & Information*, (updated December 6, 2006), available at http://socialsecurity.gov; *see also* Social Security Administration, *Social Security Online, Employer W-2 Filing Instructions & Information, What should I do if our records do not match?* Question No. 21 (updated December 6, 2006) available at http://employer-ssa.custhelp.com/cgi-bin/employer_ssa.cfg/php/enduser/std_adp.php?p_faqid=1418&p_created=1116873411&p_sid=CtptmjCi&p_accessibility=0&p_lva=&p_sp=cF9zcmNoPSZwX3NvcnRfYnk9JnBfZ3JpZHNvcnQ9JnBfcm93X2NudD04NyZwX3Byb2RzPSZwX2NhdHM9JnBfcHY9JnBfY3Y9JnBfc2VhcmNoX3R5cGU9YW5zd2Vycy5zZWFyY2hfbmwmcF9wYWdlPTI*&p_li=&p_topview=1.

[14] Internal Revenue Service, *Reasonable Cause Regulations and Requirements for Missing and Incorrect Name/ITINs*, Rev. 12-2004 (December 2004), available on file with the author.

[15] *Id.*

16. The Labor Arbitrator took all of the information into account when he issued his decision. The district court therefore did not have the authority to vacate the decision of the Labor Arbitrator.

4. Because a No-Match Letter from the SSA is Not an Indication of Work Authorization or Immigration Status, Reverification of Immigration Status is Not Required.

As discussed above, receipt of a SSA no-match letter is not a notice indicating that a worker is unauthorized to work. The letter, in fact, makes no statement about a person's immigration status or eligibility to work in the United States. Additionally, the SSA sets out steps that employers should take in response to a no-match letter, advises employers against taking adverse employment actions against workers because of the no-match letter, and expressly states that the no-match letter does not indicate that an employer is unauthorized to work. For all of these reasons, employers are not required to and should not reverify a worker's employment authorization documents or question a worker's immigration status in response to a no-match letter.[16]

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[16] The federal immigration law requires that employers verify employment authorization within 3 days of hire. 8 U.S.C. §1324a The law requires that employers re-verify employment documents in limited circumstances. Reverification is appropriate and obligated under the law when an individual's employment authorization expires, only then must the employer reverify the employee's work authorization documents; (8 C.F.R.

Aramark in its motion for summary judgment before the district court argued that the receipt of the no-match letter gave the employer "constructive knowledge" that the janitors were unauthorized to work. The Labor Arbitrator disagreed with Aramark and found that the employer violated the CBA when it fired the workers because of the SSA no-match letter. The district court erroneously agreed with Aramark and incorrectly vacated the labor Arbitration Award finding that the decision violated public policy.

As an evidentiary matter, an employer's receipt of an SSA no-match letter by itself does not constitute "constructive knowledge" of unauthorized immigration status.[17] The district court's decision that the no-match letter is

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274a.2(b)(1)(vii)), or in the event that the employer obtains actual or constructive knowledge that an individual is not authorized to work.

[17] The Immigration Reform and Control Act (IRCA) of 1986 amended the Immigration and Nationality Act (INA) by creating employer sanctions - which made it unlawful for the first time for employers to knowingly hire or continue to hire workers knowing that those workers are unauthorized to work. 8 U.S.C. § 1324a. "The term *knowing* includes not only actual knowledge but also knowledge which may fairly be inferred through notice of certain facts and circumstances which would lead a person, through exercise of reasonable care, to know about a certain condition. Constructive knowledge may include, but is not limited to, situations where an employer: (i) Fails to complete or improperly completes the Form I-9; (ii) Has information available to it that would indicate that the alien is not authorized to work, such as Labor Certification and/or an Application for Prospective Employer; or (iii) Acts with reckless and wanton disregard for the legal

essentially a method of verifying immigration status or authorization to work directly contravenes longstanding federal guidance from not only the SSA and IRS as discussed, *supra*, but also the Office of Special Counsel for Unfair Immigration Related Employment Practices (OSC)[18] and the former Immigration and Naturalization Service (INS) General Counsel.

For years, the INS General Counsel has instructed employers along identical lines as the SSA:

> If the document or documents presented to verify work authorization appear on their face to be genuine and to reasonably relate to the individual, the subsequent receipt of the SSA letter mentioned above does *not* impose any affirmative duty upon the employer to investigate further into an employee's eligibility to work in the United States. In addition, the receipt of this SSA letter by the employer, *without more*, would *not* be sufficient to establish constructive knowledge on the part of the employer regarding the employment eligibility of the named employee.[19]

Similarly, the OSC has also provided the following guidance:

> The receipt of a no-match letter, standing alone, does not indicate to an employer that he or she need question the genuineness of documents or

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consequences permitting another individual to introduce an unauthorized alien into its work force or to act on its behalf." 8 C.F.R. § 274a.1(l)(1).

[18] OSC is part of the Civil Rights Division of the U.S. Department of Justice, and is the sole agency with jurisdiction over the anti-discrimination provisions of the INA.

[19] Letter, Paul Virtue, Acting Gen. Coun. INS, HQ 274A (Feb. 17, 1994) (emphasis added), on file with the author.

information previously presented to complete an INS Form I-9.[20]

The district court's decision also contradicts case law in this circuit. In the seminal *Collins Food Intn'l v. I.N.S* case, the Ninth Circuit cautioned against the expansion of the doctrine of constructive knowledge: "IRCA . . . is delicately balanced to serve the goal of preventing unauthorized alien employment while avoiding discrimination against citizens and authorized aliens. The doctrine of constructive knowledge has great potential to upset that balance, and it should not be expansively applied." 948 F.2d 549, 554-555 (9th Cir. 1991). Accordingly, the court instructed that "[a] finding of constructive knowledge requires "willful blindness" and "to expand the concept of constructive knowledge . . . would not serve the intent of Congress, and is certainly not required by [IRCA]." *Id.* at 555.

In the matter at hand, the district court in essence extends the definition of "constructive knowledge" well beyond the holdings in *Collins* and in *Mester Manufacturing Co. v. INS*, 879 F.2d 561 (9th Cir. 1989), and other constructive knowledge cases arising under the employer sanctions

[20] Letter from Sarah DeCosse, Senior Trial Attorney, Office of Special Counsel for Immigration-Related Unfair Employment Practices, to Ana Avendaño Denier, Associate General Counsel, American Federation of Labor and Congress of Industrial Organizations (Apr. 1, 2004), on file with the author.

provision of the Immigration and Nationality Act, 8 U.S.C. § 1324a, in order to vacate the labor Award.

In *Mester*, the court held that an employer had constructive knowledge of a worker's unlawful status when it received information directly *from the INS* that an employee was an "illegal alien" but did not terminate the employee for two weeks. *Id.* at 567–68. These are not the facts that were presented before the labor Arbitrator and before the district court.

Consistent with *Mester*, cases have found constructive knowledge only where the employer has been provided specific information from a source knowledgeable about a worker's immigration status, where the employer failed to complete the Form I-9 (coupled with other suspicious circumstances), or in egregious circumstances. *See U.S. v. Jonel, Inc.* 1998 WL 804705 (OCAHO), *14 (Labor Department notice to employer that workers were unauthorized constituted constructive knowledge); *New El Ray Sausage Co. v. I.N.S.,* 925 F.2d 1153, 1157 (9th Cir. 1991) (INS gave employer "specific and detailed information" that it was employing undocumented workers); *U.S. v. American McNair*, 1OCAHO 285 (1991) (employee failure to present any work authorization documents and

notification of employer that he was ineligible for amnesty constituted constructive knowledge).

Neither existing case law nor federal immigration law requires that employers verify work authorization status or immigration status upon receipt of a SSA no-match letter. In addition, under current immigration law the receipt of an SSA no-match letter does not provide an employer with "constructive knowledge" that an employee is not authorized to work.[21] The decision of the district court should therefore be reversed and the Labor Award should be confirmed.

C. THE DISTRICT COURT'S DECISION EXACERBATES DISCRIMINATION AND EMPLOYER MISUSE OF SOCIAL SECURITY ADMINISTRATION NO-MATCH LETTERS.

Hundreds of U.S. workers have been unjustly fired or suspended from their jobs because of the SSA no-match letters. Because of early confusion among employers about the SSA no-match letters, the SSA added protective language in the letters. The no-match letters warn employers not to take adverse action against workers based on having received the SSA no-match

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[21] In July of 2006, well after the labor Arbitrator's Award was issued, the Department of Homeland Security issued a proposed regulation entitled "Safe-Harbor Procedures for Employers Who Receive a No-Match Letter." 71 Fed. Reg. 34281 (June 14, 2006). This regulation is only proposed and has not been implemented and should therefore have no bearing on the matter before the Court.

letter alone, including laying off, suspending, firing, or discriminating against an individual who is named in the letter.[22] Yet, employer misuse of the no-match letters continues to exist. If allowed to stand, the district court's decision will exacerbate discrimination, retaliation and the unjust firings of workers caused by the SSA no-match letters.

1. SSA No-Match Letters Have Resulted in the Unjust Firings of U.S. Citizens and Work-Authorized Noncitizens.

Based on *amicus curiae's* experience over the years but in particular with SSA's policy in 2002 where the agency sent the no-match letter to almost one million employers, a decision such as the one by the district court could potentially result in employers precipitously and indiscriminately firing workers who appear on a no-match list before workers have a chance to show that they are on the list because of the simple human error, database errors, or life changes described above. As a result, these mass no-match firings may include the terminations of thousands of work-authorized employees who routinely receive SSA no-match letters.

For example, in 2002, U.S. citizens, lawful permanent residents, and other work-authorized employees were among the estimated 100,000

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[22] *See* Sample "DECOR" Employer Letter, available at http://www.nilc.org/immsemplymnt/SSA-NM_Toolkit/DECORE_Employer_ltr.pdf; *and* Sample "EDCOR" Employee Letter, available at http://www.nilc.org/immsemplymnt/SSA-NM_Toolkit/EDCORE_ltr.pdf.

workers who lost their jobs as a result of the approximately 800,000 no-match letters sent by SSA in 2002.[23] Job losses were most acute in low-wage industries such as agriculture, cleaning, construction, food service, and health care. For example, no-match firings devastated the workforce at Stanford Medical Center in Palo Alto, California, where 83 percent of workers on a no-match list lost their jobs.[24] Based on the severity of the 2002 job losses, the U.S. Chamber of Commerce declared an official labor shortage and urged SSA to change its policy.[25] The SSA agreed to decrease the number of no-match letters because of the increased costs it incurred in responding to employer and employee questions without it resulting in an increased number of corrections.[26]

No-match firings across the nation continued into 2003, however. In August, Peco Foods, Inc. of Canton, Mississippi terminated about 200

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[23] Mary Beth Sheridan, "Records Checks Displace Workers: Social Security Letters Cost Immigrants Jobs," WASH. POST, Aug. 2, 2002.
[24] "A Crackdown on Workers," S.F. CHRON., Aug. 12, 2002.
[25] *"The Immigration Crisis,"* COX NEWS SERVICE, Aug. 14, 2002.
[26] Chirag Mehta, et al., *Social Security Administration's No-Match Letter Program: Implications for Immigration Enforcement and Workers' Rights* (Center for Urban Economic Development, University of Illinois at Chicago, Nov. 2003) at 7, available at http://www.uic.edu/cuppa/uicued/npublications/recent/SSAnomatchreport.pdf (hereinafter "Mehta").

workers in response to no-match letters.[27] That same year, Suncast, Inc., a Chicago-area outdoor garden product manufacturer, terminated over 100 employees in response to no-match letters.[28] By the end of 2003, a national survey conducted by the University of Illinois at Chicago's Center for Urban Economic Development determined that approximately 53.6 percent of employers responding to no-match letters terminated the listed workers.[29] Despite strong warnings to employers that appeared on the face of the letter, the study found that workers were summarily fired, often without any opportunity to correct the no-match discrepancies or any explanation of the no-match process.[30]

The following are stories reported to and collected by organizations including amicus curiae of adverse employment actions against U.S. citizens and other work-authorized noncitizens because of SSA no-match letters:[31]

- Mr. Samuel Harris. In late summer of 2003, Mr. Samuel Harris, an African American man in Virginia, was fired from his job because his employer received an SSA no-match letter regarding a discrepancy with

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[27] Peggy Matthews, "Plan to Round Up, Deport Illegals Angers Activists," THE CLARION-LEDGER, Aug. 12, 2003.
[28] Stephanie Blozen, "Latinos Start Boycott Against Batavia Firms," CHI. TRIB., Aug. 12, 2003.
[29] Mehta, *supra* note 4, at 13.
[30] *Id.* at 15.
[31] All individual worker names have been changed to protect their identities and are on file with NILC.

respect to Mr. Harris's SSN. Mr. Harris, who is a U.S. citizen, went to the local SSA office to correct his information. Apparently, SSA had issued Mr. Harris a duplicate SSN that belonged to a deceased person. Although Mr. Harris was able to correct his information with SSA, his employer refused to continue to employ him, thinking that Mr. Harris was engaging in identity theft or similar wrongdoing. He was fired and out of work for several months and had to file an arbitration case to get his job back.

- Mrs. Noelle Lopez. In July 2002, Mrs. Lopez, a worker from North Carolina, was injured on the job. While she was on leave, her employer notified her that it had received an SSA no-match letter for her. She corrected the discrepancy, which was based on a typographical error in the W-2 that her employer had filed with SSA. Weeks later, while still on leave for her injury, the employer asked Mrs. Lopez to reverify that she continued to be eligible to work in the United States because her work authorization had expired. She had employment authorization based on Temporary Status Program (TPS), and had already applied for a renewal, but the Immigration and Naturalization Service (INS) sent her an Employment Authorization Document (EAD) with someone else's picture. Although she was able to straighten this problem out, when her

doctor told her she could go back to work, the employer denied her a job because she had "too many immigration problems."

- Mr. James Heggen. An employer in Massachusetts refused to hire Mr. Heggen, a lawful permanent resident of the United States, for a permanent clerical position due to a typographical error on his Social Security card. Mr. Heggen's name appears as "Heggen" on his alien registration card or "green card," but on his Social Security card, his name is spelled "Hegen"—with one less "g." Based on this missing "g," the employer denied Mr. Heggen a permanent position, claiming that it had to be *more careful in these times*. Mr. Heggen is Black and was born in the United Kingdom. His parents immigrated to the U.K. from the Caribbean. Together, the family immigrated to the United States when Mr. Heggen was a child. Because he and his parents received their permanent immigration documents decades ago, Mr. Heggen cannot file for a correction of his Social Security card locally, and, therefore, not quickly. Correcting this minor Social Security discrepancy could take several months. Frustrated after being denied this permanent position, Mr. Heggen contacted a local community-based legal services organization for assistance. This organization immediately sent a letter to the employer, setting forth the potential illegality of the employer's

actions. Subsequently, the employer hired Mr. Heggen on a temporary basis. The week of August 7, 2006, after additional consultation with the organization, the employer hired Mr. Heggen for the permanent position.

2. SSA No-Match Letters Have Resulted in Increased Discrimination by Employers.

A disproportionate number of names on no-match lists are "foreign-sounding" names of newcomers to the United States, and many SSA letters are sent to employers with large numbers of newcomers in their workforces. Employers who believe they will face business disruption due to the letters have an incentive to prefer employees they think are less likely to receive the letters. Employers may also choose to simply dismiss employees who appear or sound foreign. These discriminatory employment actions would run afoul of federal and state antidiscrimination laws and other worker protections and lead to costly and protracted wrongful termination litigation.

Employment discrimination against authorized noncitizen workers—particularly against Latinos, Latinas, and Asians—was rampant after the passage of IRCA in 1986. A 1990 U.S. General Accounting Office (GAO) study reported a pattern of discrimination that resulted solely from employer sanctions, including discrimination on the basis of foreign accents or appearance and preferences of certain authorized workers over others. In fact, the GAO estimated that an average of 19 percent of employers—almost

one in five—participated in one or more discriminatory practices as a result of the 1986 law. These results were confirmed by nearly a dozen studies conducted locally during the 1990s by human rights commissions and other organizations, which also found significant discrimination resulting from the implementation of employer sanctions.[32]

Employment discrimination also increased when SSA began sending close to a million no-match letters in 2002. The number of immigration-related unfair employment referrals and investigations fielded by OSC has risen dramatically. From 1994 to 2000, OSC conducted only 20 investigations into firings stemming from employers that fired workers based on SSN verification matters. From 2001 to 2003, OSC opened 29 investigations. Three of the investigations opened after 2001 resulted in settlements favorable to workers, and ten investigations were open as of 2003.[33] Although recent statistics are unavailable, OSC recognized in its April 2005 quarterly newsletter that OSC "staff members frequently provide

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[32] *Immigration Reform: Employer Sanctions and the Question of Discrimination*, GGD-90-62 (GAO, Mar. 29, 1990), available at http://archive.gao.gov/d24t8/140974.pdf.

[33] Mehta, *supra* note 4, at 25.

assistance to workers" who face adverse employment actions by employers based on the no-match letters.[34]

3. SSA No-Match Letters Have Been Misused by Employers to Retaliate Against Workers Who Exercise Their Workplace Rights.

Unscrupulous employers already use the SSA no-match letter to stymie organizing campaigns and to retaliate against workers who have been injured on the job or complain of unpaid wages or other labor violations. In documented cases (including arbitration decisions) from across the country, employers initially ignored SSA no-match letters and then decided to use them as a pretext to fire workers who participated in efforts to improve working conditions and wages. Allowing the decision of the district court to stand would only exacerbate this problem.

Additional stories about ways in which no-match letters have been used to stymie organizing efforts or otherwise interfere with workers' rights:

- North Carolina. In July 2006, during a heated legal battle over a union election results, at least 24 Latino immigrant workers at a modular building construction company were suspended without pay because they were listed on a no-match letter. All 24 had voted to unionize. Many of the 24 have also initiated race and sex-based discrimination charges

[34] *OSC Update* (OSC, U.S. Department of Justice, Civil Rights Division, Apr. 2004) at 2.

against their employer with the EEOC. A former supervisor at the company reported to the press: "These workers have been used and abused. As supervisors, we were told we needed production and to crack the whip to get it. We were told not to worry because these workers are just wetbacks and have no legal rights." A large group of African American workers have also filed complaints against this company with the EEOC. To protest the no-match firings, workers walked out on the day the firings took place. The workers and their union are also contemplating race and sex-based discrimination class action lawsuits.

- California. In 2006, after months of intensive organizing, a group of nursing home workers, mainly immigrant Latina workers, marched to their manager's office to announce that they had joined together as a union in order to improve wages and working conditions and would seek formal recognition for their union under federal labor law. That afternoon, a head manager called one of leaders of the march into the office, pulled out a photocopy of that worker's Social Security card, wrote "NO GOOD" in bold letters across the photocopy, and suspended the leader without pay. Angered by management's action, the workers from the morning march crowded back into the manager's office and demanded reinstatement for their suspended colleague, denouncing

management's action as a blatant anti-union tactic. Caught off guard, the manager immediately reinstated the suspended union leader. While these workers were successful, other workers have not been able to mobilize as effectively against manipulation of SSN verification issues by employers.

- Oregon. In 2006, a Latina immigrant worker had been working as a housekeeper at an assisted living center. When it came time for her to qualify for health insurance and other benefits, the employer produced an SSA no-match letter. The worker suspects that the employer had received the letter earlier, but held it just before the benefits would have kicked in.
- Oregon. In 2003, an employer in Oregon approached a group of workers who had complained about violations of their minimum wage and overtime rights, alleging that it had just received an SSA no-match list. The employer was requiring the workers to reverify their immigration status, and would not provide a copy of the letter to workers. Interestingly, this was before SSA began sending no-match letters to employers in March 2003.
- New York. In 2002, a group of immigrant workers in New York went on strike to protest against poor working conditions. After receiving a no-match letter that the employer had initially ignored, the employer decided

to use the no-match letter as a basis to reverify the immigration status of workers involved in the strike.

A decision like the one before this Court could pose enormous challenges for all low-wage workers. All workers face an increased risk of firings, retaliation, and abuse. U.S. citizens and authorized noncitizen workers could lose their jobs in discriminatory firings. Because of the great impact that this decision will have on all workers, this Court should confirm the labor Arbitration Award.

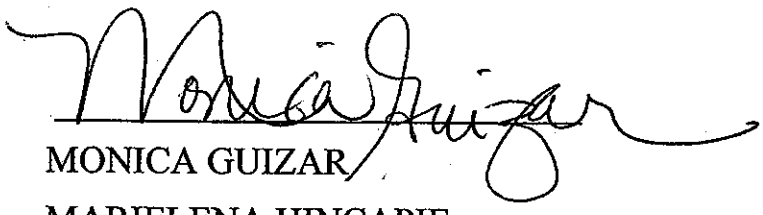
IV. CONCLUSION

For the reasons outlined above, this Court should reverse the district court's order vacating the Labor Arbitration Award and confirm the Labor Award.

Dated: May 25, 2007

Respectfully submitted,

By: Monica Guizar

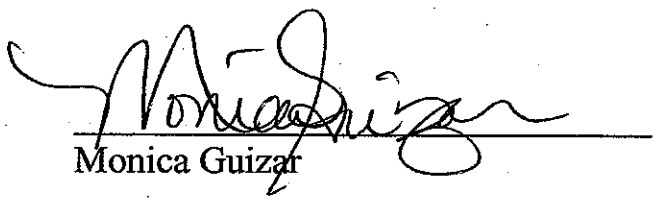


MONICA GUIZAR
MARIELENA HINCAPIE
National Immigration Law Center
Counsel of Record for Amicus Curiae

CERTIFICATE OF COMPLIANCE

Pursuant to Fed. R. App. P. 32(a)(7)(C) and Ninth Circuit Rule 32-1, I certify the attached Brief of Amicus Curiae National Immigration Law Center in Support of Appellant Urging Reversal was prepared with proportionately spaced font with a typeface of 14 points or more, and contains 4,858 words.

Respectfully submitted this 25th day of May, 2007:



Monica Guizar

CERTIFICATE OF SERVICE

CASE NO. 06-56662

The undersigned certifies:

That I am employed in the office of a member of the Bar of this Court at whose direction the service is made. My business address is 3435 Wilshire Blvd. Ste. 2850, Los Angeles, CA 90010. On May 25, 2007, I served upon the following parties in this action:

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copies of the document(s) described as:

BRIEF OF AMICUS CURIAE NATIONAL IMMIGRATION LAW CENTER IN SUPPORT OF APPELLANT

[X] **BY MAIL** I placed a true copy of each document listed herein in a sealed envelope, addressed as indicated herein, and caused each such envelope, with postage thereon fully prepaid, to be placed in the United States mail at Los Angeles, California. I am readily familiar with the practice of the National Immigration Law Center for collection and processing of correspondence for mailing, said practice being that in the ordinary course of business, mail is deposited in the United States Postal Service the same day as it is placed for collection.

[ ] **BY PERSONAL SERVICE** I placed a true copy of each document listed herein in a sealed envelope, addressed as indicated herein, and caused the same to be delivered by hand to the offices of each addressee.

[ ] **BY OVERNIGHT DELIVERY SERVICE** I placed a true copy of each document listed herein in a sealed envelope, addressed as indicated herein, and placed the same for collection by Overnight Delivery Service by following the ordinary business practices of Weinberg, Roger & Rosenfeld, Alameda, California. I am readily familiar with the practice of Weinberg, Roger & Rosenfeld for collection and processing of Overnight Delivery Service correspondence, said practice being that in the ordinary course of business, Overnight Delivery Service correspondence is deposited at the Overnight Delivery Service offices for next day delivery the same day as Overnight Delivery Service correspondence is placed for collection.

[ ] **BY FACSIMILE** I caused to be transmitted each document listed herein via the fax number(s) listed above or on the attached service list.

DATED: May 25, 2007

Monica Guizar