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UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

AMERICAN FEDERATION OF LABOR AND CONGRESS OF INDUSTRIAL ORGANIZATIONS; SAN FRANCISCO LABOR COUNCIL; SAN FRANCISCO BUILDING AND CONSTRUCTION TRADES COUNCIL; and CENTRAL LABOR COUNCIL OF ALAMEDA COUNTY, Plaintiffs, v. MICHAEL CHERTOFF, Secretary of Homeland Security; DEPARTMENT OF HOMELAND SECURITY; JULIE MYERS, Assistant Secretary of Homeland Security; U.S. IMMIGRATION AND CUSTOMS ENFORCEMENT; MICHAEL ASTRUE, Commissioner of Social Security; and SOCIAL SECURITY ADMINISTRATION, Defendants.	Case No. _____ **MEMORANDUM IN SUPPORT OF MOTION FOR TEMPORARY RESTRAINING ORDER AND PRELIMINARY INJUNCTION**

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INTRODUCTION

On August 15, 2007, the Department of Homeland Security ("DHS") published a Final Rule that would commandeer the Social Security tax system for immigration-enforcement purposes. The rule would place millions of U.S. citizens and non-citizens with work authorization at risk of losing their jobs because of discrepancies in a Social Security Administration ("SSA") database. The rule becomes effective on September 14, 2007, but DHS and SSA plan to jump the gun. Beginning on September 4, 2007, they plan to mail SSA "no-match" letter packets to employers that will include a separate DHS guidance letter about compliance with the Final Rule.

The SSA generates these no-match letters to employers when names and Social Security numbers submitted by employers on Forms W-2 do not match SSA's records. The accompanying DHS guidance letter will inform employers, pursuant to the Final Rule, that they face civil and criminal liability under the immigration laws for "knowing[ly]" employing unauthorized workers unless the no-match is resolved – and that employers should fire workers who cannot resolve a no-match with SSA within 90 days.

The unprecedented, joint SSA/DHS mailing to employers is set to run from September 4 to November 9, 2007. This round of letters would reach about 140,000 employers and affect about 8 million employees. It would be the first time that the SSA's Earnings Suspense File, a confidential tax records database that Congress prohibited SSA from sharing with DHS, has been used as an immigration-enforcement tool.

The DHS rule would place in jeopardy the jobs of employees who are legally working because there are many reasons for SSA no-matches that are entirely unrelated to unauthorized work. The SSA receives about *8 to 11 million* earnings reports per year that fail to match SSA records, and the Earnings Suspense File contains about *255 million* unmatched records. No-matches occur because of clerical errors by employers or SSA, employee name changes after marriage or divorce, foreign-born employees who use a less "foreign" name in the workplace, different naming conventions, such as multiple surnames, common in many parts of the world, and many other reasons. When the SSA has been able to reconcile no-matches, most involved U.S. citizens. The SSA itself is not an immigration agency and does not know whether a particular no-match letter, or

what proportion of all no-match letters, relate to unauthorized work.

We demonstrate below that we have a very strong likelihood of success on our legal challenge to the DHS Final Rule and to the DHS/SSA scheme to implement that rule.

As an initial matter, the new rule is contrary to the governing statute because it would expand civil and criminal liability under the immigration laws far beyond what Congress intended. Congress provided for liability when an employer continues to employ a worker "*knowing*" the worker is an "unauthorized alien." 8 U.S.C. §1324a(a)(2) (emphasis added). The word "knowing" is "a familiar term of art" that describes a state of mind necessary for civil or criminal liability; it has a meaning that "Congress is presumed to have known and adopted." *United States v. Jewell*, 532 F.2d. 697, 703 (9th Cir. 1976) (en banc). The DHS rule would change the agency's definition of *"knowing"* to provide that an employer receiving a no-match letter and failing to take action has "constructive knowledge" the worker is an "unauthorized alien." Given the many reasons for no-matches that have nothing to do with unauthorized work, and that neither SSA nor DHS knows what proportion of no-matches relate to unauthorized work, the DHS rule is premised on a definition of "*knowing*" that the term will not bear.

The Ninth Circuit already has explained that "[t]o preserve Congress' intent in passing the employer sanctions provisions of [the immigration laws] . . . the doctrine of constructive knowledge must be sparingly applied," *Collins Foods Int'l v. INS*, 948 F.2d 549, 555 (9th Cir. 1991), and that "the INS [now DHS] cannot make generalized accusations for the purpose of forcing employers to reverify the authorization of their employees." *New El Rey Sausage Co. v. INS*, 925 F.2d 1153, 1158 (9th Cir. 1991). Yet that is essentially what the DHS rule seeks to accomplish. The rule impermissibly redefines "*knowing*" as a lesser state of mind, so as to turn all no-match letters into "generalized accusations" about work-authorization status, so as to force employers to reverify the work-authorization status of millions of employees each year.

The rule also is contrary to the governing statute because it disturbs the careful balance that Congress struck in establishing the details of a system for verification of work-authorization status upon the initial hire. Congress was concerned that continuing verification would place undue burdens on employers and employees and also lead employers to discriminate against all employees

with "foreign" appearances because of fears about immigration-law liabilities. The DHS rule creates exactly the same problems Congress intentionally sought to avoid because it effectively establishes a system of continuing verification for the millions of employees each year who are covered by SSA no-match letters.

Finally, the joint DHS/SSA plan to implement the Final Rule is beyond the statutory authority of these agencies. SSA is authorized to use tax reports solely for purposes of managing the Social Security program. Only Congress can decide whether to authorize the use of tax reports for immigration-enforcement purposes. Bills to accomplish this have been introduced in Congress but have not been adopted. Such legislation raises serious policy issues because the use of tax reports for immigration enforcement would encourage "off-the-books" work and thereby lose the taxes presently paid on those wages. For its part, DHS lacks the authority to dictate how employers respond to SSA no-match letters, which are part of the tax reporting system. Only the Internal Revenue Service has authority to regulate responsibilities for correcting tax reports.

We also demonstrate below that the balance of hardships overwhelmingly favors a stay to preserve the status quo until this action is heard on the merits.

The DHS rule is a major change in existing policy, and the proposed rule lay dormant for an entire year until DHS published it as a Final Rule after Congress recessed without adopting immigration legislation that DHS had supported. No law or emergency requires that the rule be implemented immediately, without judicial review. There certainly is no emergency that requires the DHS/SSA mailings to commence on September 4, 2007 – 10 days *before* the Final Rule becomes effective.

On the other hand, once the mailings commence, employees who are U.S. citizens or non-citizens with legal work authorization, many of whom will be workers represented by the Plaintiff labor federations, will face the loss of their jobs unless they can resolve an SSA data discrepancy within a 90-day deadline. These employees will have to take off work – in all likelihood without pay – to visit SSA field offices that will be inundated with similar requests for no-match corrections. Some workers will lack birth certificates or other necessary identification documents. SSA already has informed DHS that in "difficult cases" no-match issues will not be

resolved by the deadline. Those workers will be fired. Additionally, some employers receiving the SSA/DHS mailing will terminate workers precipitously because they fear liability, particularly when the workers have a "foreign" appearance or accent. It will be impossible to completely undo the harm later.

All that being so, the Court should enjoin the Final Rule, and any actions to implement the Final Rule, until this action can be heard on the merits.

BACKGROUND

A. Social Security Administration No-Match Letters.

The Social Security Act of 1935 authorizes the SSA to establish a recordkeeping system for the Social Security program. *See* 42 U.S.C. §432. Employers annually report employee wages using Forms W-2, and SSA posts those earnings to its Master Earnings File, so workers will receive credit for them when they apply for Social Security benefits. When SSA is unable to match a worker's name and Social Security Number ("SSN") with its records, those earnings are posted to SSA's Earnings Suspense File, remaining there until they can be matched with SSA records. *See* 20 C.F.R. §422.120.

SSA collects wage report information to make benefits eligibility determinations and calculations. The wage report information collected by SSA, including the information posted to the Earnings Suspense File, does not contain information about an employee's work authorization status. As former Social Security Commissioner Kenneth S. Apfel explains, SSA does not know the percentage of earnings reports in the Earnings Suspense File that reflect unauthorized work. Nor does SSA know whether a particular earnings report in the Earnings Suspense File reflects unauthorized work. Apfel Decl. at ¶8.[1]

The most recent Government Accountability Office ("GAO") report on the Earnings Suspense File concluded that it "[c]ontains information about many U.S. citizens as well as non-

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[1] *See generally* GAO Report 06-814R, Immigration Enforcement: Benefits and Limitations to Using Earnings Data to Identify Unauthorized Work (July 11, 2006); GAO Report 06-458T, Social Security Numbers: Coordinated Approach to SSN Data Could Help Reduce Unauthorized Work (Feb. 16, 2006). These Reports are attached as Exhibits Q and O to Plaintiffs' Request for Judicial Notice ("RJN").

citizens" and that "the overall percentage of unauthorized workers is *unknown*." RJN, Exh. Q at 8 (emphasis added). When SSA ultimately has been able to resolve data discrepancies, "most . . . belong to U.S.-born citizens, not to unauthorized workers," which GAO concluded "is an indication that *a significant number of earnings reports in the [Earnings Suspense File] belong to U.S. Citizens and work-authorized noncitizens*." *Id.* (emphasis added).[2]

The ESF contains more than *255 million* mismatched earnings records and is growing at the rate of *8 million to 11 million* records per year. *Id.* at 8. About 4 percent of annual Form W-2 earnings reports wind up in the Earnings Suspense File. RJN, Exh. O at 8.

There are many reasons unrelated to an employee's work authorization status why earnings reports might not match SSA records. These include: 1) administrative errors at SSA (for example, an erroneous assignment of a SSN that SSA has previously assigned to another individual); 2) transcription errors in spelling an employee's name or recording the SSN, 3) employee name changes after marriage or divorce, 4) employees that use a less "foreign" sounding first name for work purposes; and 5) different naming conventions (such as the use of multiple surnames) that are commonplace in many parts of the world, particularly some Latin American and Asian countries. It is more common for foreign-born and female workers to be the subject of a discrepancy. Apfel Decl. at ¶7; Theodore Decl. at ¶11.

As part of its effort to credit earnings properly, SSA periodically sends out "no-match" letters to employers. Apfel Decl. at ¶11; 20 C.F.R. §422.120. A no-match letter indicates that Forms W-2 filed by the employer show a name and SSN combination that does not agree with SSA records. The no-match letter is merely a voluntary request by SSA to employers for assistance in resolving mismatches, so that earnings reports can be properly credited to the wage earner for retirement, disability, and social security benefits. Apfel Decl. at ¶10.

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[2] SSA's huge databases generally are rife with inaccuracies. When SSA assigns an SSN to an individual, it creates a Master Earnings File for each person in its "Numident" file. Apfel Decl. at ¶5. A recent report by the SSA's Inspector General determined that there were approximately 17.8 million discrepancies out of the 435 million records in the Numident file. Of those 17.8 million discrepancies, 12.7 million – or 71.3% – concerned native-born U.S. citizens' records. *Id.* at ¶13.

The Internal Revenue Service ("IRS") can sanction employers for submitting false tax information, but an employer's obligations under the tax code are satisfied by accurately transmitting the name and SSN obtained from the employee on Form W-4. *See* 26 U.S.C. §§6721, 6724; 26 C.F.R. §§301.6721-1, 301.6724-1; *see also* RJN, Exh. M at 4. The IRS does not impose penalties on employers based on an SSA no-match letter. The IRS imposes penalties only if the IRS has sent a penalty notice. *See* RJN, Exh. R at 10. Insofar as the tax code is concerned, the IRS already has issued guidance on the steps to take if notified by IRS of a discrepancy. *Id.*

SSA is not an immigration agency, and SSA does not know whether a particular no-match relates to unauthorized work. Until now, SSA's no-match letters explained to employers: "This letter does not imply that you or your employee intentionally gave the government wrong information . . . . [n]or does it make any statement about an employee's immigration status." RJN, Exh. D. Until now, SSA no-match letters have never been accompanied by any letter to the employer from DHS or any of its predecessor agencies with authority over immigration.

The only source of SSA's information about a taxpayer's earnings is the tax return information on Forms W-2, which SSA processes as an agent of the IRS. SSA is prohibited by statute from sharing information with other federal agencies, including DHS. 26 U.S.C. §6103. The use of tax returns to enforce the immigration laws presents a significant policy issue, because it would encourage more "off-the-books" employment, and "off-the-books" employment deprives the Social Security program of the taxes that otherwise would be paid on those earnings.

B. Employer Verification of Work Authorization and Sanctions.

Prior to the adoption of the Immigration Reform and Control Act ("IRCA") in 1986, no sanctions were imposed on employers for hiring unauthorized workers. The imposition of employer sanctions was very controversial, and Congress carefully crafted IRCA's employer-sanctions provisions to meet competing policy goals and political pressures. Congress wanted to discourage illegal immigration, but Congress also was concerned about disrupting the existing workforce and imposing undue burdens on employers and lawful workers. H. Rep. 99-682(I), at 56, 60, 90 (1986), 1986 USCCAN 5649, 5660, 5664, 5694. Congress also was concerned that IRCA would lead

employers fearing IRCA liability to shun all workers with a "foreign" appearance or accent. H. Rep. 99-682(I), at 68, H. Rep. 99-682(II), at 12 (1986), 1986 USCCAN at 5672, 5761.

IRCA made it unlawful for the first time for employers to "to hire . . . for employment in the United States an alien *knowing* the alien is an unauthorized alien." 8 U.S.C. §1324a(a)(1)(A) (emphasis added). IRCA also separately made it unlawful for employers to hire without complying with an initial employment eligibility verification process established by Congress. 8 U.S.C. §1324a(a)(1)(B). That process requires the employee to present the employer with documents to show proof of identity and work authorization and requires the employer and employee to complete and employment verification form (Form I-9). 8 U.S.C. §1324a(b); 8 C.F.R. §274a.2. Congress has paid careful attention to this initial verification process; federal immigration law prohibits the Executive Branch from making any changes to that verification process without advance notice to Congress. 8 U.S.C. §1324a(b)(2)(3).

When Congress adopted IRCA, it included a "grandfather" clause for current employees. Neither the initial-hire or continuing-to-employ provisions apply to anyone hired before the enactment of the statute in 1986. Pub. L. No. 99-603, §101(a)(3), 100 Stat. 3359, *codified at* 8 U.S.C. §1324a Historical and Statutory Notes. For employees hired after the effective date of the statute, Congress chose not to impose any continuing verification requirement. *See* H.R. Rep. 99-682(I), at 57, 1986 USCCAN at 5661 ("The Committee does not intend to impose a continuing verification requirement on employers."). IRCA only makes it unlawful for an employer "to continue to employ an alien . . . *knowing* the alien is (or has become) an unauthorized alien with respect to such employment." 8 U.S.C. §1324a(a)(2) (emphasis added). Employers that violate IRCA are subject to civil and criminal liability. 8 U.S.C. §1324a(e)(4)-(5), (f).

At the same time Congress imposed employer sanctions, Congress also wanted to prevent employer discrimination based on national origin or citizenship status. To that end, the immigration laws make it illegal for employers to discriminate based on national origin or citizenship status by requesting "more or different documents than are required" for the initial I-9 verification or "refusing to honor documents . . . that on their face reasonably appear to be genuine." 8 U.S.C. §1324b(a)(1), (6).

Congress' concerns that employer sanctions would lead to discrimination based on national origin turned out to be well founded. IRCA required GAO to report to Congress on this issue, and the GAO reported that employer sanctions were responsible for "a widespread pattern of discrimination." RJN, Exh. L at 6 (GAO, Immigration Reform: Employer Sanctions and the Question of Discrimination (March 30, 1990)). GAO estimated that "227,000 employers . . . began a practice, as a result of IRCA, not to hire job applications whose foreign appearance or accent led them to suspect they might be unauthorized aliens . . . . [and] an estimated 346,000 employers . . . applied IRCA's verification system only to persons who had a 'foreign' appearance or accent." *Id.* at 5. GAO also estimated that "an additional 430,000 employers . . . began hiring only persons born in the United States or not hiring persons with temporary work eligibility documents. These practices are illegal and can harm people, particularly those of Hispanic or Asian origin." *Id.* at 7.

Evidence that employer sanctions led to "a widespread pattern of discrimination" based on "foreign" appearance or accent became an important consideration in subsequent debates about employer sanctions.

C. The New Department of Homeland Security Rule.

As previously stated, IRCA makes it unlawful to "knowingly" employ an "unauthorized alien." Until now, the enforcing agencies have recognized that no-matches occur for many reasons and therefore have consistently interpreted the statute to mean that receipt of an SSA no-match letter does not constitute "constructive knowledge" that a worker is unauthorized. *See* RJN Ex. G (April 12, 1999 opinion letter from INS General Counsel) ("Notice from [SSA]to an employer notifying it of a discrepancy between wage reporting information and SSA records with respect to an employee does not, by itself, put an employer on notice that the employee is not authorized to work."); *accord* RJN Exhs. H-J (opinion letters from INS General Counsel); Exh. F (August 9, 2004 letter from DHS to Congressman); Exh. K (April 1, 2004 OSC letter). As DHS itself explained in the past:

> Discrepancies between SSA records and information submitted to SSA by the employer may be due to a variety of reasons . . . The letter does not indicate, and SSA is unable to determine, the reason(s) for the cited mismatches . . . without more information than that contained in the "No Match" letter, we have not concluded that the letter alone is sufficient to impart knowledge to the employer of unauthorized employment.

RJN Ex. F (emphasis added).

Then, on June 14, 2006, DHS sought to abandon that consistent interpretation and gave notice of a proposed rule that would effectively presume constructive knowledge when an employer receives an SSA no-match letter, unless the employer reverifies the employee's work authorization. RJN, Exh. A (Proposed Rule). More than 5,000 comments were received during the 60-day comment period, including comments that disputed Homeland Security's authority to adopt the rule absent a change in statute. *See* RJN, Exh. B, at 45611 (Final Rule) (also attached hereto as Appendix A). After the comment period closed on August 14, 2006, the proposed rule lay dormant for a year. On August 15, 2007, shortly after Congress left for recess without enacting immigration reform legislation that DHS urged, the agency issued a final rule. *Id.* The rule will become effective on September 14, 2007. *Id.*

The new DHS rule amends the definition of "*knowing*" in 8 C.F.R. §274a.1(l)(1), and therefore how DHS interprets the term "knowing" in IRCA. The new definition of "knowing" lists, as an example of an employer who has "constructive knowledge" that an employee is an unauthorized alien, an employer that "fails to take reasonable steps" after receiving an SSA no-match letter. The first part of the amended regulation provides:

> (1)(1) The term *knowing* includes having actual or constructive knowledge. . . . Examples of situations where the employer may, depending upon the totality of the relevant circumstances, have constructive knowledge that an employee is an unauthorized alien include, but are not limited to, situations where the employer:
> . . . .
> (iii) Fails to take reasonable steps after receiving information indicating that the employee may be an alien who is not employment authorized, such as –
> . . . .
> (B) Written notice to the employer from the Social Security Administration reporting earnings on a Form W-2 that employees' names and corresponding social security account numbers fail to match Social Security Administration records . . . .

Having created a threat of employer sanctions liability for employers receiving SSA no-match letters, the amended regulation then offers employers a "safe harbor." Under the amended regulation, an employer receiving a no-match letter "will be considered by the Department of Homeland Security to have taken reasonable steps – and receipt of the written notice will therefore not be used as evidence of constructive knowledge – if the employer" takes the actions specified by DHS. *Id.* at 45624. These are "the only combination of steps that will guarantee that DHS will not use the employer's receipt of the notices from SSA . . . as evidence of constructive knowledge that

an employee is an unauthorized alien." *Id.* at 45618.

To qualify for the DHS "safe harbor," an employer that determines the SSA no-match was not the result of its own clerical error must instruct an employee who claims the name and SSN are correct to resolve the discrepancy with SSA within 90 days after receipt of the no-match letter. *Id.* at 45624. If the employee is unable to resolve the discrepancy with SSA within 90 days, the employer cannot continue to employ the worker unless the employer can complete within three days a new employment eligibility verification, on a new I-9 form, as if the employee never had been hired and verified in the first place. *Id.* The new verification cannot involve any document that contains the disputed SSN, even if the employee still insists the SSN is correct. *Id.* If employees insist their names and SSNs on their identification documents are correct but have not resolved the discrepancy with SSA by the deadline, the employer would have to fire them.

To ensure that employers understand that SSA no-match letters now carry *immigration law* obligations, DHS intends to include a letter to the employer from Homeland Security with each SSA no-match letter. *See* RJN, Exh. C (DHS/ICE Guidance Letter) (also attached hereto as Appendix B). The letter is to "provide guidance on how to respond to the enclosed letter from the Social Security Administration (SSA) . . . in a manner that is consistent with your obligations under United States Immigration Laws." *Id.*

The Homeland Security guidance letter contains questions and answers, which begin with the following:

> **Q: Can I simply disregard the letter from SSA?**
>
> **A: No.** You have received official notification of a problem that may have significant legal consequences for your employees. If you elect to disregard the notice you have received and it is determined that some employees listed in the enclosed letter were not authorized to work, the Department of Homeland Security (DHS) could determine that you have violated the law by knowingly continuing to employ unauthorized persons. This could lead to civil and criminal sanctions.

Id. (boldface in original).

After threatening employers with "civil and criminal sanctions," the DHS letter then answers the question **"Q: What should I do?"** by explaining that "You should" follow Homeland Security's new "safe harbor" procedures. *Id.* (boldface in original). The letter assures employers that, if they

follow those procedures for every no-match, they will not be liable for discrimination if they terminate employees: **"Q: Will I be liable for discrimination charges brought by the United States if I terminate the employee after I follow the steps outlined above? A: No. . . . ."** *Id.* (boldface in original).

D. Implementation of the New Rule.

DHS initially announced that SSA would not begin sending out new no-match letter packets until after the new rule becomes legally effective on September 14, 2007. Avendaño Decl. at ¶3. Plaintiffs subsequently learned that SSA will actually start mailing revised no-match letter packets and the DHS/ICE Guidance letter on September 4, 2007 (*i.e.,* 10 days before the rule even becomes effective). *Id.* at ¶¶4-5. Between September 4 and November 9, SSA intends to mail no-match letters to 140,000 employers around the country, affecting about eight million employees. *Id.* at ¶5; Moran Decl. at ¶14.

In its Notice of Final Rule, DHS does not even offer an estimate of what proportion of records in the SSA's Earnings Suspense File relate to unauthorized work, conceding that "there are many causes for a no-match, including clerical error and name change" (Appendix A at 45616), and that "studies from the Governmental Accountability Office and other sources describe challenges that must be addressed." *Id.* at 45622.

If the new no-match letters are sent, employers would immediately face the administrative burdens and expense of compliance. As Nik Theodore, Professor of Urban Planning and Policy at the University of Illinois at Chicago has documented through empirical research, SSA no-match letters have the resulted in the mass and precipitous firing of work-authorized employees, a swelling in "off-the books" employment, and "major disruptions in workflow," "potentially leading to significant economy-wide job losses and higher prices." Theodore Decl. at ¶¶10-14. These effects occurred even though SSA no-match letters previously expressly cautioned employers "not use this letter to take any adverse action against an employee." *Id.* at ¶¶12, 17.

Because the DHS Rule expressly instructs employers to take action in response to the no-match letter, the DHS Rule is likely to magnify these demonstrated effects of SSA no-match letters. *Id.* at ¶17. Based on past experience with no-match letters and employer sanctions, some employers

will jump to the erroneous conclusion that all employees with no-matches and a "foreign" appearance or accent lack lawful work authorization and will terminate or choose not to hire such employees, including U.S. citizens and authorized workers. *Id.* at ¶¶19-25.

Other employees, though lawfully working in the United States, suddenly will face a 90-day deadline for resolving an SSA database discrepancy. SSA field offices generally are open only during business hours, when many employees are working, and the offices are likely to face in influx of employees with similar no-match problems. Mismatched records for lawfully immigrants have taken many months to resolve with SSA. *See* Moran Decl. at ¶6-9 (lawful immigrant from Honduras took four months to resolve no-match). Some workers will be required to travel to remedy the situation. *Id.* at ¶12 (typographical error on Social Security card issued many years ago could not be resolved locally). According to former Social Security Commissioner Apfel, "it may take considerably in excess of 90 days to resolve any given mismatched earnings report, even if the worker makes prompt efforts to resolve the discrepancy." Apfel Decl. at ¶16. Commissioner Apfel is "very concerned that there will be many legally authorized workers who cannot resolve a mismatched earnings report by any arbitrary deadline." *Id.* at ¶17. DHS acknowledges that in "difficult cases," SSA may be unable to resolve discrepancies within the 90-day timeframe. Appendix A at 45617. The new rule does not provide for that contingency.

By expressly recasting SSA no-match letters as immigration-enforcement documents, the DHS Rule is also likely to exacerbate the rise in off-the-books employment and disruptions in the workplace, "including disruptions in workflow, job losses (especially in labor-intensive industries), and higher consumer prices," created by SSA no-match letters. Theodore Decl. at ¶¶26-27.

ARGUMENT

"A preliminary injunction should issue when the plaintiff shows either: (1) a likelihood of success on the merits and the possibility of irreparable injury; or (2) that serious questions going to the merits were raised and the balance of hardships tips sharply in the plaintiff's favor. These two alternatives are extremes of a single continuum in which the greater the relative hardship to the party seeking the preliminary injunction, the less probability of success must be shown." *Land Council v. McNair*, __ F.3d ___, 2007 WL 1880990, at *2. (9th Cir., July 02, 2007) (internal