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16 UNITED STATES DISTRICT COURT  
17 NORTHERN DISTRICT OF CALIFORNIA

18 AMERICAN FEDERATION OF LABOR AND  
CONGRESS OF INDUSTRIAL ORGANIZATIONS;  
19 SAN FRANCISCO LABOR COUNCIL; SAN  
FRANCISCO BUILDING AND CONSTRUCTION  
20 TRADES COUNCIL; and CENTRAL LABOR  
COUNCIL OF ALAMEDA COUNTY,

21 Plaintiffs,

22 v.

23 MICHAEL CHERTOFF, Secretary of Homeland Security;  
24 DEPARTMENT OF HOMELAND SECURITY;  
JULIE MYERS, Assistant Secretary of Homeland  
25 Security; U.S. IMMIGRATION AND CUSTOMS  
ENFORCEMENT; MICHAEL ASTRUE, Commissioner  
26 of Social Security; and SOCIAL SECURITY  
ADMINISTRATION,

27 Defendants.  
28

Case No. \_\_\_\_\_

**MEMORANDUM IN SUPPORT  
OF MOTION FOR TEMPORARY  
RESTRAINING ORDER AND  
PRELIMINARY INJUNCTION**

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1 INTRODUCTION

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

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

15 The unprecedented, joint SSA/DHS mailing to employers is set to run from September 4 to  
16 November 9, 2007. This round of letters would reach about 140,000 employers and affect about  
17 8 million employees. It would be the first time that the SSA’s Earnings Suspense File, a  
18 confidential tax records database that Congress prohibited SSA from sharing with DHS, has been  
19 used as an immigration-enforcement tool.

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

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

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

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

16 The Ninth Circuit already has explained that “[t]o preserve Congress’ intent in passing the  
17 employer sanctions provisions of [the immigration laws] . . . the doctrine of constructive knowledge  
18 must be sparingly applied,” *Collins Foods Int’l v. INS*, 948 F.2d 549, 555 (9th Cir. 1991), and that  
19 “the INS [now DHS] cannot make generalized accusations for the purpose of forcing employers to  
20 reverify the authorization of their employees.” *New El Rey Sausage Co. v. INS*, 925 F.2d 1153,  
21 1158 (9th Cir. 1991). Yet that is essentially what the DHS rule seeks to accomplish. The rule  
22 impermissibly redefines “*knowing*” as a lesser state of mind, so as to turn all no-match letters into  
23 “generalized accusations” about work-authorization status, so as to force employers to reverify the  
24 work-authorization status of millions of employees each year.

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

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

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

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

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

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

