



1 GREGORY G. KATSAS  
 Assistant Attorney General  
 2 THOMAS H. DUPREE JR.  
 Deputy Assistant Attorney General  
 3 JOSEPH P. RUSSONIELLO  
 United States Attorney  
 4 SANDRA SCHRAIBMAN (D.C. Bar No. 188599)  
 5 DANIEL E. BENSING (D.C. Bar No. 334268)  
 Attorneys, U.S. Department of Justice  
 6 Civil Division, Federal Programs Branch  
 7 20 Massachusetts Ave., N.W., Room 6114  
 Washington, D.C. 20001  
 8 Telephone: (202) 305-0693  
 9 Facsimile: (202) 616-8460  
 Email: [Daniel.Bensing@usdoj.gov](mailto:Daniel.Bensing@usdoj.gov)

10 UNITED STATES DISTRICT COURT  
 11  
 12 NORTHERN DISTRICT OF CALIFORNIA

13 AMERICAN FEDERATION OF LABOR AND )  
 CONGRESS OF INDUSTRIAL )  
 14 ORGANIZATIONS, et al., )

Case No. 07-4472 CRB

15 Plaintiffs, )

**MEMORANDUM OF POINTS  
 AND AUTHORITIES IN  
 SUPPORT OF DEFENDANTS'  
 MOTIONS: (1) TO VACATE  
 THE PRELIMINARY  
 INJUNCTION AND  
 (2) FOR SUMMARY JUDGMENT**

16 SAN FRANCISCO CHAMBER )  
 17 OF COMMERCE, et al., )

18 Plaintiffs-Intervenors, )

19 and )

20 )  
 21 UNITED FOOD AND COMMERCIAL )  
 WORKERS INTERNATIONAL UNION, et al., )

22 Plaintiffs-Intervenors )

23 )  
 24 v. )

25 MICHAEL CHERTOFF, Secretary of Homeland )  
 Security, et al., )

26 )  
 27 Defendants. )

Date: December 12, 2008  
 Time: 8:30 a.m.  
 Place: Courtroom 8, 19<sup>th</sup> Floor  
 Hon. Charles Breyer

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1 GREGORY G. KATSAS  
 Assistant Attorney General  
 2 THOMAS H. DUPREE JR.  
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 Attorneys, U.S. Department of Justice  
 6 Civil Division, Federal Programs Branch  
 7 20 Massachusetts Ave., N.W., Room 6114  
 Washington, D.C. 20001  
 8 Telephone: (202) 305-0693  
 9 Facsimile: (202) 616-8460  
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1  
2 **INTRODUCTION**

3 On August 15, 2007 the Secretary of Homeland Security (“DHS” or “Secretary”) adopted  
4 the “Safe-Harbor Procedures for Employers Who Receive a No-Match Letter” rule, 8 C.F.R. §  
5 274a.1, 72 Fed. Reg. 45611 (August 15, 2007) (“Safe Harbor Rule”). This Rule provides  
6 guidance for the benefit of both employers and employees by establishing a “safe harbor”  
7 procedure consisting of reasonable steps that an employer can take after receiving a “no-match”  
8 letter from the Social Security Administration (“SSA”) advising them that the name and social  
9 security number presented by an employee and filed on a wage statement do not match the  
10 information in SSA's records.

11  
12 Plaintiffs challenged that rule in this civil action and on October 10, 2007 the Court found  
13 that plaintiffs had demonstrated serious questions as to three of their challenges to the rule and  
14 entered a Preliminary Injunction enjoining its implementation. American Federation of Labor, et  
15 al. v. Chertoff, 552 F.Supp.2d 999 (N.D. Cal. 2007) (“AFL”); (D.E. 135; 137). The Secretary  
16 has elected to address the Court’s concerns on these three points through a supplemental  
17 rulemaking proceeding that concluded with the issuance of a Supplemental Final Rule on  
18 October 28, 2008. See 73 Fed. Reg. 63843 (October 28, 2008).

19  
20  
21 First, in the preamble accompanying the Supplemental Final Rule, the Secretary has  
22 provided a detailed reasoned analysis for what the Court perceived as a change in policy as to the  
23 relevance of no-match letters to immigration law compliance. Second, the Supplemental Final  
24 Rule removes any statements purporting to interpret the anti-discrimination provisions of the  
25 immigration laws, the enforcement of which is delegated to the Department of Justice. In  
26 addition, the DHS insert that will be included in no-match letters sent to employers along with  
27  
28

1 SSA's no-match letters has been revised to refer to the guidance issued by the Department of  
2 Justice and eliminate any statements that might be construed as DHS's attempt to interpret the  
3 anti-discrimination provisions of the Immigration and Nationality Act ("INA"), 8 U.S.C. §  
4 1324b(a)(1). Third, the Secretary has published a detailed Regulatory Flexibility Analysis, which  
5 was subject to public comment, discussing potential costs of the Rule to small entities.  
6

7 Because the Supplemental Final Rule addresses and resolves the three grounds on which  
8 the Court entered its Preliminary Injunction against the Safe Harbor Rule, and because the Court  
9 has held plaintiffs did not raise any serious questions in any of their other challenges to the Rule,  
10 the Court should lift the preliminary injunction and enter summary judgment for defendants.  
11

## 12 BACKGROUND

### 13 A. Statutory and Regulatory Background.

14 The Immigration Reform and Control Act of 1986, Pub. L. No. 99-603, 100 Stat. 3359  
15 (1986) ("IRCA"), subjects employers to civil and criminal sanctions for knowingly hiring or  
16 continuing to employ aliens who are not authorized to work in the United States. 8 U.S.C.  
17 § 1324a(a)(1)-(2). DHS, through its Immigration and Customs Enforcement component, is  
18 charged with enforcing the Act.  
19

20 The knowledge element of the immigration laws has long been defined by regulation to  
21 include constructive knowledge "that may fairly be inferred through notice of certain facts and  
22 circumstances that would lead a person, through the exercise of reasonable care, to know about a  
23 certain condition." 72 Fed. Reg. at 45623; see 56 Fed. Reg. 41767-01 (August 23, 1991)  
24 (establishing a materially identical definition); 55 Fed. Reg. 25928 (June 25, 1990) (same); see  
25 also 72 Fed. Reg. at 45612 (discussing prior regulations and case law employing the same  
26 definition).  
27  
28

1 SSA maintains earnings information for individual workers in order to calculate properly  
2 the amount of Social Security benefits to which those workers may someday be entitled. See 42  
3 U.S.C. § 405(c)(2)(A). When employers annually report wages for their workers, SSA credits  
4 those wages to the individual worker's account. SSA cannot credit those wages, however, if an  
5 employer submits a name and social security number ("SSN") for a worker that does not match  
6 the name and number in SSA's records. See 20 C.F.R. § 422.120(a). Such a "no-match" may  
7 result when an individual submits a false social security number to his employer. However, "no-  
8 matches" can also result from clerical and typographical errors or may reflect name changes that  
9 were not reported to SSA.  
10

11  
12 In 1994, SSA began sending no-match letters to employers who submitted significant  
13 numbers of wage reports that could not be credited to workers' records. See 20 C.F.R. §  
14 422.120(a). Typically, a no-match letter asked the employer to prepare a corrected employment  
15 form for each listed social security number, or, in the alternative, to ask the employee to contact  
16 SSA to correct the error. See, e.g., SSA's Model 2006 "No-Match" Letter for Tax Year 2005  
17 (D.E. 7, Exh. D).  
18

19 Over the years following the SSA's commencement of the no-match letter program,  
20 employers, labor organizations, and others uncertain as to the implications of no-match letters  
21 under the immigration laws have made repeated inquiries to DHS and its predecessor, the  
22 Immigration and Naturalization Service ("INS"). The agencies have responded by letter to such  
23 correspondence, explaining that receipt of a no-match letter would not "by itself" be thought to  
24 provide constructive knowledge of an unauthorized employee. Letter of Dec. 23, 1997 from INS  
25 General Counsel to Littler Mendelson on behalf of Employer (D.E. 7, Exh. I). The INS  
26 explained in that letter:  
27  
28

1 Whether an employer has been put on notice of an unauthorized  
2 employment situation is . . . an individualized determination that depends  
3 on all the relevant facts, and there may be specific situations in which SSA  
4 notice of an SSN irregularity would either cause, or contribute to, such a  
5 determination.

6 Id.

7 In correspondence, the agency noted that a no-match letter alone did not impose an  
8 “affirmative duty” on the employer to reverify an employee’s work authorization, Letter of Feb.  
9 17, 1994 from Acting General Counsel to California Farm Bureau Federation (D.E. 7, Exh. J),  
10 but made clear that employers are expected to take steps “to reconcile the mismatch.” Letter of  
11 Nov. 19, 1998 from INS General Counsel to Congressman Robert F. Smith (D.E. 7, Exh. H).  
12 The INS noted, moreover, that if an employee failed to resolve the discrepancy between the  
13 employer’s records and SSA’s records, “the employer [could] be considered by the INS to have  
14 violated the prohibition against knowingly continuing to employ an unauthorized alien if it does  
15 not take reasonable steps, such as reverification, to ensure that the employee is authorized to  
16 work.” Id.

17 **B. The DHS Safe-Harbor Rule.**

18 DHS promulgated the Safe Harbor Rule to provide employers with much-needed  
19 guidance about the appropriate steps to take in response to a no-match letter. See 8 C.F.R. §  
20 274a.1, 72 Fed. Reg. 45611 (Aug. 15, 2007). The Rule reiterates the agency’s position from its  
21 previous correspondence that an employer’s failure to take “reasonable steps” in response to a  
22 no-match letter may be a ground for concluding that the employer had constructive knowledge  
23 that an employee was not authorized for employment. The Rule makes clear that determining  
24 whether an employer had constructive knowledge requires examination of the “totality of  
25 relevant circumstances,” and provides a non-exhaustive list of instances in which constructive  
26  
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1 knowledge might properly be inferred. The Rule states:

2 Examples of situations where the employer may, depending on the  
3 totality of relevant circumstances, have constructive knowledge  
4 that an employee is an unauthorized alien include, but are not  
5 limited to, situations where the employer:

6 (iii) Fails to take reasonable steps after receiving information indicating  
7 that the employee may be an alien who is not employment authorized,  
8 such as —

9 (B) Written notice to the employer from the Social Security  
10 Administration reporting earnings on a Form W-2 that employees' names  
11 and corresponding social security account numbers fail to match Social  
12 Security Administration records[.]

13 72 Fed. Reg. at 45623-24 (amending 8 C.F.R. § 274a.1).

14 Having noted that failure to take reasonable steps may be a basis for finding constructive  
15 knowledge, the rule provides “safe-harbor” procedures. The Rule explains that DHS will not use  
16 the receipt of a no-match letter as evidence of constructive knowledge if the employer: (1) checks  
17 its records and corrects any errors within 30 days of receiving a no-match letter; or (2) if that fails  
18 to resolve the no-match, instructs its employee to clear up the discrepancy with SSA within 90  
19 days of the receipt of the letter; or (3) if that too is unsuccessful, completes an alternative  
20 employment authorization verification procedure.<sup>1/</sup> 72 Fed. Reg. at 45613-14, 45624.

21 The Rule imposes no affirmative requirements on employers and emphasizes that the  
22 steps detailed in the Rule are not the only means for taking reasonable steps to resolve a no-  
23 match. Should an employer decline to follow the safe-harbor procedures but choose to respond

24 \_\_\_\_\_  
25 <sup>1/</sup> The rule explains that at this stage an employer will be considered to have taken a  
26 reasonable course if it verifies the employee’s identity and work authorization through a modified  
27 version of the process required of new employees under 8 U.S.C. § 1324a – specifically, having the  
28 employee fill out a new Form I-9 Employment Eligibility Verification and verifying the information  
but without reliance on any documents that contain the disputed social security number. 72 Fed.  
Reg. at 45624.

1 to a no-match letter in other ways, the reasonableness of that response will be viewed under the  
2 “totality of relevant circumstances.” 72 Fed. Reg. at 45614.

3  
4 In conjunction with its promulgation of the Rule, DHS created a guidance letter for SSA  
5 to insert into its no-match mailings (“the insert”). In a question-and-answer format, the insert  
6 provides employers with basic information about the new Safe Harbor Rule. See D.E. 7, Exh.

7 C.<sup>2/</sup>

8 **C. Procedural Background**

9 Plaintiffs AFL-CIO, et al. filed this action on August 29, 2007. The AFL-CIO plaintiffs  
10 amended their complaint on September 11, 2007 (D.E. 54). Subsequently, two other groups of  
11 plaintiffs joined in the action.<sup>3/</sup> The District Court entered a Temporary Restraining Order  
12 enjoining implementation of the Safe Harbor Rule on August 31, 2007 (D.E. 21).

14 After full briefing and argument, the District Court, on October 10, 2007, granted  
15 plaintiffs’ motions for preliminary injunction, enjoining implementation the Safe Harbor Rule.  
16 AFL, supra, 552 F.Supp.2d at 1015. This ruling was based on the Court’s finding that the  
17 balance of hardships tipped in favor of the plaintiffs and on the Court’s holding that the plaintiffs  
18 had raised serious questions as to: (1) whether DHS had changed its position on the legal  
19

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20 <sup>2/</sup> Defendants filed the Administrative Record of the Safe Harbor Rulemaking with the Court  
21 on October 1, 2007. (D.E. 128 and 129). Defendants are filing a Supplemental Administrative  
22 Record (“Supp. A.R.”), containing the administrative record of the supplemental rulemaking  
23 proceeding just concluded.

24 <sup>3/</sup> Plaintiffs San Francisco Chamber of Commerce, et al. (“Chamber”), moved to intervene on  
25 September 7, 2007 (D.E. 34), defendants did not oppose and the Court granted intervention on  
26 September 11, 2007 (D.E. 44). The Chamber plaintiffs’ initial complaint was filed on September  
27 11, 2007 (D.E. 45) and an Amended Complaint was filed on October 19, 2007 (D.E. 138). Plaintiffs  
28 United Food and Commercial Workers Local 5, et al., (“United”) moved to intervene on September  
12, 2007 (D.E. 59), defendants did not oppose and the Court granted intervention on September 13,  
2007 (D.E. 66). The United plaintiffs’ initial complaint was filed on September 14, 2007 (D.E. 70)  
and an Amended Complaint was filed on September 26, 2007 (D.E. 121).

1 significance of no-match letters, without adequate explanation, *id.* at 1010; (2) whether DHS had  
2 exceeded its authority, and encroached on the authority of the Department of Justice, by  
3 interpreting IRCA's anti-discrimination provisions, *id.* at 1011; and (3) whether DHS violated  
4 the Regulatory Flexibility Act ("RFA") when it determined that it was not required to conduct a  
5 regulatory flexibility analysis, *id.* at 1013.  
6

7 On November 23, 2007, DHS filed an unopposed motion to stay district court  
8 proceedings pending new rulemaking, (D.E. 142), explaining that its primary goal was to achieve  
9 the most expeditious implementation of a safe harbor rule. Accordingly, the government  
10 explained that it would seek to address the problems identified in the District Court's order  
11 through additional rulemaking. The government noted that, although the rulemaking, if  
12 successful, might ultimately obviate the need for appellate review, it would also proceed with an  
13 appeal to the Ninth Circuit. See Letter of Dec. 4, 2007 from Thomas H. Dupree, Jr. to the  
14 District Court (D.E. 148).<sup>4/</sup> After a status hearing on December 14, 2007, the District Court  
15 granted the stay to allow the agency to proceed with supplemental rulemaking to address the  
16 three issues identified in the Court's opinion (D.E. 149). The Court has vacated scheduled Status  
17 Conferences on four occasions (see D.E. 153, 155, 157 and 159) to permit the supplemental  
18 rulemaking proceedings to continue.  
19  
20

21 DHS published a supplemental notice of proposed rulemaking on March 26, 2008 to  
22 address the specific issues raised by the Court. 73 Fed. Reg. 15944. In that notice, DHS  
23 provided a detailed review of the history of DHS (and previously INS) guidance on the  
24 significance of no-match letters and provided additional reasoned analysis justifying the policy  
25

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26 <sup>4/</sup> In order to remove any uncertainty as to whether this Court has jurisdiction to entertain the  
27 government's motions, defendants are, simultaneously with the filing of these motions, moving to  
28 withdraw their appeal of the Court's Preliminary Injunction ruling.

1 set forth in the new rule. DHS also confirmed that the authority to interpret the anti-  
2 discrimination provisions of the INA rests with the Department of Justice, not DHS, id. at 15950-  
3 51, and provided an Initial Regulatory Flexibility Analysis, see 5 U.S.C. § 603, for public  
4 comment, id. at 15951, 52-54. DHS received approximately 2950 comments before the close of  
5 the public comment period on April 25, 2008. 73 Fed. Reg. at 63844.  
6

7 After considering the full record of the safe harbor rulemaking, including the rulemaking  
8 record from 2007, legal arguments and evidence presented to the Court in this action, as well as  
9 the comments received on the supplemental notice of proposed rulemaking, DHS completed  
10 action on the supplemental rulemaking and published the Supplemental Final Rule on October  
11 28, 2007. See 73 Fed. Reg. 63843 (October 28, 2008); (Attachment A), hereto, reaffirming the  
12 Safe Harbor Rule as previously issued on August 15, 2007. The preamble issued with the  
13 Supplemental Final Rule revised the preamble to the initial rule to address each of the concerns  
14 raised by this Court in its preliminary injunction ruling. The Supplemental Final Rule is  
15 accompanied by a Final Regulatory Flexibility Analysis, analyzing possible costs of the Rule to  
16 small entities. See 73 Fed. Reg. at 63844.  
17  
18

19 DHS has also revised the guidance insert for SSA to include in its no-match letters by  
20 removing the statements contained in the initial version in which DHS appeared to interpret the  
21 anti-discrimination provisions of the immigration laws. See Supp. A.R. at 3803; (Attachment B,  
22 hereto). The revised DHS guidance insert also makes clear that the rule provides a safe harbor to  
23 employers rather than imposing a mandate. This DHS insert will accompany the next round of  
24 SSA no-match letters sent to employers.  
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1  
2 **ARGUMENT**

3 **I. Standard of Review**

4 **A. Standard Of Review For a Challenge to a Rule Under The APA**

5 The Administrative Procedure Act provides that agency action may be set aside only if it  
6 is arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law, or if the  
7 action fails to meet statutory, procedural, or constitutional requirements. 5 U.S.C. § 706(2).

8 Under these deferential standards, the agency's decision is entitled to a presumption of regularity  
9 and must be upheld if rationally based. Motor Vehicle Mfrs. Ass'n of the United States, Inc. v.  
10 State Farm Mut. Auto. Ins. Co., 463 U.S. 29, 43 (1983); Citizens to Preserve Overton Park, Inc.  
11 v. Volpe, 401 U.S. 402, 415 (1971).

12 To determine whether agency action is arbitrary or capricious, a court must consider  
13 “whether the decision was based on a consideration of the relevant factors and whether there has  
14 been a clear error of judgment,” Marsh v. Oregon Natural Resources Council, 490 U.S. 360, 378  
15 (1989), or the absence of “a rational connection between the facts found and the choice made,”  
16 Motor Vehicles Mfrs. Ass’n, supra. See also Baltimore Gas & Elec. Co. v. Natural Resources  
17 Defense Council, Inc., 462 U.S. 87, 105 (1983). Regulations are presumed to be valid, and  
18 therefore review is deferential to the agency. Nat’l Ass’n of Home Builders v. Norton, 340 F.3d  
19 835, 841 (9th Cir. 2003). A court is not empowered to substitute its judgment for that of the  
20 agency. Ariz. Cattle Growers’ Ass’n v. U.S. Fish & Wildlife, 273 F.3d 1229, 1236 (9th Cir.  
21 2001). See also Hopi Tribe v. Navajo Tribe, 46 F.3d 908, 914 (9th Cir. 1995), cert. denied, 516  
22 U.S. 931 (1995); Friends of the Clearwater v. Dombeck, 222 F.3d 552, 556 (9th Cir. 2000).  
23 Moreover, an agency has broader latitude to amend positions taken in informal advice letters than  
24 in formal regulations. See Resident Councils v. Leavitt, 500 F.3d 1025, 1037 (9th Cir. 2007).  
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1 Typically, APA review cases are resolved on a motion (or cross motions) for summary  
2 judgment, based upon the administrative record of the agency action. Marshall County Health  
3 Care Authority v. Shalala, 988 F.2d 1221, 1225 (D.C. Cir. 1993); McCall v. Andrus, 628 F.2d  
4 1185, 1189-90 (9th Cir. 1980). This is because “[t]he district court sits as an appellate tribunal,  
5 not as a court authorized to determine in a trial-type proceeding whether....” the agency’s actions  
6 were lawful under § 706. Marshall County Health Care Authority, supra, 988 F.2d at 1225.

7 Therefore, the court does not make findings of fact, but rather analyzes the facts as they appear in  
8 the record to determine if they support the agency decision. Marathon Oil Co. v. United States,  
9 807 F.2d 759, 767 (9th Cir. 1986), cert. denied, 480 U.S. 940 (1987). Hence there is no need for  
10 a separate statement of undisputed, material facts.<sup>5/</sup>

11 Agencies are always free to elect to correct flaws in a rulemaking through further  
12 administrative proceedings. As the D.C. Circuit has noted, “there is no principle of  
13 administrative law that restricts an agency from reopening proceedings to take new evidence after  
14 the grounds upon which it relied are determined by a reviewing court to be invalid.” PPG  
15 Industries v. United States, 52 F.3d 363, 366 (D.C. Cir. 1995). See also Center for Science in the  
16 Public Interest v. Regan, 727 F.2d 1161, 1164 (D.C. Cir. 1984) (“it is not improper for an agency  
17 to engage in new rulemaking to supersede defective rulemaking”); Heartland Regional Medical  
18 Center v. Leavitt, 415 F.3d 24, 29-30 (D.C. Cir. 2005) (“the usual rule is that, with or without  
19 vacatur, an agency that cures a problem identified by a court is free to reinstate the original result  
20 on remand.” ).

21 DHS recognized this principle in its Supplemental Final Rule, noting that “[t]he

22 <sup>5/</sup> Local Rule 16-5 is consistent with this authority in recognizing that record review cases such  
23 as this are resolved through cross-motions for summary judgment based on the administrative record  
24 filed with the Court by the government.

1 Executive's amendment to regulations in litigation is a natural evolution in the process of  
2 governance," and quoted the D.C. Circuit:

3 It is both logical and precedented that an agency can engage in new rulemaking to  
4 correct a prior rule which a court has found defective. Where an injunction is based  
5 on an interpretation of a prior regulation, the agency need not seek modification of  
6 that injunction before it initiates new rulemaking to change the regulation. (citations  
omitted).

7 73 Fed. Reg. at 63846, quoting NAACP, Jefferson County Branch v. Donovan, 737 F.2d 67, 72  
8 (D.C. Cir. 1984).

9 Where subsequent rulemaking proceedings have conclusively resolved a particular issue  
10 in a case, that issue becomes moot and can be dismissed from the case. See e.g. Ctr. for Bio.  
11 Diversity v. Marina Point Dev. Co., 535 F.3d 1026, 1035-36 (9th Cir. 2008) (holding claim to be  
12 moot where claim concerned violation of Endangered Species Act involving bald eagles but the  
13 U.S. Fish and Wildlife Service removed bald eagles from the endangered species list after claim  
14 was filed); W. Radio Servs. Co. v. Glickman, 113 F.3d 966, 974 (9th Cir. 1997) (holding moot  
15 plaintiff's challenge to agency postponing issuance of telecommunication permits until  
16 establishment of a fee structure because agency subsequently issued fee structure).

### 18 **B. Standard on a Motion to Vacate an Injunction**

19 "[A] preliminary injunction is an extraordinary and drastic remedy, one that should not  
20 be granted unless the movant, by a clear showing, carries the burden of persuasion." Mazurek v.  
21 Armstrong, 520 U.S. 968, 972 (1997) (per curiam), quoting 11A C. Wright, A Miller & M. Kane,  
22 Federal Practice and Procedure § 2948, pp. 129-130 (2d ed. 1995) (emphasis in original). The  
23 Ninth Circuit has described two sets of criteria for preliminary injunctive relief:  
24

25 The traditional equitable criteria for granting preliminary injunctive  
26 relief are (1) a strong likelihood of success on the merits, (2) the  
27 possibility of irreparable injury to plaintiff if the preliminary relief is  
28 not granted, (3) a balance of hardships favoring the plaintiff, and (4)

1 advancement of the public interest . . . . Alternatively, a court may  
2 issue a preliminary injunction if the moving party demonstrates either  
3 a combination of probable success on the merits and the possibility of  
4 irreparable injury or that serious questions are raised and the balance of  
5 hardships tips sharply in his favor.

6 Johnson v. Cal. State Bd. of Accountancy, 72 F.3d 1427, 1430 (9th Cir. 1995) (emphasis in  
7 original) (citations and internal quotation marks omitted). Crucially, no matter how great the  
8 plaintiff's showing of irreparable harm, "it must be shown as an irreducible minimum that there  
9 is a fair chance of success on the merits." Martin v. Int'l Olympic Comm., 740 F.2d 670, 675  
10 (9th Cir. 1984).

11 The district court always has the "power to modify or to overturn an interlocutory order  
12 or decision while it remains interlocutory." Credit Suisse First Boston Corp. v. Grunwald, 400  
13 F.3d 1119, 1124 (9th Cir. 2005) quoting Tanner Motor Livery, Ltd. v. Avis, Inc., 316 F.2d 804,  
14 809 (9th Cir.1963). This power includes the dissolution of preliminary injunctions. Id. The  
15 court's wide discretion to modify the injunction is predicated upon any change in circumstances  
16 or new facts. A&M Records, Inc. v. Napster, Inc., 284 F.3d 1091, 1098 (9th Cir. 2002) citing  
17 System Fed'n No. 91 Ry. Emp. Dep't v. Wright, 364 U.S. 642, 647-48 (1961); see also Taylor v.  
18 Westly, 525 F.3d 1288, 1289 (9th Cir. 2008) (per curiam) (affirming dissolution of preliminary  
19 injunction where the State eliminated the statutory and administrative procedure that had been  
20 determined to be unconstitutional).

21  
22 Finally, a court can grant summary judgment to a party and, based upon that ruling on the  
23 merits, dissolve a preliminary injunction previously issued by the court against the prevailing  
24 party. See e.g. Unified Dealer Group v. Tosco Corp., 16 F.Supp.2d 1137, 1145 (N.D. Cal. 1998).

1 **II. Defendants' Supplemental Final Rule Has Addressed and Resolved the Concerns**  
2 **with the Safe Harbor Rule Identified In The Court's October 10, 2007 Preliminary**  
3 **Injunction Ruling**

4 **A. The Supplemental Final Rule Contains a Detailed "Reasoned Analysis" for the**  
5 **DHS Policy Embodied in the Safe Harbor Rule**

6 This Court found that, in adopting the Safe Harbor Rule, DHS changed its approach to  
7 the weight it intended to give no-match letters in enforcement proceedings. Specifically, the  
8 Court found that "DHS's new position is that an employer who receives a no-match letter can,  
9 without any other evidence of illegality, be held liable under the continuing employment  
10 provision." AFL, supra, 552 F.Supp. 2d at 1010. In order to address the Court's concerns, the  
11 Supplemental Final Rule provides a comprehensive analysis of the significance of no-match  
12 letters to immigration law enforcement, including the new information that informed DHS's  
13 decision to adopt the Rule, precisely the sort of "reasoned analysis" required when an agency  
14 changes its position on a question.

15  
16 DHS (and INS) have, for many years, informally provided guidance to employers on the  
17 government's view of the relevance of no-match letters to immigration enforcement actions, as  
18 well as recommending steps employers should take when receiving no-match letters. See, e.g.  
19 D.E. 7 Exh. H, I, J. With the issuance of the Safe Harbor Rule, DHS has elected to clarify,  
20 formalize and arguably change that guidance by creating the new safe harbor available to  
21 employers who receive no-match letters.

22  
23 The Safe Harbor Rule was the product of DHS experience with no-match letters in many  
24 different immigration-related contexts, and the gradual development of DHS expertise in  
25 recognizing the conclusions that can be drawn from the issuance of no-match letters to employers  
26 and employers' responses to those letters. The Safe Harbor Rule articulates DHS's current  
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1 position that “employers that fail to perform reasonable due diligence upon receipt of SSA no-  
2 match letters or DHS suspect document notices risk being found to have constructive knowledge  
3 of the illegal work status of employees whose names of SSNs are listed.” 73 Fed. Reg. at 63847;  
4 see also id. at 63849. DHS’s position on the relevance of no-match letters is based in large  
5 measure on “growing evidence and consensus within and outside the government that SSN no-  
6 matches are a legitimate indicator of possible illegal work by unauthorized aliens.” 73 Fed. Reg.  
7 at 63847.<sup>6/</sup> The extent of the use of false SSNs by illegal workers has become increasingly  
8 evident to DHS through many sources, including civil and criminal immigration enforcement  
9 proceedings. 73 Fed. Reg. at 63848, fn. 2. In addition, DHS has extensive evidence from  
10 numerous sources, including comments submitted in the course of this rulemaking, that “many  
11 employers are aware that a substantial portion of their workforce is unauthorized,” 73 Fed. Reg.  
12 at 63845, and that employers understand that an employee’s appearance on a no-match letter may  
13 indicate that the individual is unauthorized to work, 73 Fed. Reg. at 63848. Indeed, one recent  
14 study of the problem, that concluded that “most workers with unmatched SSNs are  
15 undocumented immigrants.” 73 Fed. Reg. at 63845, citing C. Mehta, N. Theodore & M.  
16 Hincapie, Social Security Administration’s No-Match Letter Program: Implications for  
17 Immigration Enforcement and Worker’s Rights (2003). The Supplemental Final Rule also  
18 addresses and rejects the arguments by some commentators that SSA records are so flawed and  
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24 <sup>6/</sup> DHS cited evidence from a report of the SSA Office of Inspector General, who concluded  
25 that “the magnitude of incorrect wage reporting is indicative of SSN misuse.” 73 Fed. Reg. 63847,  
26 citing, Office of the Inspector General, Social Security Administration, Social Security Number  
27 Misuse in the Service, Restaurant, and Agriculture Industries, Report A-08-05-25-23, at 2-3 (April  
28 2005). DHS also noted that its view was “overwhelmingly affirmed by those who submitted  
comments” on the proposed Safe Harbor Rule in 2006. 73 Fed. Reg. at 63848, citing comments of  
employer groups.

1 unreliable as to deserve little if any weight in immigration enforcement. 73 Fed. Reg. at 63484.<sup>2/</sup>

2 Based upon this extensive evidence, much of it of recent vintage, and DHS's extensive  
3 enforcement expertise, DHS has now found that "there is a substantial connection between social  
4 security no-match letters and lack of work authorization" by illegal aliens. 73 Fed. Reg. at 63845.  
5 That conclusion was implicit in DHS's prior correspondence on this question, but with the Safe  
6 Harbor Rule, DHS explicitly adopted this position in an agency regulation.  
7

8 Consequently, the Supplemental Final Rule enunciates four principles that form the basis of  
9 DHS's view of the relevance of no-match letters to the enforcement of the immigration laws:

10 DHS's consistent, if informal, view of SSA no-match letters has been that  
11 (1) SSA no match letters do not, by themselves, establish that an employee  
12 is unauthorized, (2) there are both innocent and non-innocent reasons for  
13 no-match letters, but (3) an employer may not safely ignore SSA no-match  
14 letters, and (4) an employer must be aware of and comply with the anti-  
discrimination provisions of the INA.

15 73 Fed.Reg. at 63847. The Supplemental Final Rule also enumerated "the most significant  
16 reasons" for the Secretary's decision to promulgate the Safe Harbor Rule. These were:

17 (1) the need to resolve ambiguity and confusion among employers  
18 regarding their obligations under the INA following receipt of an SSA no-  
19 match letter; (2) the growing evidence and consensus within and outside  
20 government that SSN no-matches are a legitimate indicator of possible  
21 illegal work by unauthorized aliens; (3) DHS's view that SSA's criteria for  
22 sending employee no-match letters effectively focuses those letters on  
23 employers that have potentially significant problems with their employees'  
24 work authorization; and (4) the established legal principle that employers  
25 may be found to have knowingly employed unauthorized alien workers in  
26 violation of INA section 274A based on a constructive knowledge theory.

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27 <sup>2/</sup> DHS notes, for example, that "SSA has developed a series of computerized error checking  
28 routines to resolve certain common errors that result in unmatched name and SSN." 73 Fed. Reg.  
at 63848 (22).

1 73 Fed. Reg. 63847, citing 73 F.R. 15949 – 50.<sup>2/</sup>

2 Ultimately, DHS reaffirms its conclusion that the Safe Harbor Rule represents a  
3 reasonable approach to the use of no-match letters in immigration law enforcement.

4  
5 DHS has consistently stated that an SSA no-match letter, standing alone,  
6 does not conclusively establish that any employee identified in the letter is  
7 an unauthorized alien. Nor does an employer’s receipt of, and response to,  
8 an SSA no-match letter always prove that the employer had constructive  
9 knowledge that any listed employees were unauthorized to work in the  
10 United States. Rather, this rulemaking announces DHS’s view that a no-  
11 match letter, and an employer’s response to it, may be used as evidence,  
12 evaluated in light of “the totality of the circumstances,” of an employer’s  
13 constructive knowledge.

14 73 Fed. Reg. at 63851-52. This position, even if viewed as a departure from prior informal DHS  
15 statements, is supported by a “reasoned analysis for the change,” Motor Vehicle Mfgs. Ass’n.,  
16 supra, 463 U.S. at 42, and hence the Safe Harbor Rule is not arbitrary and capricious or otherwise  
17 in violation of the APA.

18  
19 **B. The Supplemental Final Rule Removes Any Reference to the Anti-Discrimination  
20 Provisions of the IRCA**

21 In the preamble accompanying the final rule published on August 15, 2007, DHS stated  
22 that:

23  
24 employers who follow the safe harbor procedures set forth in this rule  
25 uniformly and without regard to perceived national origin or citizenship  
26 status as required by the provisions of 274B(a)(6) of the INA will not be  
27 found to have engaged in unlawful discrimination.

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29 <sup>2/</sup> DHS recognized that its pre-existing regulations on constructive knowledge, 8 C.F.R. §  
30 274a.1(l), standing alone, were not sufficient to address the problem of employer uncertainty, as they  
31 “provided no detailed guidance” to employers on how to respond to no-match letters, 73 Fed. Reg.  
32 at 63846, and certainly “do not substantially deter employers from retaining or hiring undocumented  
33 immigrants.” Id at 63845, quoting Mehta, et al., supra; see A.R. at 314. DHS explicitly recognized  
34 that “many law-abiding employers are unsure of their obligations under current immigration law  
35 after they receive a no-match letter.” 73 Fed. Reg. at 63845.

1 72 Fed. Reg. at 45613-14. The DHS insert to accompany SSA's no-match letters contained a  
2 similar statement. However, the text of the Safe Harbor Rule itself did not address this question.

3 Enforcement of the anti-discrimination provisions of the IRCA is the responsibility of the  
4 Office of Special Counsel for Immigration-Related Unfair Employment Practices ("Special  
5 Counsel") within DOJ. In its October 10, 2007 Order, the Court concluded that this statement by  
6 DHS appears to constitute an official determination as to employer liability under IRCA's anti-  
7 discrimination provisions. Consequently, the Court concluded that "[t]here is therefore a serious  
8 question whether DHS has impermissibly exceeded its authority and encroached on the authority  
9 of the Special Counsel by interpreting IRCA's anti-discrimination provisions to preclude  
10 enforcement where employers follow the safe-harbor framework." AFL, supra, 552 F.Supp. 2d  
11 at 1011.  
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14 In the Supplemental Final Rule, DHS expressly recognized the jurisdiction of DOJ over  
15 enforcement of the anti-discrimination provisions of IRCA and affirmed that "DHS does not  
16 have the authority to obligate the DOJ or its Office of Special Counsel . . ." 73 Fed. Reg. at  
17 68849. To address the Court's concerns on this point, "DHS rescinds the statements in the  
18 preamble of the August 2007 Final Rule discussing the potential for anti-discrimination liability  
19 faced by employers that follow the safe harbor procedures set forth in the August 2007 Final  
20 Rule." 73 Fed. Reg. at 63849. DHS has also made a conforming change to the insert to  
21 accompany SSA's no-match letters, referring employers to the guidance issued by the  
22 Department of Justice and eliminating any statements that could be construed as an attempt by  
23 DHS to interpret the anti-discrimination provisions of the INA. See Supp. A.R. at 3803. Thus,  
24 the clarification of this point in the preamble of the Supplemental Final Rule fully addresses this  
25 Court's concerns, rendering this issue moot.  
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1           **C. DHS Has Performed a Regulatory Flexibility Analysis of the Safe Harbor Rule**

2           The third and final basis for entry of the preliminary injunction was the failure of DHS to  
3 perform an analysis of the Safe Harbor Rule under the Regulatory Flexibility Act, 5 U.S.C. § 601  
4 et seq. (“RFA”). DHS did not perform a regulatory flexibility analysis because the Secretary  
5 certified that the rule will not “have a significant economic impact on a substantial number of  
6 small entities,” pursuant to 5 U.S.C. § 605(b). The Court concluded that while the rule does not  
7 mandate compliance, the practical effect of noncompliance will be to “subject employers to the  
8 threat of civil and criminal liability,” AFL, supra, 552 F.Supp. 2d at 1013, and therefore “there  
9 are serious questions whether DHS violated the RFA by refusing to conduct a final flexibility  
10 analysis,” id.

11           DHS has elected to perform a regulatory flexibility analysis in order to address the  
12 Court’s concerns. The “Final Regulatory Flexibility Analysis” contained in the Supplemental  
13 Final Rule, as supplemented by the “Final Small Entity Impact Analysis,” published with the  
14 Supplemental Final Rule, Supp. A.R. at 3666-3802, provides a detailed and comprehensive  
15 analysis of the possible economic impact of the Safe Harbor Rule on small entities, in full  
16 satisfaction of the RFA’s requirements.

17           The RFA requires that both the Initial Regulatory Flexibility Analysis and the Final  
18 Regulatory Flexibility Analysis contain five components. The five components required for the  
19 final analysis are:

- 20           (1) “a succinct statement of the need for, and objectives of, the rule;”  
21           (2) “a summary of the significant issues raised by the public comments,” as well  
22           as the agency’s assessment of those comments and any changes made as a  
23           result;  
24           (3) “an estimate of the number of small entities to which the rule will apply;”  
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1 (4) “a description of the projected reporting, record keeping and other compliance  
2 requirements of the rule” as well as an estimate of the small entities that will be  
3 affected by these requirements;

4 (5) “a description of the steps the agency has taken to minimize” impacts on small  
5 entities as well as the reasons for selecting the alternative adopted and  
6 rejecting the other significant alternatives.

7 5 U.S.C. § 604(a)(1) – (5). See also 5 U.S.C. § 603(b) (similar requirements for Initial  
8 Regulatory Flexibility Analysis).

9 Both the preamble of the Supplemental Final Rule as well as the “Small Entity Impact  
10 Analysis” itself, address each of these five categories of information and analysis. See 73 Fed.  
11 Reg. at 63861– 63866; Supp. A.R. 3666-3802. The Small Entity Impact Analysis contains  
12 estimates of all areas where a small entity could reasonably be expected to incur direct costs due  
13 to the rulemaking. Cost areas analyzed include increased human resources costs, turnover and  
14 replacement cost of authorized employees, lost productivity, and even an estimate of the costs of  
15 printing and postage. The analysis also contains several Appendixes that explain how the  
16 calculations were derived, making the computations as transparent and reproducible as possible.

17  
18 The Ninth Circuit has held that “[t]he RFA imposes no substantive requirements on an  
19 agency; rather its requirements are ‘purely procedural’ in nature.” Ranchers Cattlemen Action  
20 Legal Fund United Stockgrowers of Am. v. U.S. Dep’t of Agric., 415 F.3d 1078, 1101 (9th Cir.  
21 2005), quoting United States Cellular Corp. v. FCC, 254 F.3d 78, 88 (D.C. Cir. 2001). To satisfy  
22 the RFA, an agency must demonstrate a “reasonable, good-faith effort” to fulfill its requirements,  
23 id., and it needs not evaluate every alternative solution, but only the significant ones. Id. at 1102  
24 (internal citations omitted).

25  
26 Because the RFA is purely procedural in nature, it does not provide plaintiffs grounds to  
27 attack an agency’s choice among regulatory alternatives, including an agency’s “failure” to  
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1 choose an alternative preferred by plaintiffs. See National Coalition for Marine Conservation,  
2 231 F. Supp. 2d. 119, 143 (D.D.C. 2002) (stating that “the RFA does not give plaintiff the  
3 authority to determine which alternative best meets the agency's goals.”). Again, this Circuit has  
4 affirmed that “the analyses required by the RFA are essentially procedural hurdles; after  
5 consideration of the relevant impacts and alternatives, an administrative agency remains free to  
6 regulate as it sees fit.” Environmental Defense Center v. EPA, 344 F.3d 832, 879 (9th Cir.  
7 2003). Other circuits have also recognized that the RFA’s requirements are purely procedural.  
8 See e.g. Aeronautical Repair Station Ass’n v. FAA, 494 F.3d 161 169 (D.C. Cir. 2007) (“If the  
9 FAA properly follows the procedure [under the RFA] in its rulemaking . . . it discharges its  
10 responsibility in this regard.”); Little Bay Lobster Co. v. Evans, 352 F.3d 462, 471 (1st Cir. 2003)  
11 (holding that the RFA creates only procedural obligations upon an agency “simply to make a  
12 reasonable good faith effort to address comments and alternatives”); Alenco Commc’ns, Inc. v.  
13 FCC, 201 F.3d 608, 625 (5th Cir. 2000) (“The RFA is a procedural rather than substantive  
14 agency mandate.”). DHS has undeniably made a good faith effort to comply with the procedural  
15 obligations under the RFA, and indeed has produced an exceptionally detailed and  
16 comprehensive analysis. This issue too has become moot.  
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## 21 CONCLUSION

22 Wherefore, as the Supplemental Final Rule has addressed the Court’s three grounds for  
23 preliminarily enjoining the Safe Harbor Rule, the Court should grant defendants’ motions and:  
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1 (1) vacate the Preliminary Injunction; and (2) enter Summary Judgment for defendants on  
2 plaintiffs' challenges to the Safe Harbor Rule.

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Respectfully submitted,

GREGORY B. KATSAS  
Assistant Attorney General  
THOMAS H. DUPREE JR.  
Deputy Assistant Attorney General

JOSEPH P. RUSSONIELLO  
United States Attorney

*Daniel Bensing*

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SANDRA SCHRAIBMAN  
DANIEL E. BENSING (D.C. Bar No. 334268)  
Attorneys, U.S. Department of Justice  
Civil Division, Federal Programs Branch  
20 Massachusetts Ave., N.W., Room 6114  
Washington, D.C. 20001  
Telephone: (202) 305-0693  
Facsimile: (202) 616-8460  
E-mail: [Daniel.Bensing@USDOJ.gov](mailto:Daniel.Bensing@USDOJ.gov)