UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND
SOUTHERN DIVISION

CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA, *et al.*,	)	
Plaintiffs	)	8:08-CV-03444-AW
v.	)	
JANET NAPOLITANO, *et al.*,	)	
Defendants.	)	

MEMORANDUM IN SUPPORT OF DEFENDANTS' MOTION FOR SUMMARY JUDGMENT AND IN OPPOSITION TO PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT

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The Executive Order and implementing rule issued in this case are appropriate uses of the President's broad power under the Federal Property and Administrative Services Act of 1949, 40 U.S.C. 121 (formerly 40 U.S.C. § 486) (hereinafter "Procurement Act"), and they are not barred by any other statute. Plaintiffs' lengthy brief attempts to make the relatively simple issues in this case more complicated than they need to be. The rule challenged here, like the Executive Order that authorized it, is not, as plaintiffs would have the Court believe, an enforcement of any immigration statute. Rather, it is a procurement rule designed to ensure that the economy and efficiency of the government's procurement system is not harmed by the potentially destabilizing hiring practices of government contractors. That this rule, like many earlier procurement rules may have a secondary effect on a non-procurement policy – in this case, the employment of aliens unauthorized to work in the United States – does not change the fact that it is a permissible and proper procurement rule, as demonstrated by cases described below.

The Executive Order and rule constitute a proper use of the President's power under the Procurement Act. The challenged directives were not promulgated pursuant to the Illegal Immigration Reform and Immigrant Responsibility Act of 1996, Pub. L. 104-208, div. C, 110 Stat. 3009-546, ("IIRIRA"), and thus need not find authorization in that statute, but in any event, they are entirely consistent with that statute. Finally, plaintiffs' technical procedural objections to the rule are without merit as the promulgating agencies properly followed both the Office of Federal Procurement Policy Act, 41 U.S.C. § 401, *et seq.*, and the Regulatory Flexibility Act, 5 U.S.C. § 601, *et seq*. Plaintiffs' complaint is thus without merit and judgment should be granted for defendants.

BACKGROUND

On February 13, 1996, President Clinton issued an Executive Order providing for the debarment of certain federal contractors who failed to comply with the Immigration and Nationality Act provisions prohibiting the unlawful employment of aliens. Exec. Order No. 12,989, 61 Fed. Reg. 6,091 (Feb. 13, 1996). President Clinton issued this Order pursuant to his powers under the Procurement Act in order "to promote economy and efficiency in Government procurement." *Id.* at 6,091. Specifically, President Clinton found:

> Stability and dependability are important elements of economy and efficiency. A contractor whose work force is less stable will be less likely to produce goods and services economically and efficiently than a contractor whose work force is more stable. It remains the policy of this Administration to enforce the immigration laws to the fullest extent, including the detection and deportation of illegal aliens. In these circumstances, contractors cannot rely on the continuing availability and service of illegal aliens, and contractors that choose to employ unauthorized aliens inevitably will have a less stable and less dependable work force than contractors that do not employ such persons. Because of this Administration's vigorous enforcement policy, ***contractors that employ unauthorized alien workers are necessarily less stable and dependable procurement sources than contractors that do not hire such persons***.

Id. (emphasis supplied); *see also* 73 Fed. Reg. 67653 ("Thus, as early as 1996, agencies were instructed to use provisions within the FAR to support economical and efficient Federal Government contracting by avoiding doing business with contractors that employ unauthorized workers.").

Executive Order 12,989 relied on the Attorney General (later changed to the Secretary of Homeland Security by Executive Order 13,286 (Feb. 28, 2003)) to conduct investigations and determine whether a contractor was not in compliance with the INA employment provisions. *See* 61 Fed. Reg. at 6091-92. By 2008, President Bush determined that it had become technically feasible to electronically check the work status of individuals at the time they are

hired and/or assigned to work on a government contract. President Bush concurred in his predecessor's findings as to the deleterious effect that the employment of illegal workers by federal contractors can have on the economy and efficiency of government procurement, adding that:

> Where a contractor assigns illegal aliens to work on Federal contracts, the enforcement of Federal immigration laws imposes a direct risk of disruption, delay, and increased expense in Federal contracting. Such contractors are less dependable procurement sources, even if they do not knowingly hire or knowingly continue to employ unauthorized workers.
>
> ***Contractors that adopt rigorous employment eligibility confirmation policies are much less likely to face immigration enforcement actions, because they are less likely to employ unauthorized workers, and they are therefore generally more efficient and dependable procurement sources than contractors that do not employ the best available measures to verify the work eligibility of their workforce***. It is the policy of the executive branch to use an electronic employment verification system because, among other reasons, it provides the best available means to confirm the identity and work eligibility of all employees that join the Federal workforce. Private employers that choose to contract with the Federal Government should meet the same standard.
>
> I find, therefore, that adherence to the general policy of contracting only with providers that do not knowingly employ unauthorized alien workers and that have agreed to utilize an electronic employment verification system designated by the Secretary of Homeland Security to confirm the employment eligibility of their workforce will promote economy and efficiency in Federal procurement.

Exec. Order 13465, 73 Fed. Reg. 33,285 (June 11, 2008) (amending Exec. Order 12,989) (emphasis supplied) (Exec. Order 12,989, as amended, is hereinafter referred to as "the Executive Order"). To promote economy and efficiency by reducing the incidence of immigration violations by federal contractors, the Executive Order states that: "Executive departments and agencies that enter into contracts shall require, as a condition of each contract, that the contractor agree to use an electronic employment eligibility verification system designated by the Secretary of Homeland Security to verify the employment eligibility of: (i) all

persons hired during the contract term by the contractor to perform employment duties within the United States; and (ii) all persons assigned by the contractor to perform work within the United States on the Federal contract." *Id.* at 33,286. The Executive Order directs the Secretary of Defense, the Administrator of General Services, and the Administrator of NASA[1] ("the FAR Council" or "the Council") to amend the Federal Register to the extent necessary to implement this requirement. *Id.*

On June 9, 2008, Secretary of Homeland Security Michael Chertoff, designated "the E-Verify system, modified as necessary and appropriate," as the electronic employment eligibility verification system to be used to verify employment eligibility pursuant to the Executive Order.

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[1] The proper defendant in a suit challenging an agency rulemaking is "the United States, the agency by its official title, or the appropriate officer." 5 U.S.C. § 703. In the instant case, plaintiffs seek injunctive and declaratory relief relating to the rule promulgated by three agencies: the Department of Defense, the General Services Administration, and the National Aeronautics and Space Administration. *See* 73 Fed. Reg. 67,650 (stating that the rule is being "issued under the authority of the Secretary of Defense, the Administrator of General Services, and the Administrator for the National Aeronautics and Space Administration"); *see also* 41 U.S.C. § 421 (providing that the FAR Council shall include the Secretary of Defense, the Administrator of National Aeronautics and Space, and the Administrator of General Services). Thus, the only proper defendants with regard to plaintiffs' challenge to the rule are those three agencies, their heads (*i.e.*, the Secretary of Defense, the Administrator of General Services, and the Administrator of NASA) and/or the United States. The Secretary of Homeland Security and the Chairman of the Civilian Agency Acquisition Council (which is an inter-agency council and not an "agency," *see* 48 C.F.R. § 1.201-1) are thus not proper defendants and should be dismissed. *See Philadelphia Hous. Auth. v. Leavitt*, 2006 WL 2990391, at *1 n.1 (E.D. Pa. Oct. 17, 2006) (where agency at issue was Department of Health and Human Services, that agency and its Secretary were proper defendants and subordinate officials within HHS would be dismissed as defendants).

The United States is a sufficient defendant for the Court to adjudicate the claims in this case, *see* 5 U.S.C. § 702, and thus the dismissal of the improperly named defendants will not prejudice plaintiffs. In any event, defendants are willing to consent to the substitution of the proper defendants – the Secretary of Defense, the Administrator of GSA, and the Administrator of NASA, in their official capacities – in place of the improperly named defendants, and to waive any further service requirements.

Notice, 73 Fed. Reg. 33,837 (June 13, 2008). The E-Verify system is operated by U.S. Citizenship and Immigration Services (a component of the Department of Homeland Security) in partnership with the Social Security Administration. *See id.* The E-Verify system, initially developed pursuant to Section Sections 401-404 of IIRIRA, allows the federal government and participating employers to verify the employment status of newly hired employees.

As described more fully below, IIRIRA directed the establishment of three pilot programs (only one of which, now known as E-Verify, remains in existence) to permit an employer to confirm a new hire's employment eligibility with more accuracy than the existing Form I-9 process. *See infra* Part II.A. Secretary Chertoff determined that the E-Verify system, "modified as necessary and appropriate," could also be used for the procurement program required by the Executive Order. 73 Fed. Reg. at 33,837; *cf.* 73 Fed. Reg. 67,651 (Nov. 14, 2008) ("E-Verify represents the best means currently available for employers to verify the work authorization of their employees.").

On June 12, 2008, the FAR Council published a notice of proposed rulemaking. *See* 73 Fed. Reg. 33,374. On November 14, 2008, after extensive notice and comment, the Council issued a final rule implementing the President's directive. The rule will provide for the insertion of a clause into certain government contracts by which contractors will agree to use the E-Verify system to verify that all of the contractors' new hires, as well as all existing employees who are assigned to perform work under government contracts, are legally authorized to work in the United States. *See* 73 Fed. Reg. at 67,703 - 05. The rule exempts contracts for commercially available off-the-shelf items, contracts for less than $100,000, contracts for less than 120 days, and contracts for work to be performed outside the United States. *See id.* at 67,704.

The rule was initially scheduled to become effective on January 15, 2009. *Id.* at 67,651. In order to comply with the Congressional Review Act, 5 U.S.C. § 801(a)(3)(A), the effective date of the rule was extended to January 19, 2009, and in order to give this Court time to resolve the issues in this case, the applicability date of the rule was extended until February 20, 2009. 74 Fed. Reg. 1,937 (Jan. 14, 2009). After the Administration of President Obama was inaugurated on January 20, 2009, the Council delayed the applicability date several times, ultimately until September 8, 2009, in order to allow the newly inaugurated Administration to consider the Executive Order and rule. *See* Docket No. 24, ¶¶ 2, 4. After undertaking an extensive review of the Executive Order and rule, the Administration "determined that the Final Rule's implementation will improve economy and efficiency in government procurement for reasons set forth in the Executive Order." Docket No. 26, ¶ 3. The rule will thus become applicable on September 8, 2009.

ARGUMENT

Plaintiffs' seven counts raise three basic contentions, each of which is without merit. In Counts III and V, plaintiffs contend that the Executive Order and rule are beyond the President's authority under the Procurement Act. This contention fails because the Executive Order and rule constitute a proper use of the President's broad power to make rules to improve the efficiency and economy of the procurement process. In Counts I, II, and IV, plaintiffs contend that the Executive Order and rule are inconsistent with the basic pilot program provisions of IIRIRA. This contention fails for at least two independent reasons. First, the Executive Order and rule were promulgated pursuant to the Procurement Act and not IIRIRA, and thus IIRIRA's provisions are inapplicable. And, in any event, the Executive Order and rule do not violate the

provisions in IIRIRA.

Finally, in Counts VI and VII, plaintiffs contend that the rule is invalid due to alleged technical flaws in the rule-making process. This contention fails because the Council fully complied with both the Procurement Policy Act and the Regulatory Flexibility Act.

I. The Executive Order and Rule Were Properly Promulgated Pursuant to the President's Broad Authority Under the Procurement Act

A. The Executive Order and Rule Serve the Goals of Efficiency and Economy in Federal Contracting

1. The Executive Order and Rule Are Valid

The Procurement Act empowers the President to "prescribe policies and directives that the President considers necessary to carry out" the Act's provisions, so long as the directives are "consistent" with the Act. 40 U.S.C. § 121(a). The Procurement Act thus permits Presidential directives so long as they are "reasonably related to the Procurement Act's purpose of ensuring efficiency and economy in government procurement." *Liberty Mutual Ins. Co. v. Friedman*, 639 F.2d 164, 170 (4th Cir. 1981). "'Economy' and 'efficiency' are not narrow terms; they encompass those factors like price, quality, suitability, and availability of goods and services that are involved in all acquisition decisions." *AFL-CIO v. Kahn*, 618 F.2d 784, 789 (D.C. Cir. 1979). Thus, courts have recognized "the necessary flexibility and 'broad ranging authority'" that the Procurement Act provides to the President. *UAW-Labor Employment & Trading Corp. v. Chao*, 325 F.3d 360, 366 (D.C. Cir. 2003) (quoting *Kahn*, 618 F.2d at 789); *accord Farkas v. Texas Instrument, Inc.*, 375 F.2d 629, 632 n.1 (5th Cir. 1967) (noting the "broad authority" granted to the President by the Procurement Act).

This broad authority was granted to the President because, "by emphasizing the leadership role of the President in setting Government-wide procurement policy on matters common to all agencies, Congress intended that the President play a direct and active part in supervising the Government's management functions." *Kahn*, 618 F.2d at 788. As the D.C. Circuit characterized it, after a searching review of the Procurement Act's legislative history:

> Section 205(a) [of the Procurement Act] grants the President particularly direct and broad-ranging authority over those larger administrative and management issues that involve the Government as a whole. And that direct presidential authority should be used in order to achieve a flexible management system capable of making sophisticated judgments in pursuit of economy and efficiency.

Id. at 789.

This power has been used by Presidents over the years to improve economy and efficiency in numerous ways. "[T]he most prominent use of the President's authority under [the Procurement Act] has been a series of anti-discrimination requirements for Government contractors." *Id.* at 790. The use of the Procurement Act power to prevent employment discrimination by companies that held government contracts has been upheld by numerous courts which have deferred to Presidents' findings that reducing discrimination by federal contractors could reduce federal costs in the long run by broadening the available labor pool. *See Contractors Ass'n of E. Pa. v. Secretary of Labor*, 442 F.2d 159, 167 (3d Cir. 1971); *Farkas v. Texas Instrument, Inc.*, 375 F.2d 629, 632 n.1 (5th Cir. 1967); *cf. Trinity Indus., Inc. v. Herman*, 173 F.3d 527, 530 (4th Cir. 1999). Similarly, the use of the Procurement Act power to require federal contractors to comply with voluntary wage and price standards was upheld. *American Federation of Labor and Congress of Industrial Organizations v. Kahn*, 618 F.2d 784, 793 (1979); *see also Chamber of Commerce v. Reich*, 74 F.3d 1322, 1333 (D.C. Cir. 1996) ("The

President's authority to pursue 'efficient and economic' procurement to be sure, has been interpreted to permit such broad ranging Executive Orders as [those] guaranteeing equal employment opportunities and restricting wage increases on the part of government contractors–measures which certainly reach beyond any narrow concept of efficiency and economy in procurement." (quoting Procurement Act)). More recently, the D.C. Circuit upheld an executive order and implementing rule that required federal contractors to post notices at all facilities informing employees of certain labor law rights despite the "attenuated" link between the posting rights at a contractor's facility and economy and efficiency in government procurement. *UAW-Labor*, 325 F.3d at 366-67; *see also City of Albuquerque v. United States Dep't of Interior*, 379 F.3d 901, 914 (10th Cir. 2004) (upholding Executive Order that required federal government to consider acquiring office space in the "centralized community business area" because "directions concerning the consideration of locations within the central business area are sufficiently related to the [Procurement] Act to be a valid exercise of the Act's authority.")

In the present case, the challenged Executive Order and rule, which will require government contractors to use the best available system to screen unauthorized workers from their workforce, has a clear nexus with efficiency and economy, as demonstrated by the findings of two Presidents and by an extensive administrative record. As early as 1996, President Clinton determined that "contractors that employ unauthorized alien workers are necessarily less stable and dependable procurement sources than contractors that do not hire such persons," and concluded, "I find, therefore, that adherence to the general policy of not contracting with providers that knowingly employ unauthorized alien workers will promote economy and

efficiency in Federal procurement." Exec. Order No. 12,989, 61 Fed. Reg. 6091 (Feb. 13, 1996). President Bush concurred, finding that "[w]here a contractor assigns illegal aliens to work on Federal contracts, the enforcement of Federal immigration laws imposes a direct risk of disruption, delay and increased expense in Federal contracting" and thus, "[s]uch contractors are less dependable procurement sources." Exec. Order 13,465, 73 Fed. Reg. 33,285 (June 11, 2008). Following directly from this, President Bush concluded that "[c]ontractors that adopt rigorous employment eligibility confirmation policies are much less likely to face immigration enforcement actions, because they are less likely to employ unauthorized workers, and they are therefore generally more efficient and dependable procurement sources than contractors that do not employ the best available measures to verify the work eligibility of their workforce." *Id.* And, President Bush concluded, the best available measure is "an electronic employment verification system" because "it provides the best available means to confirm the identity and work eligibility of all employees that join the Federal workforce." *Id.* Thus, the Executive Order directs the Executive Branch to contract only with entities that utilize this best available means to avoid the disruptions that can be caused by employment of unauthorized workers. *Id.*

The conclusions of Presidents Clinton and Bush that the employment of unauthorized workers by government contractors is detrimental to the economy and efficiency of the government's procurement system springs from several indisputable propositions. First, immigration laws restrict the employment of unauthorized workers. Second, the Department of Homeland Security has the authority to, and does indeed, vigorously enforce these laws. Third, an entity that hires illegal workers can have its business significantly disrupted or even ended by such an enforcement action. Indeed, plaintiffs concede the first two of these points, and cannot

seriously contest the third. *See* Pl's Mem., at 3-4. And, the administrative findings demonstrate that these are not simply abstract concerns. In the rule-making, the Council documented multiple instances in which "Federal Government contracts have been disrupted when the contractor's employees were identified as unauthorized workers." 73 Fed. Reg. at 67,653. One incident involved the arrest of 33 undocumented construction workers at a federal courthouse site, another incident involved the arrest of 40 undocumented workers at three military bases, and a third incident involved the arrest of 57 undocumented workers at a defense contractor. *Id.* Moreover, to the extent that other federal contractors employ unauthorized workers, similar disruptions may occur given the Department of Homeland Security's broad enforcement powers and strong commitment to vigorous enforcement of the laws against employing unauthorized workers.

In *UAW-Labor Employment & Trading Corp. v. Chao*, 325 F.3d 360 (D.C. Cir. 2003), the court upheld the following analysis as sufficient to support a procurement rule that required the posting of certain labor law rights: "When workers are better informed of their rights, including their rights under Federal labor laws, their productivity is enhanced." 325 F.3d at 366 (quoting Exec. Order 13,201, § 1(a), 66 Fed. Reg. 11, 221 (Feb. 17, 2001)). The Executive Order upheld in *City of Albuquerque v. United States Dep't of Interior*, 379 F.3d 901, 914 (10th Cir. 2004), provided even less of an analytical basis for the link between the Order and the goals of the Procurement Act. *See* Exec. Order 12,072, 43 Fed. Reg. 36,869 (Aug. 16, 1978). Here, the nexus between reducing contractors' use of unauthorized workers and efficiency and economy in government procurement has been demonstrated to a substantially greater degree than in either of those cases. Because, as two Presidents have found, the employment of

unauthorized workers by government contractors provides a substantial risk of disruption to the government's procurement system, the requirement that the Executive Branch contract only with entities that use the best possible means to identify unauthorized workers is a proper use of the President's broad Procurement Act powers.

2. The Fact that the Executive Order Is Consistent with and May Advance Non-Procurement Policy Goals Does Not Alter the Conclusion that It Is a Proper Use of the President's Procurement Act Powers

It is certainly the case that the policy put into place by the Executive Order, in addition to advancing economy and efficiency in government procurement, is also consistent with the Executive Branch's policy of reducing the illegal employment of unauthorized workers. *See, e.g.*, Department of Homeland Security Press Release (July 8, 2009) (statement of Secretary that the rule "will create a more reliable and legal workforce" and "complements our Department's continued efforts to strengthen immigration law enforcement and protect critical employment opportunities"). Indeed, it would be surprising if the President promulgated a procurement policy that conflicted with the Administration's non-procurement policy goals.

The caselaw makes it clear that the fact that the Executive Order and rule may have a secondary effect on non-procurement policy – in this case, increasing the effectiveness of measures to prevent the illegal hiring of unauthorized workers – does not take it outside the scope of the Procurement Act authority. Indeed, nearly every Executive Order pursuant to the Procurement Act that has been upheld by the courts has had a significant non-procurement policy component. *See City of Albuquerque*, 379 F.3d 901 (urban renewal); *UAW-Labor*, 325 F.3d 360 (promoting rights of union members); *AFGE*, 669 F.2d 815 (conservation of gasoline during an oil crisis); *Kahn*, 618 F.2d 784 (reducing inflation); *Farkas*, 375 F.2d 629 (combatting

racial discrimination in employment).

For example, in *AFGE v. Carmen*, President Carter's directive to phase out parking subsidies for federal employees was proposed to him in a packet labeled "energy issues," in which "[a]ir quality, transportation policy, and energy conservation concerns were cited in support of eliminating the subsidies." 669 F.2d at 817. The directive was publicly announced by President Carter in a speech on energy policy in which the President made no mention of economy and efficiency in procurement, but stated: "Steps will be taken to eliminate free parking for Government employees in order to reduce the waste of energy, particularly gasoline, in commuting to and from work." *Id.* at 818. A fact sheet released contemporaneously with the speech noted, under the heading "Longer Term Conservation Activities," that "[t]he President has directed the Office of Management and Budget to begin phasing out subsidized parking for federal employees." *Id.* Despite the clear energy conservation purpose that was served by the directive, and that was clearly a motivating factor in the directive, the D.C. Circuit upheld the directive as a proper use of the President's Procurement Act authority. *Id.* at 821.

Similarly, Executive Order 10,925, requiring that government contracts contain provisions prohibiting racial discrimination by government contractors, stated that its purpose was "to realize more fully the national policy of nondiscrimination within the executive branch of the Government" and noted that "it is the plain and positive obligation of the United States Government to promote and ensure equal opportunity for all qualified persons, without regard to race, creed, color, or national origin, employed or seeking employment . . . on government contracts." Despite this obvious and important non-procurement policy interest that was served by the Executive Order, it was nevertheless upheld as a valid Procurement Act directive because

it related to government procurement. *See Farkas*, 375 F.2d at 632 n.1 ("We would be hesitant to say that the antidiscrimination provisions of Executive Order No. 10925 are so unrelated to the establishment of 'an economical and efficient system for . . . the procurement and supply' of property and services, that the order should be treated as issued without statutory authority. Indeed, appellees make no such challenge to its validity. We, therefore, conclude that Executive Order No. 10925 was issued pursuant to statutory authority, and has the force and effect of law." (quoting Procurement Act) (ellipsis in original)).[2]

The caselaw thus makes it clear that the fact that the Executive Order and rule challenged here may advance a substantive policy goal, in addition to efficiency and economy in government procurement, does not alter the conclusion that they are proper uses of the President's Procurement Act authority.

3. The Cases Relied on by Plaintiffs Provide No Support to Their Position

As the foregoing discussion suggests, most directives issued pursuant to the Procurement Act have been upheld by courts when challenged. Plaintiffs can cite only two instances of plaintiffs successfully challenging such orders, and neither of these cases provides any support to plaintiffs here. In *Liberty Mutual Ins. Co. v. Friedman*, 639 F.2d 164, 170 (4th Cir. 1981), the court ruled for the plaintiff not because of any incongruity between the anti-discrimination policy imposed by the Executive Order and efficiency in contracting, but because the plaintiff was not a federal contractor, but merely a seller of insurance to companies, some of whom happened to be federal contractors. And, in *Chamber of Commerce v. Reich*, 74 F.3d 1322, 1333

[2] *Cf. Trinity Indus., Inc. v. Herman*, 173 F.3d 527, 530 (4th Cir. 1999) (applying subsequent antidiscrimination Executive Order promulgated pursuant to the Procurement Act).

(D.C. Cir. 1996), the court found that the Executive Order was within the President's broad Procurement Act powers, but struck it down as preempted by an entirely separate statute that is not at issue here.

Liberty Mutual concerned a company's challenge to the government's attempt to apply anti-discrimination policies to that company. The Fourth Circuit did not question that the President had the power, pursuant to the Procurement Act, to impose the anti-discrimination requirements on federal contractors, but upheld the plaintiff's challenge only because the plaintiff was not a federal contractor and had no more than general, generic relationships with companies that happened to be federal contractors. The salient point in *Liberty Mutual* was that the plaintiff was "not itself a federal contractor and there [was], therefore, no direct connection to federal procurement." 639 F.2d at 171. Rather, the plaintiff merely issued blanket workers compensation policies to employers, some of whom held federal contracts. *Id.* As such, the Fourth Circuit found that it was "simply too attenuated to allow a reviewing court to find the requisite connection" with procurement costs. *Id.* That the outcome in *Liberty Mutual* turned on the plaintiff's status as a non-contractor is made clear from the fact that the very same anti-discrimination requirements that could not be applied to the plaintiff in *Liberty Mutual* can be applied to actual federal contractors. *See, e.g.*, *Trinity Industries, Inc. v. Herman*, 173 F.3d 527, 530 (4th Cir. 1999). Indeed, the *Liberty* panel itself favorably cited *Contractors Ass'n of E. Pa. v. Secretary of Labor*, 442 F.2d 159 (3d Cir. 1971), which upheld the application of anti-discrimination requirements to those entities with a direct nexus to government funds. 639 F.2d at 169-70.

In *Reich*, the D.C. Circuit invalidated a directive that would have restricted the Executive Branch's contracting with entities that hired permanent replacement workers to replace striking workers. *See* 74 F.3d at 1324. The court did not deny that the requirement fell within "the broad reaches of the Procurement Act." *Id.* at 1333. Rather, the court found that the order in that case was preempted by the unique National Labor Relations Act preemption doctrine: "[L]abor relations policy is different because of the NLRA and its broad field of preemption. No state or federal official or government entity can alter the delicate balance of bargaining and economic power that the NLRA establishes, whatever his or its purpose may be." *Id*. at 1337; *accord id.* ("Whatever one's views on the issue, it surely goes to the heart of United States labor relations policy."). The Executive Order and rule at issue here do not implicate labor relations policy, and as such, *Reich* is inapplicable. Moreover, there is no comparable "balance" in the area of hiring of illegal workers – it is unquestionably illegal, and these laws are vigorously enforced.[3]

* * *

In sum, as found by two Presidents and demonstrated in the rule, the Executive Order and rule at issue here have a substantial nexus to the Procurement Act's policy of ensuring economy and efficiency in government contracting. As such, Count III of plaintiffs' complaint is without merit.

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[3] Rather, the balance in immigration law, as stated by Congress, is that a zero tolerance for employment of unauthorized workers is implemented "to close the back door on illegal immigration so that the front door on legal immigration may remain open." H.R. Rep. No. 99-682(I), 99th Cong., 1st Sess. 46 (1986), 1986 U.S. Code Cong. & Admin. News, p. 5649. "The principal means of closing the back door, or curtailing future illegal immigration, is through employer sanctions." *Id.*

B. The Executive Order and Rule Are Not Improperly Legislative

In Count V, plaintiffs contend that the Executive Order and rule are "legislative in nature" and thus barred by *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579 (1952). This contention is baseless. *Youngstown* dealt with limits on the President's inherent constitutional powers, specifically holding that President Truman did not have an inherent constitutional power to seize and operate steel mills that had been closed by a labor dispute. 343 U.S. at 589. *Youngstown* has no application in situations such as this where "the Government relies entirely upon authority said to be delegated by statute, and makes no appeal to constitutional powers of the Executive that have not been confirmed by legislation." *Kahn*, 618 F.2d at 787.[4] Here, as in *Kahn*, the Executive Branch's actions are authorized by legislation and not a claimed inherent constitutional power. As such, the only "legislative nature" claim that plaintiffs could possibly bring would be a delegation doctrine claim – *i.e.*, that Congress, in passing the Procurement Act, improperly delegated legislative authority to the President. *See id.* at 787 n.13. But this claim also would be baseless.

Congress' power to delegate authority to the Executive Branch is extremely broad. As long as Congress provides "an intelligible principle" to govern the exercise of authority assigned to the Executive Branch, "such legislative action is not a forbidden delegation of legislative power." *Mistretta v. United States*, 488 U.S. 361, 372 (1989) (internal quotation marks omitted). "Intelligible principles" can be found not only in the text of the enactment, but also in "the

[4] It is likely that the Executive Order could lawfully have been based on the President's inherent power to exercise general administrative control "throughout the Executive Branch of government of which he is the head," *Building & Construction Trades Dep't v. Allbaugh*, 295 F.3d 28, 32 (D.C. Cir. 2002), or on "implied authority" from Congress, *Contractors Ass'n v. Secretary of Labor*, 442 F.2d 159, 171 (3d Cir. 1971). Nevertheless, the Court need not reach these issues as the Executive Order and rule are clearly authorized by the Procurement Act.

purpose of the Act, its factual background and the statutory context." *Am. Power & Light Co. v. SEC*, 329 U.S. 90, 104 (1946). The requirement of an "intelligible principle" is an exceedingly mild one; "[o]nly the most extravagant delegations of authority, those providing no standards to constrain administrative discretion, have been condemned by the Supreme Court as unconstitutional." *Humphrey v. Baker*, 848 F.2d 211, 217 (D.C. Cir. 1988).

The Procurement Act's grant of authority to permit the President to issue directives to promote efficiency and economy in federal procurement easily meets this standard. The two appellate courts that have considered the issue have summarily rejected any notion that the Procurement Act is an impermissible Congressional delegation. *See City of Albuquerque v. United States Dep't of Interior*, 379 F.3d 901, 914 (10th Cir. 2004); *Kahn*, 618 F.2d at 793 n.51 ("The [Procurement Act] requires the President to make procurement policy decisions based on considerations of economy and efficiency. Although broad, this standard can be applied generally to the President's actions to determine whether those actions are within the legislative delegation.").

Because the Executive Order and rule constitute a permissible use of delegated authority, Count V is without merit.

II. The Executive Order and Rule Were Not Promulgated Pursuant to IIRIRA and Do Not Contravene that Act

In Counts I, II, and IV, plaintiffs contend that the Executive Order and rule are inconsistent with the portion of IIRIRA that mandated the creation of a "basic pilot program." Plaintiffs' arguments are without merit. The Executive Order and rule are based on the Procurement Act, and thus do not require separate authority in IIRIRA. Moreover, the Executive Order and rule do not contravene any provision of IIRIRA. And, to the extent that IIRIRA

contains any ambiguity, the Executive Branch's interpretation of that immigration statute is entitled to the utmost deference. *E.g.*, *INS v. Abudu*, 485 U.S. 94, 110 (1998) ("[W]e have recognized that judicial deference to the Executive Branch is especially appropriate in the immigration context.").

A. IIRIRA Provided Certain Authorities and Responsibilities to the Attorney General, which Have Since Passed to the Secretary of Homeland Security, but IIRIRA Did Not Limit the Powers of Other Executive Branch Officials Pursuant to Other Statutes

Congress enacted the Illegal Immigration Reform and Immigrant Responsibility Act of 1996, Pub. L. 104-208, div. C, 110 Stat. 3009-546 ("IIRIRA"), to more effectively enforce the federal laws against illegal immigration while facilitating lawful immigration.[5] In Title IV of IIRIRA, entitled "Enforcement of Restrictions Against Employment," Congress addressed one of the principal tools in the enforcement of immigration laws, prohibition on hiring unauthorized workers.[6] As part of this enforcement plan, Congress directed the Attorney General to conduct three "pilot programs of employment eligibility confirmation." IIRIRA § 401(a). The Attorney General was required to implement and begin operating these pilot programs in a way that they would be operable within a year, and was required to terminate each program at the end of a four-year period unless extended by Congress. *Id.* § 401(b). Participation in a pilot program offers an entity a rebuttable presumption that it has not violated the immigration laws with

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[5] *See* IIRIRA § 1 (listing substantive topics addressed by statute); *cf. Appiah v. United States*, 202 F.3d 704, 707 (4th Cir. 2000) ("IIRIRA . . . aimed to expedite the removal of deportable aliens and to limit discretionary relief.").

[6] As plaintiffs note, a general federal prohibition on the knowing employment of unauthorized workers has existed since 1986, well before IIRIRA was passed. Pl's Mem. at 2-4 (discussing the Immigration and Nationality Act). In Title IV of IIRIRA, Congress addressed enforcement of this pre-existing restriction.

regard to each hired individual whose eligibility was confirmed in the program. *Id.* § 402(b)(1).

General requirements and procedures of the three programs are set forth in IIRIRA §§ 401-404, and the distinctive elements of the individual programs are provided in IIRIRA § 403(a), (b), and (c). Two of the three original pilot programs – the Citizen Attestation Pilot Program, see IIRIRA § 403(b), and the Machine-Readable Document Pilot Program, *see* IIRIRA § 403(c) – have since expired. The remaining program – originally referred to as the basic pilot program, *see* IIRIRA § 403(a) – remains in operation today. The basic pilot program is a free, internet-based system that operates by comparing identifying information submitted by newly hired employees against information contained in databases maintained by the Social Security Administration and, where necessary, immigration records maintained by DHS, to verify that an individual is authorized to work in the United States.

While IIRIRA provided the Attorney General with specified authorities and responsibilities, it also delineated limits on the grant of authority. Specifically, IIRIRA provided:

> Subject to [the Attorney General's authority to deal with resource constraints], any person or other entity that conducts any hiring (or recruitment or referral) in a State in which a pilot program is operating may elect to participate in that program. Except as specifically provided in subsection (e), ***the Attorney General*** may not require any person or other entity to participate in a pilot program.

Id. § 402(a) (emphasis supplied). Notably, this limitation does not purport to limit the Executive Branch's authority pursuant to other statutes, or to limit the authority of the President or other Executive Branch officials.

Although the basic pilot program[7] was initially authorized to run for four years in a

[7] On September 25, 2007, the Department of Homeland Security rebranded the basic pilot program as "E-Verify." It is the E-Verify system, modified as necessary and appropriate, that is

handful of States, in 2002, Congress extended the length of the program by two additional years, *see* Basic Pilot Extension Act of 2001, Pub. L. 107-128, 115 Stat. 2407, and in 2003, Congress extended the program an additional five years and expanded it to all 50 States, *see* Basic Pilot Program Extension and Expansion Act of 2003, Pub. L. 108-156, 117 Stat. 1944. In September 2008, after the President's Executive Order and the Secretary's Notice, Congress extended the program yet again, Pub. L. 110-329, § 106(3), 122 Stat. 3574 (Sept. 30, 2008), and further extended the program in March 2009, Pub. L. 111-8, Div. J, § 101, 123 Stat. 524, 988 (Mar. 11, 2009). Congress appears to be poised to pass yet another extension in the fiscal year 2010 Homeland Security appropriations bill. *See* H.R. 2892, 111th Cong. § 545 (as passed by Senate on July 9, 2009) (authorizing E-Verify through Sept. 30, 2012).

With the creation of the Department of Homeland Security, the responsibilities and duties of the Attorney General under IIRIRA were transferred to the Secretary of Homeland Security. Pub. L. 108-156, § 3(d). Thus, it is the Secretary who is now charged with the responsibilities of IIRIRA and it is her authority that is delineated in IIRIRA. *See* 8 U.S.C. § 1324a note. There remains nothing in IIRIRA that in any way removes or limits the President's pre-existing authority under the Procurement Act.

B. Because the Executive Order and Rule Were Promulgated Pursuant to the Procurement Act, They Do Not Require Independent Authority in IIRIRA

As described above, the Executive Order and rule were properly promulgated pursuant the President's authority under the Procurement Act. The Order and rule utilize the E-Verify system that was created pursuant to IIRIRA but do not rely in any way on the authority provided in that statute.

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being used to implement the Executive Order and rule.

Because the Order and rule were promulgated pursuant to the Procurement Act, plaintiffs' contention that the Order and rule are not also authorized by IIRIRA is irrelevant. Indeed, in arguing that the Executive Order and rule go beyond the statutory authority set forth in IIRIRA, plaintiffs make the same mistake that was made by the plaintiffs in *Kahn* – namely the incorrect assumption that when the President, pursuant to his powers under the Procurement Act, makes use of a pre-existing federal program that was created pursuant to another statute, the President is somehow acting according to that other statute. To the contrary, when the President acts pursuant to his Procurement Act power, he can utilize pre-existing programs within the Executive Branch – in this case, the E-Verify system created pursuant to IIRIRA – that may have been created pursuant to a different statute for a different purpose.

In *Kahn*, the court addressed a challenge to President Carter's directive that the Executive Branch deny government contracts above $5 million to companies that failed or refused to comply with voluntary wage and price standards. *See* 618 F.2d at 785. Like the Order in this case, President Carter's directive was issued pursuant to the Procurement Act. And, as the current Order incorporates a program created pursuant to another statute (the E-Verify system), President Carter's directive incorporated voluntary wage and price standards that were established and maintained pursuant to the Council on Wage and Price Stability Act, Pub. L. 93-387, 88 Stat. 750 (1974) ("COWPSA"). The *Kahn* plaintiffs challenged this use of a pre-existing program on grounds remarkably similar to the arguments advanced by plaintiffs here, namely that COWPSA created only ***voluntary*** wage and price standards and specifically stated that it did not authorize "the continuation, imposition, or reimposition of any mandatory economic controls with respect to prices, rents, wages, salaries, corporate dividends, or any similar transactions."

Kahn, 618 F.2d at 794 (quoting Pub. L. 93-387); *compare* Pl's Mem., at 30 (arguing that "IIRIRA § 402(a) clearly evidences Congress's intent to preclude a substantive result–*i.e.*, that no 'person or other entity' be required to participate in a pilot program").

The D.C. Circuit rejected the *Kahn* plaintiffs contention on alternative grounds, one of which was that the limitations of COWPSA did not apply because the President's directive was based on his authority under the Procurement Act, and not on COWPSA:

> Executive Order 12,092 relies on COWPSA for the Council's power to establish the voluntary wage and price standards, but the Order rests on the [Procurement Act] for implementation of the procurement compliance program. Since we think the procurement feature of the President's Order is supported by [the Procurement Act], it is of no concern that [another statute] may not also grant him that authority.

Kahn, 618 F.2d at 795.

Similarly, in this case, while the E-Verify system was developed pursuant to direction in IIRIRA, the Executive Order and rule rely exclusively on the Procurement Act for implementing a contractual provision in which federal contractors agree to use the best available means to verify the lawfulness of their workforces. And, just as the restriction in COWPSA was "irrelevant to the President's procurement compliance program," provisions in IIRIRA governing the basic pilot program are irrelevant to the present Order and rule which constitute a valid exercise of separate statutory authority to use the E-Verify system created pursuant to IIRIRA. *Kahn*, 618 F.2d at 795; *accord AFGE v. Carmen*, 669 F.2d 815, 823-826 (D.C. Cir. 1981) (regulation phasing out free parking for federal employees as part of energy conservation plan was a valid use of Procurement Act power and thus the fact that it did not meet the terms of the Energy Policy and Conservation Act was irrelevant).

The *Kahn* court drew additional support for its conclusion from the fact that, after President Carter's order, Congress extended COWPSA for an additional year:

> Finally, it is important to point out that just two months ago the Congress approved a one-year extension of COWPSA, a tripling of its budget, and a sixfold increase in its staff. The legislative history of this 1979 extension of COWPSA, which was approved while this suit was pending in the District Court, contains several assertions that Congress did not intend to make any statement on the issues raised in this case. ***Yet it strains credulity to maintain that COWPSA bars the procurement compliance program when Congress has just extended the statute knowing that the Council it established is charged with implementing the wage and price guidelines on which the procurement program is based***. Congress can reverse incorrect Executive interpretations of its statutes and has used that power in the past. Congress, fully aware of the procurement program, renewed COWPSA without significant modification. In this context, a court could only in the most extreme case find that the Executive has violated the statute.

Kahn, 618 F.2d at 795-96 (footnotes omitted) (emphasis supplied); *accord Contractors' Ass'n*, 442 F.2d at 171. Similarly, it strains credulity to maintain that the basic pilot provisions of IIRIRA bars the Executive Order and rule, when Congress, after promulgation of the Executive Order, extended the basic pilot program and system twice and appears poised to extend it yet again.

C. The Executive Order and Rule Do Not Contravene IIRIRA

In Counts I and II, plaintiffs argue that the Executive Order and rule violate IIRIRA's provision stating that "the Secretary may not require any person or other entity to participate in a pilot program." IIRIRA § 402(a). Even if IIRIRA's restrictions were relevant to directives promulgated pursuant to the Procurement Act (and they are not, as discussed above), this argument would have no merit for two independent reasons: (1) the Executive Order and rule do not require any individual or entity to use E-Verify because no one is required to enter into federal contracts, and (2) the directives at issue were promulgated by the President and the

Council and thus the Secretary is not requiring anything.

In Count IV, plaintiffs contend that using E-Verify to verify contractors' existing employees violates IIRIRA. This contention is without merit as there is no provision of IIRIRA that forbids the use of E-Verify to verify existing employees.

1. The Executive Order and Rule Do Not Require Anyone To Use E-Verify

The Executive Order and rule cannot contravene IIRIRA's provision that "the Secretary may not require any person or other entity to participate in a pilot program," because, *inter alia*, as a matter of law, the Executive Order and rule do not require any given person or other entity to participate in E-Verify. Rather, the Executive Order and rule require the Executive Branch to grant a certain class of contracts only to entities that agree to use E-Verify. No one is required to use E-Verify, because no one is required to bid for a government contract. This rather obvious proposition was persuasively stated by six judges of the D.C. Circuit in *Kahn*:

> [***A*]*ny alleged mandatory character of the procurement program is belied by the principle that no one has a right to a Government contract***. As the Supreme Court ruled in *Perkins v. Lukens Steel Co.*, [310 U.S. 113, 127 (1940),] 'the Government enjoys the unrestricted power . . . to determine those with whom it will deal, and to fix the terms and conditions upon which it will make needed purchases.' Those wishing to do business with the Government must meet the Government's terms; others need not.

Kahn, 618 F.2d at 794 (emphasis supplied) (ellipsis in original).

Plaintiffs' attempts to distinguish *Kahn* betray the weakness of their position. Their lead argument is that the statute in *Kahn* said "mandatory" while IIRIRA says "require." Pl's Mem., at 36. This distinction flounders on the simple fact that "mandatory" and "required" are synonymous. *E.g.*, Black's Law Dictionary, at 973 (7th ed. 1999) ("mandatory" defined as "required"); Roget's II The New Thesaurus, at 621 (synonym for "mandatory" is "required"); *id.*

at 825 (synonym for "required" is "mandatory"). Thus, Plaintiffs' assertion that provisions in federal contracts (which contractors choose whether to enter into) are not "mandatory" but are "required" is baseless.

Plaintiffs' second argument here is irrelevant because it cites purported statutory differences that have nothing to do with the *Kahn* court's holding that federal contractual requirements (*i.e.*, provisions that a contracting party agrees to abide by when it signs a contract) are not statutory requirements (*i.e.*, provisions that an entity is subject to regardless of its own decisions) because contracts are freely entered into. Pl's Mem., at 36. Plaintiff's assertion that the above quoted language from *Kahn* is *dicta*, is incorrect. *Id.* The two holdings referenced by the plaintiffs are alternative holdings, each of which provided an independent basis for the court's determination that the challenged order did not violate COWPSA,[8] and the voluntariness holding quoted above is stated first. 618 F.2d at 794.

Finally, plaintiffs' assertion that the *Kahn* case is not directly binding on this Court, Pl's Mem. at 36, is correct, and may explain why plaintiffs, all of whom operate in Washington, D.C. or northern Virginia, and their principal counsel, who practice in Washington, D.C., did not bring this suit against Washington, D.C.-based defendants in Washington, D.C. While not

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[8] *See, e.g.*, *Bravo v. United States*, 532 F.3d 1154, 1162 (11th Cir. 2008) ("[A]dditional or alternative holdings are not *dicta*, but instead are as binding as solitary holdings." (citing *Massachusetts v. United States*, 333 U.S. 611, 623 (1948))); *United States v. Gonzalez-Terrazas*, 529 F.3d 293, 298 (5th Cir. 2008) ("The footnoted language, however, was not *dictum*; it was one of two alternative holdings, and each is binding."); *Philadelphia Marine Trade Ass'n v. Commissioner of I.R.S.*, 523 F.3d 140, 147 n.5 (3d Cir. 2008) ("We note that this portion of the opinion is an alternative holding, not a *dictum*: 'where a decision rests on two or more grounds, none can be relegated to the category of *obiter dictum*.'" (quoting *Woods v. Interstate Realty Co.*, 337 U.S. 535, 537 (1949))); *see also Brunswick Corp. v. Long*, 392 F.2d 337, 343 n.9 (4th Cir. 1968) ("That the portion of the *Gentry* decision on which we rely is only an alternative holding, or even only *dictum*, does not persuade us that we should ignore it.").

binding, *Kahn* is a persuasively reasoned 6-3 *en banc* opinion of the appellate court most experienced in administrative law, a fact that plaintiffs' forum shopping cannot obscure. Moreover, the *Kahn* court's voluntariness holding, as that court noted, springs inexorably from the Supreme Court's statement in *Perkins*, which is binding precedent.

Because federal contracting is voluntary, no entity is required by the Executive Order and rule to use E-Verify. For this reason, among others, Counts I and II are without merit.

2. The Executive Order and Rule Were Not Promulgated by the Secretary of Homeland Security

Another reason why the Executive Order and rule cannot violate IIRIRA's provision that "the Secretary may not require any person or other entity to participate in a pilot program," is that the Secretary did not promulgate these directives, and, insofar as this case is concerned, is not requiring anyone to do anything. The President promulgated the Executive Order and the Council promulgated the rule. The only involvement by the Secretary cited by plaintiffs is that Secretary Chertoff used his professional judgment to identify the electronic employment eligibility verification system that could fulfill the requirement set forth by President Bush in the Executive Order. Secretary Chertoff did not use his authority under IIRIRA or any other statute to require contractors to use E-Verify. The Executive Order and rule were promulgated by other actors pursuant to separate statutory authority. *See supra* Part I.A. Plaintiffs' assertion that "[t]he Secretary, and not the Councils, was the precipitating actor" is *ipse dixit*, and simply wrong. Pl's Mem. at 27. In fact, it was the President who was "precipitating actor" in requiring the Executive Branch to contract with entities that utilize the best possible means to ensure the legal status of their workforce. The Secretary, far from being the "precipitating actor," provided

only a technical judgment as to what database constituted that best possible means.[9]

Plaintiffs attempt various contortions in a vain attempt to demonstrate that when Congress used the term "the Secretary of Homeland Security" it really meant something different, such as "the entire Executive Branch." Pl's Mem. at 29-32. Plaintiffs concede that they have no caselaw supporting their position, *id.* at 29, and this is unsurprising, as it is doubtful that many previous litigants have attempted to argue that Congress did not realize that the terms "Secretary of Homeland Security" and "Executive Branch" mean different things. Plaintiffs' contention, of course, runs headlong into the "preeminent canon of statutory construction" which "requires [the Court] to presume that the legislature says in a statute what it means and means in a statute what it says there." *Bedroc Ltd., LLC v. United States*, 541 U.S. 176, 183 (2004) (quotation and alteration omitted); *see also, e.g.*, *Connecticut Nat. Bank v. Germain*, 503 U.S. 249, 253-54 (1992) ("We have stated time and again that courts must presume that a legislature says in a statute what it means and means in a statute what it says there.").

Moreover, Congress' use of the term "Secretary" in Section 402(a) of IIRIRA has an obvious purpose. IIRIRA granted certain authority and responsibility to the Secretary. The fact that the provision cited by plaintiffs imposes a limitation on "the Secretary," as opposed to on the entire government, demonstrates that Congress was limiting the power granted by IIRIRA,

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[9] Plaintiffs' suggestion that the Secretary will "administer and enforce the Executive Order . . . by requiring use of E-Verify" is baseless speculation. *Id.* The Council has enacted the requirement that the Executive Branch grant certain contracts to those entities that use the best means of screening their workforce, and there is no reason to believe that the Secretary will promulgate any similar or other rule pursuant to the Executive Order, particularly given that, by regulation, enforcing "[a]gency compliance with the FAR is the responsibility of the Secretary of Defense (for the military departments and defense agencies), the Administrator of General Services (for civilian agencies other than NASA), and the Administrator of NASA (for NASA activities)." 48 C.F.R. § 1.202.

not limiting other grants of authority to other Executive Branch officials, such as the Procurement Act which grants authority to the President. *See supra* Part I.A.[10]

Plaintiff's argument is further undermined because this is not a matter where the President simply bypassed the Secretary in the enforcement of an immigration statute.[11] The rule at issue is a ***procurement*** rule. It was issued by the FAR Council that governs ***procurement***. And, it is based on the President's power pursuant to the Procurement Act. It is not a blanket enforcement of the immigration laws, but is a procedure to help ensure that the federal government is not contracting with entities that violate those laws, so that the federal government will not be injured by the consequences of that employment. The Council, which promulgated the rule, falls nowhere within the authority of the Secretary of Homeland Security. And, as noted above, the fact that the rule may also advance efforts to reduce the unlawful employment of unauthorized workers, does not undermine its validity as a procurement rule.

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[10] Plaintiffs' reference to the National Defense Authorization Act for Fiscal Year 2006 shows, once again, the paucity of support for plaintiffs' position. *See* Pl's Mem., at 31. That statute states: "The Secretary of Defense may not destroy any official record ***in the custody or control of the Department of Defense*** that contains information relating to radioactive fallout from nuclear weapons testing." 10 U.S.C. § 113 note (emphasis supplied). Plaintiffs' note that this statute would not prevent the Secretary of Energy from ordering the destruction of Department of Defense documents. Pl's Mem., at 31. This ignores the fact that, unlike the Secretary of Defense, the Secretary of Energy would have no authority to issue such an order in the first place. What is clear is that the quoted statutory provision would not prevent the Secretary of Energy from ordering the destruction of documents within his own authority (*i.e.*, documents in the custody or control of the Department of Energy) even if copies of the same documents could not be destroyed by the Secretary of Defense. In the same vein, IIRIRA limits the Secretary of Homeland Security's authority under that statute, but does not regulate President's use of entirely separate statutory authority.

[11] Plaintiffs' state: "IIRIRA's designation of the Secretary made practical sense because Congress has assigned primary responsibility for administering ***all*** federal immigration laws to the Secretary, not the President or the Councils." Assuming this to be true, it only bolsters the point made by defendants above. The Executive Order and rule challenged in this case are ***procurement*** rules.

See supra Part I.A.2.

What exists here are two separate sources of statutory authority. IIRIRA grants authority to the Secretary and limits that grant of authority to the Secretary. The Procurement Act grants authority to the President. There is simply no basis for plaintiffs' attempt to rewrite IIRIRA to limit the President's separate statutory authority granted by the Procurement Act.

Because any requirement imposed by the Executive Order and the rule were imposed by the President and/or the Council, and not the Secretary of Homeland Security, Counts I and II are without merit.

3. The Executive Order and Rule Do Not Exceed the Scope of IIRIRA

In Count IV, plaintiffs challenge that portion of the Executive Order and rule that allows for the verification of contractors' existing employees when those employees are assigned to a federal contract. Plaintiffs' assert: "The statutory authority for the E-Verify program is limited to employment verification of new hires only." Pl's Mem., at 41 (citing IIRIRA §§ 402(c)(2)(A)(i), 403(a)). Plaintiffs' citations to IIRIRA are irrelevant because the authority for the Executive Order and rule comes not from IIRIRA but from the Procurement Act. *See supra* Part I.A. But even if IIRIRA was relevant, neither of the IIRIRA provisions cited by plaintiffs, nor any other provision of IIRIRA, prohibits the use of the E-Verify system (or the basic pilot program) for existing employees.

The first cited provision provides that–

> any electing person or other entity may provide that the election under subsection (a) shall apply . . . to all its hiring (and all recruitment or referral) in the State (or States) in which the pilot program is operating.

IIRIRA § 402(c)(2)(A)(i). The second cited provision states:

> A person or other entity that elects to participate in the basic pilot program described in this subsection agrees to conform to the following procedures in the case of the hiring (or recruitment or referral) for employment in the United States of each individual covered by the election.

IIRIRA § 403(a). The first cited provision is entirely permissive and does not mandate or prohibit anything. The second provision requires a certain agreement by participants, but does not prohibit any additional agreements or terms. Plainly, neither of these provisions bars the use of the E-Verify system to verify the status of existing employees. Indeed, IIRIRA contains no such bar.[12]

III. Plaintiffs' Technical Objections to the Rule Are Without Merit

In Counts VI and VII, plaintiffs raise technical objections to the promulgation of the rule. Plaintiff's objections are meritless. The Council complied with the Procurement Policy Act which requires the publication of procurement policies, regulations, procedures, and forms, but does not require the publication of publicly available materials that, while relevant to contractual terms, do not themselves govern the process or terms of the government's procurement of goods or services. The Council complied with the Regulatory Flexibility Act by calculating the direct costs of the rule while properly omitting indirect costs.

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[12] The administrative guidance materials cited by plaintiff have no relevance here. *See* Pl's Mem. at 41-42. These materials describe the E-Verify program in effect at the time which did (and until September 8, 2009, still does) involve verification of only new hires. They nowhere state or imply that IIRIRA bars the President from using his Procurement Act power to direct the government to enter into contracts in which the contractor agrees to use E-Verify to verify the status of current employees.

A. The Council Complied with the Procurement Policy Act

Relying on a single, inapposite district court case that was reversed by the court of appeals, plaintiffs contend that the Council violated the Office of Federal Procurement Policy Act, 41 U.S.C. 401 *et seq.*,[13] by placing the E-Verify System Memorandum of Understanding ("MOU") in the official docket for this rulemaking, found through internet access at the Federal eRulemaking portal "www.Regulations.gov" on the Federal Docket Management System (FDMS) or by visiting the Council's Secretariat; providing the public with the citation to and a summary of the MOU; and soliciting, receiving, and responding to comments on the MOU.[14] *See* 73 Fed. Reg. 33,374-75, 33,377; 73 Fed. Reg at 67,667, 67,677, 67,684. Instead, plaintiffs contend the Council was required to publish the text of the MOU in the Federal Register and "actively solicit" comments. Pl's Mem., at 47. Plaintiff's contention that every document that affects a federal contractor is a "procurement policy, regulation, procedure or form" that must be published in the Federal Register is not supported in law and would lead to absurd results.

The Procurement Policy Act provides that no "procurement policy, regulation, procedure or form" shall take effect until sixty days after the procurement policy, regulation, procedure, or form is published for public comment in the Federal Register. 41 U.S.C. § 418b(a). The Act defines "procurement" as including "all stages of ***the process of acquiring property or services***, beginning with the process for determining a need for property or services and ending with contract completion and closeout." 41 U.S.C. § 403(2) (emphasis supplied). A transaction is not

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[13] The rule at issue here was promulgated pursuant to the Procurement Policy Act and not pursuant to the Administrative Procedure Act.

[14] The proposed and final rules also directed the public to the E-Verify program website www.dhs.gov/E-Verify for the MOU and other information. *See* 73 Fed. Reg. 33,376; 73 Fed. Reg. 67,652.

a procurement if "the essence of the transaction is not the acquisition of goods or services" by the federal government. *Matter of: Crystal Cruises, Inc.*, No. B-238347, 90-1 C.P.D. 560, 1990 WL 278100 (Comp. Gen. June 14, 1990); *see also Rapides Regional Med. Ctr. v. Secretary, Dep't of Veterans' Affairs*, 974 F.2d 565, 573 (5th Cir. 1992) ("[T]here can be little doubt that the word procurement is widely understood, by lawyers and laymen alike, to denote the process by which the government pays money or confers other benefits in order to obtain goods and services from the private sector.").

The MOU is not a procurement policy, regulation, procedure, or form, because it does not address any step in the process of the government's acquisition of property or services. *See* Draft Memorandum of Understanding between Social Security Administration, Department of Homeland Security, and Employer, *available at*, www.regulations.gov/fdmspublic/component/main?main=DocketDetail&d=FAR-FAR-2008-0001 (also attached as Exhibit 5 to Plaintiff's Memorandum). Indeed, the MOU is a standard agreement between an employer (who may or may not be a federal contractor), and the Department of Homeland Security and the Social Security Administration, the agencies which operate the E-Verify system. *Id.* The Council is not a party to the MOU, nor is the contracting officer or contracting agency. *See id.* Moreover, the MOU sets forth the respective agreed-upon obligations of DHS, the Social Security Administration, and the participating employer with regard to use of the E-Verify system to confirm the employment eligibility of employees. *Id.* Nowhere does it set forth any terms for the ***procurement*** by the government of goods or services. *See id.* As such, it is simply not a "procurement, policy, regulation, or form." And, while a contractual term will set forth the contractor's agreement to enter into and abide by the MOU, this does not make the MOU a

procurement policy or procedure any more than a contractual term obliging a contractor to abide by "state and municipal law" or "federal labor law" would make state and municipal law or federal labor law into procurement policies that must be reprinted or summarized in the Federal Register.

In addition, plaintiff's proposed interpretation goes against the obvious intent of Section 418b. That section is intended to provide the public, and particularly prospective contractors, with access to proposed procurement policies and forms that would not otherwise be publicly available, hence the reference to "a statement specifying the name, address, and telephone number of the officer or employee of the executive agency from whom the full text may be obtained." 41 U.S.C. § 418b(c)(1). It is not intended to require the reprinting of general, publicly available policies and procedures that, while referenced or incorporated in a procurement contract in order to ensure the reliability of the prospective government contractor, do not set forth procedures or terms for the acquisition of goods or services from the federal government. The MOU was publicly available on the official docket for this rulemaking on the internet during the comment period, at a web site provided in the Federal Register notice, *see* 73 Fed. Reg. at 33,377, and indeed, the Council received and considered comments regarding the MOU. *See* 73 Fed. Reg. at 67,667-69.

Plaintiffs' radical suggestion that the Court should invalidate a properly noticed and promulgated regulation on the basis that a related agreement that does not itself deal with the terms of government procurement – an agreement that was publicly available at a web site provided in the rule notice in the Federal Register, and on which comments were in fact received and considered – was not itself published in its entirety in the Federal Register is based on the

single case of *Munitions Carriers Conference, Inc. v. United States*, 932 F. Supp. 334 (D.D.C. 1996), *rev'd*, 147 F.3d 1027 (D.C. Cir. 1998). But that reversed district court opinion provides no support for plaintiffs' premise. In *Munitions Carriers*, the district court invalidated a procurement rule because the rule itself had been entirely omitted from the Federal Register, not because a publicly available related agreement (which does not itself deal with procurement) was not republished in the Federal Register. *See* 932 F. Supp. at 339-40. Moreover, in *Munitions Carriers*, the court held that the plaintiffs did not have constructive notice because there was no evidence that all of the plaintiffs received notice of the unpublished proposed rule and because the agency did not solicit comments. *See id.* at 339. Here, in contrast, the fact and location on the internet of the MOU were stated in the Federal Register notice soliciting comments. *See* 73 Fed. Reg. at 33,377.

Because the publicly available MOU is not a procurement policy or form, the Council was not required to reprint the MOU in its entirety in the Federal Register, and Count VI of plaintiff's complaint is without merit.

B. The Council Complied with the Regulatory Flexibility Act

Count VII of plaintiff's complaint contends that the Council violated the Regulatory Flexibility Act ("RFA") by excluding certain alleged indirect costs of the rule. Plaintiffs do not argue this point in their memorandum, and for good reason. It is without merit because the Council's RFA analysis was in compliance with the statute.

In reviewing an agency's compliance with the RFA, courts are mindful of the fact that the RFA does not require a specific outcome, nor does the statute require an agency to take specific substantive measures. *See Associated Fisheries of Maine, Inc. v. Daley*, 127 F.3d 104, 114 (1st

Cir. 1997). In addition, the RFA does not require mathematical exactitude in an agency's consideration of alternatives to the proposed rulemaking. *See Southern Offshore Fishing Ass'n v. Daley*, 995 F. Supp. 1411, 1436 (M.D. FL 1998). Thus courts only examine whether the agency made a reasonable, good faith effort to carry out the mandate of RFA. *See Ranchers Cattlemen Action Legal Fund v. USDA*, 415 F.3d 1078, 1101 (9th Cir. 2005); *see also Associated Fisheries of Maine*, 127 F.3d at 114.

Plaintiffs challenge the Council's RFA analysis on the ground that it does not count costs to employers who must replace workers whose illegal status is determined as a result of the E-Verify system. Compl. ¶ 97. In other words, plaintiffs claim that the analysis should take into account the costs of replacing unauthorized workers whom plaintiffs's members never should have employed in the first place, but whose illegal status they might have remained ignorant of but for the more effective screening provided by the E-Verify system. This seems a rather morally dubious contention, but in any event, it is legally irrelevant.

Caselaw makes it clear that an RFA analysis is only to include the direct impacts of a regulation on a small entity that is required to comply with that regulation. *E.g.*, *Cement Kiln Recycling Coalition v. EPA*, 255 F.3d 855, 869 (D.C. Cir. 2001) ("[T]o require an agency to assess the impact on all of the nation's small businesses possibly affected by a rule would be to convert every rulemaking process into a massive exercise in economic modeling, an approach we have already rejected."); *Mid-Tex Electric Coop. v. FERC*, 773 F.2d 327, 340-343 (D.C. Cir. 1985) (holding indirect impact of a regulation on small entities that do business with or are otherwise dependent on the regulated entities are not to be considered in RFA analyses).

Costs associated with the termination of unauthorized workers are a direct result, not of

this rule, but of the Immigration and Nationality Act which expressly prohibits employers from knowingly continuing to employ any non-citizen who is not authorized to work in the United States. 8 U.S.C. § 1324a(a)(2).[15] However an employer learns of the employee's unlawful employment status, the INA obligation is the same, and the resulting termination is the direct result of the INA and not the rule at issue here. *See* 73 Fed. Reg. at 67,687 ("While it may be that many employers have taken a misguided 'see no evil' approach under which they hope to avoid learning inconvenient truths about the legal status of their existing workforce, that is not an approach that is countenanced by the INA.").[16]

Because the Council's RFA analysis properly took into account direct costs, Count VII of plaintiff's complaint is without merit.

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[15] Plaintiffs concede, as they must, that "it is the obligation of their members to comply with all federal immigration laws." Pl's Mem., at 1.

[16] Plaintiffs' assertion that workers can "become unauthorized to work solely by operation of the requirements imposed by Executive Order 13,465" is thus a flat misstatement of the law. Under the INA, workers are either authorized or unauthorized. Executive Order 13,465 does not change any worker's status. It merely seeks to prevent the use by federal contractors of unauthorized workers in order to create a more reliable base of federal contractors.

CONCLUSION

For the reasons stated above, defendants' motion for summary judgment should be granted and plaintiffs' motion for summary judgment should be denied.

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Respectfully submitted,

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