IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND
SOUTHERN DIVISION

CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA, *et al.*, *

Plaintiffs, *

v. * Civil Action No. AW-08-3444

MICHAEL CHERTOFF, *et al.*, *

Defendants. *

* * * * *

MEMORANDUM OF LAW IN SUPPORT OF
PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT

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GLOSSARY

APA	Administrative Procedure Act
DHS	Department of Homeland Security
FAR	Federal Acquisition Regulation
IIRIRA	Illegal Immigration Reform and Immigrant Responsibility Act of 1996
IRCA	Immigration Reform and Control Act of 1986
SSA	Social Security Administration
USCIS	United States Citizenship and Immigration Services

Plaintiffs Chamber of Commerce of the United States of America; Associated Builders and Contractors, Inc.; Society for Human Resource Management; American Council on International Personnel; and HR Policy Association (collectively, "Plaintiffs") respectfully submit this Memorandum of Law in Support of their Motion for Summary Judgment.

PRELIMINARY STATEMENT

Plaintiffs firmly believe it is the obligation of their members to comply with all federal immigration laws. Since 1986, federal law has made it illegal to hire someone who the employer knows is not authorized to work in the United States. Since 1986, federal law has also required employers to verify the eligibility of new employees to work in the United States using a document-based system whereby the employer and employee complete a prescribed form. The form is not filed with any federal agency but, instead, must be retained by the employer and made available for inspection by federal officials.

Under a statute first enacted in 1996 and amended on various occasions since then, Congress instructed the federal officer primarily responsible for enforcing this Nation's immigration laws—the Secretary of Homeland Security ("Secretary")—to undertake three experimental projects, known as "pilot programs," to test new methods for confirming the employment eligibility of newly hired employees. *See* Illegal Immigration Reform and Immigrant Responsibility Act of 1996 ("IIRIRA"), Pub. L. No. 104-208, div. C, tit. IV, subtit. A, 110 Stat. 3009-546, 3009-655 (codified as amended at 8 U.S.C. § 1324a note).[1] IIRIRA authorized the experimental program at issue in this case, referred to in the statute as the "basic pilot program" and more commonly known as "E-Verify."

[1] The statutory acronym "IIRIRA" is most commonly pronounced "IRA-IRA." All references to the United States Code in this memorandum are to the 2006 edition, which is the most recent version published by the Office of the Law Revi- (continued)

E-Verify is an Internet-based system designed to enable employers to verify electronically that newly hired employees are authorized to work in the United States. E-Verify is operated by the United States Citizenship and Immigration Services ("USCIS") within the Department of Homeland Security ("DHS"), in partnership with the Social Security Administration ("SSA"). Participation in E-Verify may supplement, but cannot replace, an employer's compliance with the document-based requirements enacted in 1986. In other words, employers cannot rely on E-Verify to meet their legal obligation to ensure that employees can legally work in the United States. Employers must still complete the Form I-9 process and maintain the completed forms for inspection, as required by federal law. To participate in E-Verify, an employer must execute a Memorandum of Understanding with DHS and SSA that specifies the responsibilities of the employer, DHS and SSA.

Of particular importance to this case, IIRIRA expressly provides that

> 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 pilot program. Except as specifically provided in subsection (e) [referring to the required use of E-Verify by federal agencies, the Legislative Branch and certain immigration law violators], *the Secretary of Homeland Security may not require any person or other entity to participate in a pilot program.*

IIRIRA § 402(a) (emphasis added).

On November 14, 2008, the Civilian Agency Acquisition Council and the Defense Acquisition Regulations Council (collectively, the "Councils") promulgated regulations that purport to require certain government contractors and subcontractors to participate in E-Verify. Issued pursuant to an Executive Order signed by President George W. Bush on June 6, 2008, the regulations mandate that covered

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sion Counsel. To help facilitate the Court's review, Plaintiffs have included true and correct copies of all essential statutes and regulations in their separately bound Appendix of Exhibits at Tab 12.

contractors and subcontractors *must* use E-Verify to confirm the employment eligibility of all new hires, regardless of whether the person being hired is assigned to a federal contract or subcontract. The regulations in question also require that covered contractors and subcontractors use E-Verify to electronically "reverify" the employment eligibility of existing employees hired after November 6, 1986, who are assigned to covered contracts and subcontracts. Although the regulations were originally scheduled to go into effect on January 15, 2009, following the filing of this action, the Councils agreed to delay the regulations' enforcement until February 20, 2009.

The requirements imposed by the Executive Order and regulations at issue in this case are illegal and must be set aside for a multitude of reasons. There are no material issues of disputed fact. First, the Secretary violated IIRIRA by designating E-Verify as the electronic employment eligibility verification system required to be used by contractors and subcontractors. Second, the regulations at issue violate IIRIRA by requiring participation in a pilot program. Third, the regulations at issue are not authorized by statute. Fourth, the reverification-of-existing-employees requirement imposed by the Executive Order and the regulations violates federal law. Fifth, apart from their illegal substance, the regulations were promulgated without observance of procedure required by law.

Because the requirements imposed by the Executive Order and regulations are invalid as a matter of law, Plaintiffs are entitled to summary judgment for the reasons detailed below.

STATUTORY AND REGULATORY BACKGROUND

A. Immigration Statutes

Enacted in 1952 and amended on various occasions thereafter, the Immigration and Nationality Act provides a comprehensive scheme for the regulation of immigration into the United States. *See* Immigration and Nationality Act, ch. 477, 66 Stat. 163 (1952) (codified as amended at 8 U.S.C.

§§ 1101-1537). In 1986, Congress amended the Immigration and Nationality Act to prohibit the hiring or continued employment of aliens when employers know that the aliens are not authorized to work in the United States. *See* Immigration Reform and Control Act of 1986 ("IRCA"), Pub. L. No. 99-603, § 101(a)(1), 100 Stat. 3359, 3360 (codified as amended at 8 U.S.C. § 1324a(a)).

To ensure compliance with this new statutory prohibition, Congress established a document-based system for employers to verify that individuals are authorized to work in the United States. *See* IRCA § 101(a)(1), 100 Stat. at 3361 (codified as amended at 8 U.S.C. § 1324a(b)). Pursuant to that system, employers and employees must complete a form known as the Form I-9. *See* 8 C.F.R. § 274a.2(a)(2) (2008); *see also* USCIS, *Form I-9, Employment Eligibility Verification*, available at http://www.uscis.gov/files/form/I-9.pdf (last visited on Jan. 14, 2009). A true and correct copy of the Form I-9 is found at Tab 1 of Plaintiffs' Appendix of Exhibits.

The Form I-9 is not filed with any federal agency. Instead, it must be retained by the employer and made available for inspection by federal officials who periodically conduct worksite inspections. *See* 8 C.F.R. § 274a.2(b)(2). Employers must retain completed Forms I-9 for three years after the date of hire or one year after the date employment ends, whichever is later. § 274a.2(b)(2)(A).

At the same time that it created the document-based system for employers to verify that individuals are authorized to work in the United States, Congress directed the President to evaluate the document-based system's security and efficacy, but provided that he could only implement necessary changes subject to strict congressional oversight. *See* IRCA § 101(a)(1), 100 Stat. at 3363 (codified as amended at 8 U.S.C. § 1324a(d)). In relevant part, federal law provides that "[a]ny change the President proposes to implement . . . in the verification system must be designed in a manner so the verification system, as so changed, meets" certain enumerated requirements, including maintaining privacy of in-

formation. 8 U.S.C. § 1324a(d)(2). "No major change may be implemented unless the Congress specifically provides, in an appropriations or other Act, for funds for implementation of the change." § 1324a(d)(3)(C)(ii).

In 1996, Congress instructed the federal official who at that time had primary responsibility for enforcing this Nation's immigration laws, the Attorney General of the United States, to conduct three experimental programs of employment eligibility confirmation. *See* IIRIRA § 401(a), 110 Stat. at 3009-655. Known as "pilot programs," Congress specifically stated that no one could be required to participate in any of the "pilot programs," save for certain persons and entities specifically identified by IIRIRA. *See id.*

As enacted, IIRIRA stated that

> 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 pilot 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.

IIRIRA § 402(a), 110 Stat. at 3009-656. Subsection (e) provides that three categories of persons or entities may be required to participate in a pilot program. First, IIRIRA instructs that "[e]ach Department of the Federal Government shall elect to participate in a pilot program and shall comply with the terms and conditions of such an election." IIRIRA § 402(e)(1)(A)(i), 110 Stat. at 3009-658. In addition, subsection (e) provides that "[e]ach Member of Congress, each officer of Congress, and the head of each agency of the legislative branch, that conducts hiring in a State in which a pilot program is operating shall elect to participate in a pilot program . . . ." IIRIRA § 402(e)(1)(B), 110 Stat. at 3009-659. Finally, subsection (e) instructs that certain immigration law violators may be required to participate in a pilot program. *See* IIRIRA § 402(e)(2), 110 Stat. at 3009-659. Government contractors and subcontrac-

tors are not included in the class of persons or entities that may be required to participate in E-Verify under subsection (e).

In 2003, the Attorney General's duties under IIRIRA were transferred to the Secretary. *See* Basic Pilot Program Extension and Expansion Act of 2003, Pub. L. No. 108-156, § 3(d), 117 Stat. 1944, 1945 (substituting "Secretary of Homeland Security" for "Attorney General" each place the latter term appeared in IIRIRA). Of the three experimental programs created by IIRIRA, only one—the "basic pilot program" created by IIRIRA § 403(a)—still exists. The basic pilot program is more commonly known as "E-Verify."

Further underscoring its experimental nature, E-Verify has always been authorized on a temporary basis. When first enacted, IIRIRA provided that E-Verify would only last for four years. *See* IIRIRA § 401(b), 110 Stat. at 3009-656 ("Unless the Congress otherwise provides, the Attorney General shall terminate a pilot program at the end of the 4-year period beginning on the first day the pilot program is in effect."). Congress has since extended the life of E-Verify on three separate occasions. *See* Basic Pilot Extension Act of 2001, Pub. L. No. 107-129, § 2, 115 Stat. 2407 (2002) (extending life of program until November 30, 2003); Basic Pilot Program Extension and Expansion Act of 2003, Pub. L. No. 108-156, § 2, 117 Stat. 1944 (extending life of program until November 30, 2008); Consolidated Security, Disaster Assistance, and Continuing Appropriations Act, 2009, Pub. L. No. 110-329, § 106(3), 122 Stat. 3574, 3575 (2008) (extending life of program until March 6, 2009). E-Verify thus only finds its authorizing support in congressional enactment.

B. Government Procurement Statutes and Regulations

Two procurement-related statutes are relevant to this case. The first is the Federal Property and Administrative Services Act of 1949 ("Procurement Act"), 40 U.S.C. §§ 101-1315. The Procurement

Act is intended to "provide the Federal Government with an economical and efficient system" of government procurement. 40 U.S.C. § 101. In relevant part, the Procurement Act gives the President of the United States the authority to "prescribe policies and directives that the President considers necessary to carry out" the Procurement Act; however, any such policies "must be consistent with" the Procurement Act. § 121(a).

The second procurement-related statute relevant to this case is the Office of Federal Procurement Policy Act ("Procurement Policy Act"), 41 U.S.C. §§ 403-438. In relevant part, the Procurement Policy Act provides that

> no procurement policy, regulation, procedure, or form (including amendments or modifications thereto) relating to the expenditure of appropriated funds that has (1) a significant effect beyond the internal operating procedures of the agency issuing the procurement policy, regulation, procedure or form, or (2) a significant cost or administrative impact on contractors or offerors, may take effect until 60 days after the procurement policy, regulation, procedure, or form is published for public comment in the Federal Register pursuant to subsection (b) of this section. Notwithstanding the preceding sentence, such a policy, regulation, procedure, or form may take effect earlier than 60 days after the publication date when there are compelling circumstances for the earlier effective date, but in no event may that effective date be less than 30 days after the publication date.

41 U.S.C. § 418b(a).

Among other things, the notice of a proposed procurement policy, regulation, procedure or form must include the "text of the proposal or, if it is impracticable to publish the full text of the proposal, a summary of the proposal and 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." § 418b(c)(1). The comment period for the proposed procurement policy, regulation, procedure, or form may not be less than 30 days. § 418b(b). In addition, the Procurement Policy Act's notice-and-comment requirements may only be waived "if urgent and compelling circumstances make compliance with such requirements impracticable." § 418b(d)(1).

As for procurement-related regulations, recent amendments to the Federal Acquisition Regulation ("FAR"), 48 C.F.R. chs. 1-2, are central to this dispute. First promulgated in 1983 by the Department of Defense, General Services Administration and the National Aeronautics and Space Administration, the FAR "establishes a single regulation for use by all Executive agencies in their acquisition of supplies and services with appropriated funds." Establishing the Federal Acquisition Regulation, 48 Fed. Reg. 42,102 (Sept. 19, 1983).[2] Among other things, the FAR contains standard contract provisions that must be used by federal contracting officers. *See* 48 C.F.R. pt. 52. The Councils are assigned the task of preparing and issuing revisions to the FAR. 48 C.F.R. § 1.201-1.[3]

FACTUAL BACKGROUND

A. Executive Order 13,465

On Friday, June 6, 2008, President George W. Bush signed Executive Order 13,465, which instructs 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

[2] Characterizing the FAR as a "single regulation" may be somewhat misleading, however, since the FAR currently spans two separate volumes of regulations within Title 48 of the Code of Federal Regulations. In addition, a number of federal agencies with significant procurement responsibilities have promulgated their own regulations supplementing the FAR, none of which are at issue in this case. *See, e.g.*, 48 C.F.R. pts. 200-99 (Defense Acquisition Regulations System); 48 C.F.R. pts. 300-99 (Department of Health and Human Services Acquisition Regulation). In addition, although the FAR is codified within Title 48 of the Code of Federal Regulations, federal agencies and courts that decide a significant number of government contracting issues—i.e., the United States Court of Federal Claims and the United States Court of Appeals for the Federal Circuit—often refer to the FAR using a section number only and do not include a section symbol or a citation to the Code of Federal Regulations. *See, e.g., General Injectables & Vaccines, Inc. v. Gates*, 527 F.3d 1375, 1376 (Fed. Cir. 2008) (referring to 48 C.F.R. § 52.212-4(f) as "FAR 52.212-4(f)"). For ease of reference, Plaintiffs use citations to "48 C.F.R. §" in their discussion of specific FAR provisions.

[3] Although they are charged with preparing and issuing revisions to the FAR, the Councils do not design or enforce substantive obligations imposed by statute or implementing regulations. Rather, the Councils perform the administrative function of ensuring that such requirements are properly included in the FAR in a manner consistent with the unified procurement regulatory scheme.

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." Exec. Order No. 13,465 § 3, 73 Fed. Reg. 33,285, 33,286 (June 11, 2008) (amending Exec. Order No. 12,989 § 5) (emphasis added). Moreover, President Bush directed that the Secretary shall "administer and enforce" Executive Order 13,465 and gave him the authority to "establish such requirements" as he thought "necessary and appropriate" to implement Executive Order 13,465. *Id.* President Bush also commanded that the FAR be amended to "implement the debarment responsibility, the employment eligibility verification responsibility, and other related responsibilities assigned to heads of departments and agencies under this order." *Id.* A true and correct copy of Executive Order 13,465 is found at Tab 2 of Plaintiffs' Appendix of Exhibits.

As justification for these new requirements, President Bush stated that Executive Order 13,465 was "designed to promote economy and efficiency in Federal Government procurement." Exec. Order No. 13,465 § 1(b), 73 Fed. Reg. at 33,285. According to the Executive Order, "[s]tability and dependability are important elements of economy and efficiency. A contractor whose workforce is less stable will be less likely to produce goods and services economically and efficiently than a contractor whose workforce is more stable." *Id.* "Because of the worksite enforcement policy of the United States and the underlying obligation of the executive branch to enforce the immigration laws," President Bush continued, "contractors that employ illegal aliens cannot rely on the continuing availability and service of those illegal workers, and such contractors inevitably will have a less stable and less dependable workforce than contractors that do not employ such persons." *Id.*

Therefore, "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 veri-

fication system designated by the Secretary of Homeland Security to confirm the employment eligibility of their workforce," President Bush argued, would "promote economy and efficiency in Federal procurement." *Id.* (emphasis added). The Executive Order relied on no formal studies, testimony or other evidence to support these assertions. Furthermore, although he instructed the Secretary that he was to "administer and enforce this order" requiring participation in an unspecified "electronic employment eligibility verification system," Exec. Order No. 13,465 § 3, 73 Fed. Reg. at 33,286, President Bush made no mention of IIRIRA's prohibition against requiring "any person or other entity to participate in a pilot program" such as E-Verify.

B. The E-Verify Designation Notice

Three days later, on Monday, June 9, 2008, the Secretary signed a notice designating E-Verify as the electronic employment eligibility verification system to be used by federal contractors and subcontractors. The Secretary's notice was published in the *Federal Register* on June 13, 2008. *See* Notice of Designation of the Electronic Employment Eligibility Verification System Under Executive Order 12989 ("E-Verify Designation Notice"), 73 Fed. Reg. 33,837 (June 13, 2008). A true and correct copy of the Secretary's E-Verify Designation Notice is found at Tab 3 of Plaintiffs' Appendix of Exhibits.

In issuing the E-Verify Designation Notice, the Secretary explained that he was acting "[p]ursuant to" Executive Order 13,465, which he acknowledged "instructs Federal departments and agencies that enter into contracts to 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 all persons hired during the contract term by the contractor to perform employment duties within the United States, and all persons assigned by the contractor to perform work within the United States on the Federal contract." E-Verify Designation Notice, 73 Fed.

Reg. at 33,837. The Secretary's notice made no mention of IIRIRA's prohibition against requiring "any person or other entity to participate in a pilot program" such as E-Verify.

C. The Proposed Rule

The next day, on June 10, 2008, Albert A. Matera, acting in his official capacity as Chairman of the Civilian Agency Acquisition Council, signed a notice of proposed rulemaking beginning implementation of President Bush's instruction that the FAR be amended to require participation in the electronic employment eligibility verification system designated by the Secretary. The notice of proposed rulemaking was published in the *Federal Register* on June 12, 2008. *See* Proposed Employment Eligibility Verification Rule ("Proposed Rule"), 73 Fed. Reg. 33,374 (June 12, 2008). A true and correct copy of the Proposed Rule is found at Tab 4 of Plaintiffs' Appendix of Exhibits.

In addition to parroting Executive Order 13,465's claims that use of an electronic verification system designated by the Secretary would promote efficiency and economy in government procurement, the Proposed Rule argued that "one of the Government's primary responsibilities is the enforcement of the immigration laws of the United States. It is appropriate to ensure that Government contractors and subcontractors abide by the immigration laws that the Government enforces." Proposed Rule, 73 Fed. Reg. at 33,375. In addition, the Proposed Rule claimed that "[t]he new contractual requirement to use the E-Verify System will enhance the Government's ability to protect national security and ensure compliance with the nation's immigration laws—core aspects of the Government's mission that otherwise could be compromised by the presence of unauthorized aliens in Government facilities or by the employment of unauthorized aliens in the Government's supply chain." *Id.* at 33,378.

Among other things, the Councils proposed to amend the FAR such that a clause would be added to government contracts over $3,000 in value, whereby the contractor would be required to use E-Verify

to confirm that all "new hires, and all employees (existing and new) directly engaged in the performance of work under Federal contracts, are authorized to work in the United States." *Id.* at 33,375. Specifically excluded from the Proposed Rule's reach were contracts for "commercially available off-the-shelf (COTS) items or items that would be COTS items but for minor modifications." *Id.* According to the Councils, COTS items were excluded because "the cost of compliance would likely outweigh the benefits . . . ." *Id.* at 33,376.

Contractors covered by the Proposed Rule would be required to "[e]nroll in the E-Verify program within 30 calendar days of contract award, and use E-Verify within 30 calendar days thereafter to verify employment eligibility of their employees assigned to the contract at the time of enrollment in E-Verify." *Id.* at 33,381 (proposed 48 C.F.R. § 22.1802(b)(1)(i)). If contractors were already enrolled in E-Verify at the time of contract award, the Proposed Rule explained that contractors would be required to "use E-Verify within 30 calendar days of contract award to verify employment eligibility of their employees assigned to the contract." *Id.* (proposed 48 C.F.R. § 22.1802(b)(1)(ii)). "Following this initial period," contractors would be required to "initiate verification of all new hires of the contractor and of all employees newly assigned to the contract within three business days of their date of hire or date of assignment to the contract." *Id.* (proposed 48 C.F.R. § 22.1802(b)(2)).

The foregoing requirements were not limited to prime contractors. Any contractor covered by the Proposed Rule would be required to "flow down" this requirement to its subcontractors for non-COTS subcontracts over $3,000 in value. *Id.* at 33,381 (proposed 48 C.F.R. § 22.1802(c)). The Proposed Rule estimated that in federal fiscal year 2009 alone, employers' startup and training costs for complying with these new requirements would total $61,630,740. *Id.* at 33,377.

The Proposed Rule also explained that in order to comply with the proposed regulations, a government contractor or subcontractor would have to enter into a Memorandum of Understanding ("MOU") with DHS and SSA. *Id.* at 33,376. In issuing the Proposed Rule, however, the Councils did not publish the full text of the MOU in the *Federal Register*, nor did they ask the public to submit comments on the full text of the MOU. Instead, the Councils explained that "USCIS is in the process of revising its MOU." *Id.* at 33,377. A draft of the revised MOU was "placed in the docket for [the proposed] rulemaking" and made "available online at *http://www.regulations.gov*." *Id.* A true and correct copy of the revised MOU as it was "placed in the docket for [the proposed] rulemaking" on June 13, 2008—one day after the Proposed Rule was published in the *Federal Register*—is found at Tab 5 of Plaintiffs' Appendix of Exhibits.

Although the full text of the revised MOU was not published in the *Federal Register*, the importance of that separate, legally binding agreement to government procurement was made abundantly clear by the Councils. "Federal contractors' compliance with [the] revised MOU," the Proposed Rule stated, would "be a performance requirement under the terms of the Federal contract or subcontract, and the contractor must consent to the release of information relating to compliance with its verification responsibilities to contracting officers or other officials authorized to review the Employer's compliance with Federal contracting requirements." *Id.* at 33,377.

D. The Final Rule

On November 14, 2008, the Councils published a final rule, effective January 15, 2009, requiring that certain government contractors and subcontractors participate in E-Verify to verify the employment eligibility of all newly hired employees and all employees directly engaged in the performance of work in the United States under contracts with the Federal Government and covered subcontracts. *See* Final

Employment Eligibility Verification Rule ("Final Rule"), 73 Fed. Reg. 67,651 (Nov. 14, 2008) (to be codified within 48 C.F.R. pts. 2, 22 and 52). The Final Rule was signed by Mr. Matera in his official capacity as Chairman of the Civilian Agency Acquisition Council. *See id.* at 67,703. A true and correct copy of the Final Rule is found at Tab 6 of Plaintiffs' Appendix of Exhibits.

Among other things, the Final Rule explained that "[m]any commenters challenge[d] the Councils' authority to promulgate the Rule, arguing that the insertion of a clause into Federal contracts that commits Federal contractors to use E-Verify conflicts with the congressional intent expressed in [IIRIRA] that participation in E-Verify be 'voluntary.'" *Id.* at 67,655. In response, the Councils argued that, because IIRIRA applies "only to the Secretary of Homeland Security and does not apply to the President or the Councils," the "requirement to insert the contract clause set forth in this rule [pursuant to Executive Order 13,465] is not a requirement imposed by the Secretary of Homeland Security and therefore does not run afoul of section 402(a) of IIRIRA." *Id.* at 67,656. The Councils refused to acknowledge that pursuant to Executive Order 13,465, the Secretary's action of designating E-Verify was a condition precedent to their action and that the Secretary was instructed by Executive Order 13,465 to ensure government contractors and subcontractors complied with President Bush's instructions.

In addition, the Councils argued that even if IIRIRA's prohibition against requiring participation in E-Verify applied to the President and the Councils, the Final Rule did not run afoul of IIRIRA § 402(a) because "acceptance of a Federal procurement contract is, by definition, a voluntary act." *Id.* "If a contractor chooses to do business with the Federal Government, then the Federal Government can, and routinely does, impose contract performance requirements. Where, as with this rule, such requirements are imposed through contract terms included in contracts," the Councils stated that "a contractor's agreement to abide by those terms of the agreement is not 'involuntary.'" *Id.*

The Final Rule made several substantive changes to the rule first proposed on June 12, 2008. For example, the Final Rule increased the contract dollar threshold from $3,000 to $100,000. *See id.* at 67,654. The dollar threshold for subcontracts, however, was kept at $3,000. *See id.* at 67,676. The Final Rule also increased the timelines for covered entities to enroll in E-Verify and to begin verifying newly hired employees and employees assigned to a covered federal contract or subcontract. *See, e.g.*, *id.* at 67,654 ("The final rule amends the proposed rule to permit Federal contractors participating in the E-Verify program for the first time a longer period—90 calendar days from enrollment instead of 30 days as initially proposed—to begin using the system for new and existing employees. The final rule also provides a longer period after this initial enrollment period—30 calendar days instead of 3 business days—for contractors to initiate verification of existing employees who have not previously gone through the E-Verify system when they are newly assigned to a covered Federal contract.").

In addition, the Final Rule explained that institutions of higher education, state and local governments, federally recognized Indian tribes, and "sureties performing under a takeover agreement entered into with a Federal agency pursuant to a performance bond" did not have to use E-Verify on all new hires. Instead, these entities need only verify employees assigned to a covered federal contract. *See id.* at 67,704 (to be codified at 48 C.F.R. § 22.1802(b)). The Final Rule estimated that in federal fiscal year 2009 alone, employers' startup and training costs for complying with these new requirements would total $188,138,945—some $126,508,205 greater than the cost estimated in the Proposed Rule ($61,630,740). *Compare* Final Rule, 73 Fed. Reg. at 67,702, *with* Proposed Rule, 73 Fed. Reg. at 33,377.

Responding to criticism that the Proposed Rule did not include the full text of the revised MOU, the Councils asserted that they had

> placed the proposed MOU reflecting the program participation requirements for Federal contractors into the public docket, and discussed the requirements under that document in the preamble of the proposed rule. . . . In response, the Councils received many comments related to the MOU in general and as to specific provisions within the MOU, which are addressed in greater detail later in this section. Accordingly, commenters were afforded an opportunity to comment on the provisions of the MOU and, in fact, did provide such comments to the Councils. . . . .

Final Rule, 73 Fed. Reg. at 67,667. The Councils also responded to complaints that the revised text of the MOU still had not been finalized, stating:

> *Comment:* One commenter noted that DHS needed to finalize the MOU prior to the effective date of the FAR rule. Another commenter expanded upon this point to assert that DHS needs to finalize the E-Verify Web site, training materials, and program manual prior to the effective date of the FAR rule. A chamber of commerce wanted DHS to undertake a nationwide program to educate and train contractors prior to the rule's effective date.
>
> *Response:* The Councils concur that implementation of the final rule *must* coincide with finalization of the MOU and other necessary systems revisions. The Councils expect that the MOU and other DHS systems and procedures will be ready in time for the effective date of the final rule [i.e., January 15, 2009].

Id. at 67,684 (emphasis added).

As with the Proposed Rule, the Councils did not publish the revised MOU in the *Federal Register*, nor has a final version been published. On the other hand, the Final Rule added regulatory language making the consequences for a government contractor or subcontractor who violated the terms of its MOU abundantly clear. In particular, the Councils amended the contract provision required by the Final Rule to state that the contractor "shall comply, for the period of performance of this contract, with the requirements of the E-Verify program MOU." *Id.* at 67,705 (to be codified at 48 C.F.R. § 52.222-54 as subsection (b)(5) of the required E-Verify contract provision). In addition, the Councils added language providing that if "DHS or SSA terminates a contractor's MOU, the terminating agency *must* refer the

contractor to a suspension or debarment official for possible suspension or debarment action." *Id.* at 67,704 (to be codified at 48 C.F.R. § 22.1802(e)).[4]

E. Plaintiffs' Complaint for Declaratory and Injunctive Relief

On December 23, 2008, Plaintiffs initiated the instant case by filing their seven-count Complaint for Declaratory and Injunctive Relief against Michael Chertoff, in his official capacity as Secretary of Homeland Security; Albert Matera, in his official capacity as Chairman of the Civilian Agency Acquisition Council; and the United States of America (collectively, "Defendants"). Among other things, Plaintiffs alleged that the requirements imposed by the Final Rule violated IIRIRA's express prohibition against requiring any person or entity to participate in a pilot program such as E-Verify. (Compl. ¶¶ 63-68.) Plaintiffs also challenged the legality of the Secretary's E-Verify Designation Notice (Compl. ¶¶ 58-62) and Defendants' compliance with the Procurement Policy Act's notice-and-comment requirements (Compl. ¶¶ 85-91).

F. Temporary Delay of the Final Rule's "Applicability Date" and Effective Date

On January 8, 2009, an agreement was reached between the parties whereby enforcement of the Final Rule was delayed until February 20, 2009, in order to allow for expedited briefing on cross-motions for summary judgment in this case. The Councils later published a notice in the *Federal Register* delaying the "applicability date" of the Final Rule until February 20, 2009. *See* Notice Delaying Final Employment Eligibility Verification Rule ("Delay Notice"), 74 Fed. Reg. 1937 (Jan. 14, 2009). A true and correct copy of the Delay Notice is found at Tab 7 of Plaintiffs' Appendix of Exhibits.

[4] The Councils later published a notice correcting certain technical errors in the Final Rule, none of which are relevant to the legal claims at issue here. *See* Federal Acquisition Regulation; Corrections, 73 Fed. Reg. 72,242 (Nov. 26, 2008).

With respect to the Final Rule's effective date, however, the Councils stated that the effective date was only being extended until January 19, 2009—just one day shy of president-elect Barrack Obama's January 20, 2009 inauguration. According to the Councils, the January 19, 2009 effective date was selected to comply with the Congressional Review Act, 5 U.S.C. § 801(a)(3)(A). *See* Delay Notice, 74 Fed. Reg. at 1937. The Congressional Review Act provides Congress with a 60-day window in which it can enact a "joint resolution of disapproval" rejecting a rule promulgated by a federal agency. *See* 5 U.S.C. § 802. According to the Councils, although the Final Rule had been published in the *Federal Register* on November 14, 2008, it was not received by Congress until November 19, 2008. Delay Notice, 74 Fed. Reg. at 1937. Thus, the Councils attempted to immunize the Final Rule from direct consideration by the incoming Administration and Congress by designating the effective date to occur at the midnight hour of the departing Administration.

G. Representative Harm

To put the requirements of the Final Rule in perspective, Plaintiffs have included the Declaration of Mario A. DiFranco, Vice President of Finance and Administration at Landover, Maryland-based Quality Support, Inc. ("Quality Support"). A true and correct copy of Mr. DiFranco's declaration is found at Tab 8 of Plaintiffs' Appendix of Exhibits. In addition, Plaintiffs have included the Declaration of Margie Jones, United States Immigration Operations Manager for Intel Corporation. A true and correct copy of Ms. Jones's declaration is found at Tab 9 of Plaintiffs' Appendix of Exhibits.

1. Quality Support, Inc.

As demonstrated by Mr. DiFranco's declaration, the requirements imposed by the Final Rule have caused and will continue to cause harm to thousands of government contractors and subcontractors throughout the United States absent timely judicial relief.

Quality Support is a minority-owned small business that is owned and controlled by a service-disabled veteran, Wayne M. Gatewood, Jr. (DiFranco Decl. ¶ 4.) The company's approximately 80 full-time employees and 20 part-time employees provide a distinctive array of management, administrative, meeting and conference support, fulfillment, and technical support services for short- and long-term projects. (*Id.* ¶¶ 4-5.) The vast majority of these projects are performed either (1) under contract with federal agencies or (2) under subcontracts with private businesses that are themselves working under contract with federal agencies. (*Id.* ¶ 5.) In calendar year 2008, contracts with federal agencies individually valued in excess of $100,000 and similar subcontracts individually valued in excess of $3,000 accounted for approximately 98 percent of Quality Support's total revenue. (*Id.* ¶ 6.)

For example, pursuant to a contract with the Health Resources and Services Administration ("HRSA") within the Department of Health and Human Services, Quality Support provides on- and off-site conference support services to HRSA's Office of Field Operations, which is located in Rockville, Maryland. (*Id.* ¶ 7.) Quality Support's contract with HRSA is valued in excess of $100,000. (*Id.*)

In addition, Quality Support also works under subcontract with Metropolitan Van & Storage, Inc. ("Metropolitan Van"), providing administrative and systems management for non-temporary storage of personal property related to Metropolitan Van's contract with the Department of Defense's ("DOD's") Surface Deployment and Distribution Command. (*Id.* ¶ 9.) Under this subcontract, Quality Support manages administrative, systems and documentation requirements for processing DOD-sponsored personal property coming through the Port of Oakland and Naval Weapons Station in Concord, California. (*Id.*) Quality Support's subcontract with Metropolitan Van is valued in excess of $3,000. (*Id.*)

Quality Support is committed to ensuring that it complies with all federal laws that regulate the ability of individuals to work in the United States. (*Id.* ¶ 10.) To that end, Quality Support currently

utilizes the document-based system of employment verification required by federal law. (*Id.*) Quality Support completes a Form I-9 for all newly hired employees to verify their identity and authorization to work in the United States. (*Id.*) To Mr. DiFranco's knowledge, Quality Support has never been cited for knowingly hiring or continuing to employ an individual not authorized to work in the United States. (*Id.*)

To date, Quality Support has elected not to participate in E-Verify. (*Id.* ¶ 11.) Instead, Quality Support relies on the legally mandated document-based system of employment verification described above. (*Id.*) Quality Support's decision not to participate in E-Verify is based on many factors. (*Id.* ¶ 12.) For example, Quality Support takes seriously its legal obligation to confirm the employment eligibility of employees using the required Form I-9. (*Id.*) Quality Support's human resources personnel carefully examine supporting documentation provided by new employees to confirm they are eligible to work in the United States. (*Id.*) Therefore, usage of E-Verify is seen as redundant and unnecessary, especially for a small business like Quality Support that does not have the luxury of a large human resources department. (*Id.*)

Because of the Final Rule's original January 15, 2009 effective date, and because government contracts and subcontracts covered by the Final Rule will likely comprise a substantial portion of Quality Support's annual revenue, Quality Support already has been forced to dedicate resources to prepare for the possibility that the Final Rule will be upheld as lawful. (*Id.* ¶ 18.) For example, since the Final Rule was published on November 14, 2008, Quality Support has dedicated man-hours to investigate and learn the many nuances of the Final Rule. (*Id.* ¶ 20.)

Furthermore, because government contracts and subcontracts covered by the Final Rule are essential if Quality Support is to remain a viable business, Quality Support has no choice but to participate

in E-Verify. (*Id.* ¶ 22.) Quality Support will also be required on an ongoing basis to dedicate additional resources to comply with the requirements established by the Final Rule. (*Id.* ¶ 23.) Among other things, Quality Support will have to train its human resources personnel on how to use E-Verify. (*Id.*) In turn, Quality Support's human resources personnel will have to spend time inputting data into E-Verify and counseling employees regarding the process for challenging a tentative nonconfirmation. (*Id.*)

Quality Support estimates that in fiscal year 2009 alone, the cost to Quality Support of complying with the requirements imposed by the Final Rule will total approximately $27,320.00. (*Id.* ¶ 24.) These costs will include various administrative costs, as well as extra legal costs for ensuring compliance with the Final Rule. (*Id.* ¶ 24.) Of course, these additional costs will be incorporated into Quality Support's pricing structure, thereby increasing the overall cost to the Federal Government when it contracts with Quality Support. (*Id.* ¶ 30.)

In addition, because of the Final Rule's "flow down" requirement, Quality Support will face increased difficulty outsourcing such things as information technology services to third-party vendors because the providers of those services do not necessarily depend on business related to federal contracts and will choose not to do business with Quality Support because of the added administrative burden the Final Rule would place on them as a covered subcontractor. (*Id.* ¶ 31.) As a function of supply and demand, any reduction in the number of third-party vendors willing to do work for Quality Support under subcontract will likely result in higher prices being charged Quality Support for such services, which also will increase Quality Support's pricing structure and thereby increase the cost to the Federal Government. (*Id.* ¶ 31.)

2. Intel Corporation

As demonstrated by Ms. Jones's declaration, the Final Rule affects large companies as well. Intel Corporation ("Intel") is a worldwide leader in the design, manufacture and marketing of microcomputer components that are the building blocks integral to computers, servers, and networking and communications products. (Jones Decl. ¶ 3.) Intel currently employs over 45,000 individuals in the United States. (*Id.*) In addition, Intel currently has several contracts with the Federal Government concerning direct technology research and development, each of which has a value in excess of $100,000. (*Id.* ¶ 4.)

Intel is dedicated to ensuring that it complies with all federal laws that regulate the ability of individuals to work in the United States. (*Id.* ¶ 5.) To that end, Intel currently utilizes the document-based system of employment verification whereby an employer completes a Form I-9 for all newly hired employees to verify their identity and authorization to work in the United States. (*Id.*)

In addition, Intel has participated in the E-Verify system since January 1, 2008, first with respect to its Arizona facilities, and, then, by July 2008, Intel voluntarily expanded its participation in E-Verify to all its United States hiring sites. (*Id.* ¶ 6.) Consistent with its current MOU with DHS and SSA, Intel uses E-Verify to confirm the employment eligibility of new hires only. (*Id.*) Intel does not use E-Verify to electronically "reverify" the employment eligibility of existing employees and is precluded from doing so pursuant to its existing MOU. (*Id.*)

Because Intel is a federal contractor covered by the Final Rule, the company has been forced to dedicate significant resources to prepare for the possibility that the Final Rule will be enforced and that Intel's participation in E-Verify will be significantly expanded to include many of Intel's current employees working in the United States. (*Id.* ¶ 17.) For example, Intel has already engaged outside counsel to assist it in determining a process for identifying and re-verifying the work eligibility of current

employees subject to the Final Rule. (*Id.* ¶ 18.) Because of the complexities of Intel's research and development business model and the nature of technology services it provides to the Federal Government, Intel has also devoted resources to evaluate whether it is feasible to identify and track employees who will directly perform work under a contract or subcontract covered by the Final Rule. (*Id.*)

Absent timely injunctive and declaratory relief in this case, Intel will be forced to comply with the provisions of the Final Rule, which would dramatically change Intel's obligations to confirm employment eligibility for new hires and its current workforce under the E-Verify system. (*Id.* ¶¶ 7-16, 19.) Because Intel's government contracts covered by the Final Rule are of material importance to Intel, the company will be required to expand its previously voluntary participation in E-Verify even though Congress has expressly stated that participation in E-Verify may not be required. (*Id.* ¶ 20.) Intel will also be required to dedicate significant resources to comply with the Final Rule's requirement that contractors and subcontractors not only use E-Verify to confirm the employment eligibility of all new hires, but that Intel and its subcontractors also use E-Verify to electronically "reverify" existing employees hired after November 6, 1986. (*Id.* ¶ 20.)

Meeting the electronic-reverification-of-existing-employees requirement of the Final Rule will prove particularly costly in both time and resources. Intel will first need to review the I-9 forms of all of the employees assigned to work on Intel's federal contracts. (*Id.* ¶ 21.) This is so because, as allowed by IRCA, Intel has not maintained copies of work authorization documents its employees submit during the I-9 process. (*Id.*) Intel is thus without information necessary to confirm that its existing I-9's meet the requirements of Paragraph 5 of the proposed E-Verify MOU placed in the rulemaking docket, which, among other things, requires the employer to examine a photographic identification document for each individual processed through E-Verify. (*Id.*) Once Intel becomes a covered federal contractor, Intel will

need to schedule face-to-face meetings to update I-9 forms for all employees working on federal contracts to collect and review new photographic identification provided by the employee to make sure the documents provided reasonably relate to the employee, thereby satisfying Paragraph 5 of the proposed MOU. (*Id.*) In addition, Intel will need to discuss work authorization documentation with any affected employee who (a) was not a United States citizen at the time his/her last updated I-9 form was completed or (b) authenticated his/her work authorization in the I-9 process with a document, such as a certification of naturalization, which is not accepted in the E-Verify process. (*Id.*) Intel estimates that approximately 500 hours of skilled personnel time would need to be expended before Intel could submit E-Verify queries for covered current employees. (*Id.* ¶ 22.)

Moreover, because Intel's I-9 process is decentralized and is carried out by trained staff in the field, Intel will need to train affected personnel about the particular "re-verification" requirements for the affected current employees imposed by the proposed E-Verify MOU for Federal Government contractors. (*Id.* ¶ 23.) Before any current Intel employee is subject an E-Verify query, the cost of training six Intel employees to perform these tasks is estimated by Intel to be approximately $18,000 (if performed by Intel staff) or approximately $50,000 (if outsourced to Intel's I-9 service provider). (*Id.*) In addition, Intel will pay a total of $4,000 to its outsourced I-9 service provider to conduct the 500 E-Verify queries and will bear additional costs of $50 for each tentative nonconfirmation ("TNC") returned by E-Verify, in addition to significant human resources efforts required to manage the TNC process and help affected employees and managers through the period of uncertainty caused by TNC responses. (*Id.*)

STANDARD OF REVIEW

Summary judgment is appropriate "if the pleadings, the discovery and disclosure materials on file, and any affidavits show that there is no genuine issue as to any material fact and that the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(c); *see also Celotex Corp. v. Catrett*, 477 U.S. 317, 323-25 (1986). "To defeat a motion for summary judgment, the nonmoving party must come forward with affidavits or other similar evidence to show that a genuine issue of material fact exists." *Feldman v. Pro Football, Inc.*, 579 F. Supp. 2d 697, 702 (D. Md. 2008) (Williams, J.) (citing *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 587 (1986)), *cross-appeals docketed*, Nos. 09-1021 & 09-1023 (4th Cir. Jan. 8, 2009). "While the evidence of the nonmoving party is to be believed and all justifiable inferences drawn in his or her favor, a party cannot create a genuine dispute of material fact through mere speculation or compilation of inferences." *Id.* (citing *Deans v. CSX Transp., Inc.*, 152 F.3d 326, 330-31 (4th Cir. 1998)).

Plaintiffs' legal claims as they relate to the Secretary and the Final Rule are subject to the standard of review provided by the Administrative Procedure Act ("APA"). In relevant part, the APA provides that a "reviewing court shall . . . hold unlawful and set aside agency action found to be . . . (B) contrary to constitutional right, power, privilege, or immunity; (C) in excess of statutory jurisdiction, authority, or limitations, or short of statutory right; [or] (D) without observance of procedure required by law." 5 U.S.C. § 706(2)(B)-(D). As for Plaintiffs' claims regarding the legality of Executive Order 13,465, an Executive Order that conflicts with a federal statute is illegal and must be set aside. *See Chamber of Commerce of the U.S. v. Reich*, 74 F.3d 1322, 1332 (D.C. Cir. 1996); *Marks v. CIA*, 590 F.2d 997, 1003 (D.C. Cir. 1978).

ARGUMENT

I. THE SECRETARY VIOLATED IIRIRA § 402(a) BY ISSUING THE E-VERIFY DESIGNATION NOTICE

Except as it relates to federal agencies, the Legislative Branch and certain immigration law violators, IIRIRA provides that the Secretary "may not require any person or other entity to participate in a pilot program." IIRIRA § 402(a). There is no ambiguity whatsoever in this statutory prohibition. The Secretary is in violation of this express statutory prohibition in three ways.

First, the Secretary designated E-Verify as the "electronic employment eligibility verification system" required to be used by government contractors and subcontractors under Executive Order 13,465. That the Secretary designated E-Verify at the direction of the President is of no moment. Congress, as the "legislative body which created the office" of Secretary of Homeland Security, has the authority to put "restrictions . . . upon the exercise of [the Secretary's] authority." *United States v. San Jacinto Tin Co.*, 125 U.S. 273, 284 (1888); *see also* Homeland Security Act of 2002, Pub. L. No. 107-296, § 102(a)(1), 116 Stat. 2135, 2142 (creating office of "Secretary of Homeland Security, appointed by the President, by and with the advice and consent of the Senate") (codified at 6 U.S.C. § 112(a)(2)). The Supreme Court explained long ago that "it would be an alarming doctrine that Congress cannot impose upon any executive officer any duty they may think proper which is not repugnant to any rights secured and protected by the Constitution, and, in such cases, the duty and responsibility grow out of and are subject to the control of the law, and not to the direction of the President." *Kendall v. United States ex rel. Stokes*, 37 U.S. (12 Pet.) 524, 610 (1838).

The duty imposed upon the Secretary by Congress was not to require "any person or other entity to participate in a pilot program" such as E-Verify. IIRIRA § 402(a). The Secretary violated this statutory duty by designating E-Verify as the "electronic employment eligibility verification system." The

direct result of the Secretary's designation is that use of E-Verify, as the Secretary knew, would be required under Executive Order 13,465. *See* E-Verify Designation Notice, 73 Fed. Reg. at 33,837 (acknowledging that Executive Order 13,465 "instructs Federal departments and agencies that enter into contracts to require, as a condition of each contract, that the contractor agree to use an electronic employment eligibility verification system designated by the Secretary").

Thus, the Secretary acted to make participation in E-Verify program-mandatory for federal contractors and subcontractors. The Secretary, and not the Councils, was the precipitating actor in making this happen. Neither the Secretary nor the Councils can ignore the unambiguous prohibition of IIRIRA simply by using Executive Order 13,465 as a filter to do away with a statutory command, no matter how much the Secretary or the Councils may disagree with Congress's policy choices.

IIRIRA § 402(a)'s prohibition, that the Secretary not require use of E-Verify, is violated a second time by the mandate of Executive Order 13,465 that the "Secretary of Homeland Security . . . shall administer and enforce this order." Exec. Order No. 13,465 § 3, 73 Fed. Reg. at 33,286. Inasmuch as the Executive Order requires the use of E-Verify by government contractors, the directive that the Secretary "shall administer and enforce this order" is a directive and authorization that the Secretary do that which IIRIRA § 402(a) forbids, i.e., require use of E-Verify. To put it bluntly, the Secretary can administer and enforce the Executive Order only by requiring use of E-Verify. The Executive Order, in the plainest of terms, requires the Secretary to do that which Congress has prohibited.

Moreover, the Executive Order also purports to authorize the Secretary to "issue such rules, regulations, or orders, or establish such requirements, as may be necessary and appropriate to implement this order." Exec. Order No. 13,465 § 3, 73 Fed. Reg. at 33,286. Again, inasmuch as the Executive Order requires use of E-Verify, the authorization to "issue such rules, regulations, or orders, or establish

such requirements, as may be necessary and appropriate to implement this order" is a direct violation of IIRIRA § 402(a)'s prohibition on requiring use of E-Verify. The Secretary cannot "implement this order" unless he requires government contractors to utilize E-Verify. A more patent violation of the statute is hard to imagine.

In sum, the Secretary has (1) established the requirement by designating E-Verify as the mandatory system to be used by government contractors; (2) been directed to "administer and enforce" use of E-Verify; and (3) been authorized to take necessary and appropriate action to implement the requirement that E-Verify be used by government contractors. Individually, each of those actions violates IIRIRA § 402(a)'s prohibition directing that the Secretary not require use of E-Verify. Collectively, they represent a considered, deliberate and comprehensive violation of Congress's command that use of E-Verify not be required. Accordingly, Plaintiffs are entitled to summary judgment on Count I of their Complaint.[5]

II. THE REQUIREMENTS IMPOSED BY THE FINAL RULE ARE INVALID BECAUSE THEY VIOLATE IIRIRA § 402(a)

E-Verify is an experimental program created by Congress and funded by monies appropriated by Congress. *See, e.g.*, Consolidated Security, Disaster Assistance, and Continuing Appropriations Act, 2009, Pub. L. No. 110-329, div. D, tit. IV, 122 Stat. 3574, 3676 (2008) (appropriating $100 million "for the E-Verify program to assist United States employers with maintaining a legal workforce" during federal fiscal year 2009). Congress has every right to place restrictions on the use of that experimental pro-

[5] To the extent that the Court interprets Executive Order 13,465 as requiring participation in a pilot program such as E-Verify, the Executive Order itself runs afoul of IIRIRA § 402 and therefore is void as a matter of law. *See Chamber of Commerce*, 74 F.3d at 1339 (holding that Executive Order, which barred the Federal Government from contracting with employers who hired permanent replacement workers during lawful "economic" strikes, was invalid because it conflicted with the National Labor Relations Act).

gram by the Executive Branch and has done so in the form of IIRIRA § 402(a), which states that "the Secretary of Homeland Security may not require any person or other entity to participate in a pilot program."

According to the Final Rule, "[m]any commenters challenge[d] the Councils' authority to promulgate the Rule, arguing that the insertion of a clause into Federal contracts that commits Federal contractors to use E-Verify conflicts with the congressional intent expressed in the IIRIRA that participation in E-Verify be 'voluntary.'" Final Rule, 73 Fed. Reg. at 67,655. In response, the Councils made two arguments for why the Final Rule does not violate IIRIRA § 402(a): (1) the statute does not apply to the President or the Councils; and (2) the decision to contract with the Federal Government is a voluntary act, and thus the requirements imposed by the Final Rule are not mandatory. *See id.* at 67,655-56. As discussed below, neither argument has merit.

A. IIRIRA Governs the Entire Executive Branch

Because IIRIRA supposedly applies "only to the Secretary of Homeland Security and does not apply to the President or the Councils," the Final Rule contends that the "requirement to insert the contract clause set forth in this rule [pursuant to Executive Order 13,465] is not a requirement imposed by the Secretary of Homeland Security and therefore does not run afoul of [IIRIRA]." Final Rule, 73 Fed. Reg. at 67,656. Tellingly, unlike other portions of the Final Rule, no case law is cited to support the Councils' assertion that IIRIRA does not govern the President or the Councils. Although Plaintiffs' own research has uncovered no case law directly on point, several considerations demonstrate that IIRIRA's prohibition on requiring participation in a pilot program such as E-Verify applies broadly to the Executive Branch as a whole.

First, E-Verify is a creation of Congress funded by monies appropriated by Congress. When Congress instructed the Secretary to design and implement the "basic pilot program" that eventually became E-Verify, there was no need for Congress to expressly state that the prohibition also applied to the President or the Councils. Neither the President nor the Councils were to have any role in the design or implementation of E-Verify.

Second, IIRIRA's designation of the Secretary made practical sense because Congress has assigned primary responsibility for administrating *all* federal immigration laws to the Secretary, not the President or the Councils. Federal law provides, in relevant part:

> The Secretary of Homeland Security shall be charged with the administration and enforcement of this chapter [referring to Chapter 12, Title 8 of the United States Code, entitled "Immigration and Nationality"] and all other laws relating to the immigration and naturalization of aliens, except insofar as this chapter or such laws relate to the powers, functions, and duties conferred upon the President, Attorney General, the Secretary of State, the officers of the Department of State, or diplomatic or consular officers: *Provided, however*, That determination and ruling by the Attorney General with respect to all questions of law shall be controlling.

8 U.S.C. § 1103(a)(1). Federal law does not confer upon the President or the Councils "powers, functions, and duties" related to E-Verify; instead, the plain language of IIRIRA demonstrates that all such "powers, functions, and duties" were to be exercised by the Secretary.

Third, 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 such as E-Verify—regardless of who within the Executive Branch imposes that requirement. It makes no sense to argue, as does the Final Rule, that because Congress expressly prohibited the Secretary from taking a specific substantive action, the substantive result Congress expressly prohibited can nonetheless be effectuated by the Secretary's superior officer or colleagues in the Executive Branch. Adopting such a position makes the *means* Congress uses to achieve a particular result (here a directive to the Secretary), more

important than the substantive *result* Congress intended (here assuring that "no person or other entity" is required to participate in a pilot program such as E-Verify). IIRIRA § 402(a). Indeed, such an argument turns Congress's purpose on its head and makes the means of achieving a congressionally desired result an impediment to achievement of Congress's substantive goal. When Congress prohibits a substantive result from being implemented directly by the federal official otherwise possessing the authority to do so, reasonable people understand that the prohibition extends to indirect action to achieve the prohibited result by other members of the Executive Branch. It is the result Congress prohibited; the means by which a prohibited result is achieved are secondary to Congress's desire to preclude the result.

A contrary rule of law would allow for the wholesale disregard of statutory prohibitions placed on Executive Branch officials. Congress regularly names the title of a particular official as the means for limiting the Executive Branch's authority. *See, e.g.*, National Defense Authorization Act for Fiscal Year 2006, Pub. L. No. 109-163, § 1055(a), 119 Stat. 3136, 3438 (2006) (codified at 10 U.S.C. § 113 note) ("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."). Using the foregoing statute as an example, under the argument put forth by the Councils, the Secretary of Energy could order the destruction of Department of Defense records related to radioactive fallout from nuclear weapons testing with legal impunity simply because Congress did not name the Secretary of Energy in the statute.

That IIRIRA cannot be circumvented by the artifice of having the President or the Councils do that which Congress has prohibited the Secretary from doing is evident from other restrictions placed on Executive authority in the immigration law context. For example, Congress has placed strict limits on the President's ability to alter the document-based system of employment verification currently in use.

In relevant part, federal law provides that "[a]ny change the President proposes to implement . . . in the verification system must be designed in a manner so the verification system, as so changed, meets" certain enumerated requirements, including maintaining privacy of information. 8 U.S.C. § 1324a(d)(2). "No major change may be implemented unless the Congress specifically provides, in an appropriations or other Act, for funds for implementation of the change." § 1324a(d)(3)(C)(ii).

Fourth, the President's constitutional responsibility to "take Care that the Laws be *faithfully* executed," U.S. Const. art. II, § 3 (emphasis added), should include an inherent responsibility to assure that the express will of Congress prohibiting specific action be effected. "[T]he President alone and unaided could not execute the laws. He must execute them by the assistance of subordinates." *Myers v. United States*, 272 U.S. 52, 117 (1926). It stands to reason, therefore, that a statutory prohibition on action by the President's subordinate should also bind the President especially when, as here, the subordinate has statutory responsibility for implementing the statute in question.

In sum, contrary to the assertion set forth by the Councils in the Final Rule, the fact that IIRIRA does not expressly list the President or the Councils does not mean that the statute's prohibition against requiring "any person or other entity to participate in a pilot program" can be circumvented simply by having someone other than the Secretary do that which Congress has expressly prohibited.

B. The Final Rule Requires Participation in a Pilot Program Within the Plain Meaning of IIRIRA § 402(a)

IIRIRA expressly provides that no "person or other entity" may be "require[d]" to "participate in a pilot program" such as E-Verify. IIRIRA § 402(a). Despite this unambiguous statutory prohibition, the Final Rule is brazenly honest in what it does, stating in its very first substantive sentence: "The [Councils] have agreed on a final rule amending the [FAR] *to require* certain contractors and subcontractors to use the E-Verify system . . . ." Final Rule, 73 Fed. Reg. at 67,651 (emphasis added).

In responding to criticism that the Final Rule violates IIRIRA § 402(a) by requiring government contractors and subcontractors to participate in a pilot program, the Councils put forward a straw-man argument that participation in E-Verify is "voluntary" because a person or entity can choose not to contract with the Federal Government. The Councils then pointed to a single decision of the United States Court of Appeals for the District of Columbia Circuit as support for the argument that the Final Rule is not "mandatory" because an employer can always choose not to be a government contractor or subcontractor. *See* Final Rule, 73 Fed. Reg. at 67,656 (discussing *AFL-CIO v. Kahn*, 618 F.2d 784 (D.C. Cir.) (en banc), *cert. denied*, 443 U.S. 915 (1979)). Because the Final Rule is not "mandatory," the Councils reasoned, the requirements it imposes do not run afoul of IIRIRA § 402(a). *See id.* at 67,656 ("Where, as with this rule, such requirements are imposed through contract terms included in contracts, a contractor's agreement to abide by those terms of the agreement is not 'involuntary.'").

There are several obvious flaws in the Councils' legal argument. First, the plain language of IIRIRA § 402(a) is a limitation on government action. Section 402(a) prohibits the government from imposing certain requirements on "any person or other entity." Indeed, to the extent that it involves government contractors at all, § 402(a) confers the right on persons and entities to enter government contracts without having to participate in a pilot program such as E-Verify.

That a contractor voluntarily chooses to contract with the government and that no one is entitled to a government contract are wholly beside the point. Section 402(a) does not address the right of parties to contract with the Federal Government. Section 402(a) does not address what government contractors may or may not do. It is simply and solely an across-the-board prohibition on what *the government* may do *vis-à-vis* the public. As such, § 402(a) precludes the Federal Government from requiring

E-Verify participation in *any* government contract. Conversely, § 402(a) assures those who choose to contract with the Federal Government that participation in E-Verify cannot be required by contract.

In essence, the Councils' defense of the Final Rule rests on the proposition that persons or entities may choose not to contract with the Federal Government and therefore may avoid an obligation to comply with a contract requirement that IIRIRA § 402(a) prohibits the government from imposing in the first place. That makes no sense.

A common, real-world analogy illustrates the fundamental error in the Councils' logic. It is a legal requirement that motorists obey the posted speed limit if they choose to drive on a public street. Is the speed limit "mandatory"? An individual can always choose not to drive a car or to disregard the speed limit; however, that does not make the posted speed limit any less of a requirement. In other words, simply because a person or entity can theoretically avoid complying with the Final Rule by choosing not to be a government contractor or subcontractor does not mean the Final Rule imposes anything but a requirement.

Moreover, for businesses like Quality Support that derive almost all of their revenue from government contracts and subcontracts covered by the Final Rule, there actually is no choice to make if they want to remain a viable business. (*See* DiFranco Decl. ¶¶ 6, 22.) The fact that one can theoretically choose to ignore the requirement and accept the consequences does not make it any less of a requirement. In addition, the Final Rule does not provide covered government contractors and subcontractors with discretion over whether to participate in E-Verify.

Second, because IIRIRA never uses words like "mandatory," "voluntary" or "involuntary," the *Kahn* decision is completely inapposite. The issue in *Kahn* was whether President Jimmy Carter could by Executive Order deny federal contracts to companies that failed to comply with certain "voluntary"

wage-and-price standards. *See* 61 F.2d at 785. The central legal question in *Kahn* was whether the Procurement Act gave the President sufficient statutory authority to issue the Executive Order in question. *See id.* at 787. Among other things, certain plaintiff-unions argued that the Executive Order violated § 3(b) of the Council on Wage and Price Stability Act ("Stability Act"), which stated: "Nothing in this Act . . . *authorizes* the continuation, imposition, or reimposition of any *mandatory* economic controls with respect to prices, rents, wages, salaries, corporate dividends, or any similar transfers." *Id.* at 794 (emphasis added). The district court found the Executive Order violated the Stability Act. *See AFL-CIO v. Kahn*, 472 F. Supp. 88, 99-101 (D.D.C. 1979).

In reversing the district court's judgment, the majority in *Kahn* observed:

> Although every denial of a benefit may be viewed in some sense as a sanction, we do not find in the procurement compliance program those elements of coercion and enforceable legal duty that are commonly understood to be part of any legally mandatory requirement. The situation in this case seems analogous to those federal programs that offer funds to state and local governments on certain conditions. The Supreme Court has upheld such conditional grants, observing on one occasion through Justice Cardozo that "to hold that motive or temptation is equivalent to coercion is to plunge the law in endless difficulties." [*Steward Machine Co. v. Davis*, 301 U.S. 548, 589-90 (1937).]
>
> Further, any 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)], "[T]he 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.

Id. at 794 (footnotes omitted).

Immediately after making these observations, the majority in *Kahn* explained: "The question presented by this case, however, is not whether in some abstract sense President Carter's program is mandatory or voluntary, *but whether it is barred by* [the Stability Act]." *Id.* (emphasis added). The majority found that the Executive Order was not barred by the Stability Act, going so far as to conclude that

the Stability Act was "irrelevant" because it simply stated that "[n]othing in *this* Act" authorized mandatory wage-and-price standards. *Id.* at 795. Because the Executive Order relied on another statute (the Procurement Act) for requiring compliance with the "voluntary" wage-and-price controls, the Stability Act was irrelevant in the majority's opinion. *See id.*

Kahn is readily distinguishable from the instant case. First, as noted above, IIRIRA § 402(a) does not speak in terms of the mandatory/voluntary dichotomy used by the statute at issue in *Kahn*. Instead, IIRIRA provides that "the Secretary of Homeland Security may not *require* any person or other entity to participate in a pilot program." IIRIRA § 402(a) (emphasis added).

Second, the Stability Act at issue in *Kahn* provided that nothing in the statute *authorized* a specific type of executive action, which in that case was the imposition of "mandatory" wage-and-price controls. In other words, unlike IIRIRA, the statute at issue in *Kahn* did not expressly *prohibit* a specific type of action by the Executive Branch.

Third, the language from *Kahn* quoted by the Final Rule—in particular, the language regarding the voluntary nature of government contracting—is *dicta* since it was irrelevant to the majority's conclusion that the Stability Act did not preclude another statute from providing the necessary authority for the Executive Order.

In sum, the Councils have disregarded the plain language of IIRIRA § 402(a) in order to set up a straw-man argument. That effort fails. *Kahn* does not answer the question of whether the Final Rule requires employers to participate in a pilot program in violation of the plain meaning of IIRIRA. Even if it did, *Kahn* is not binding precedent in this circuit and the logic of the majority opinion ignores real-world realities. *See Kahn*, 618 F.2d at 809 (MacKinnon, J., dissenting), 816 (Robb, J., dissenting, joined by Wilkey, J.).

Accordingly, because the Final Rule requires participation in a pilot program in violation of IIRIRA § 402(a), Plaintiffs are entitled to summary judgment on Count II of their Complaint. In addition, to the extent the Court interprets Executive Order 13,465 as requiring participation in a pilot program such as E-Verify, the Executive Order itself runs afoul of IIRIRA § 402 and therefore is void as a matter of law. *See Chamber of Commerce*, 74 F.3d at 1339 (holding that Executive Order, which barred the Federal Government from contracting with employers who hired permanent replacement workers during lawful "economic" strikes, was invalid because it conflicted with the National Labor Relations Act).

III. EVEN IF THE REQUIREMENTS IMPOSED BY THE FINAL RULE DO NOT VIOLATE IIRIRA, THOSE REQUIREMENTS ARE NONETHELESS INVALID BECAUSE THEY ARE NOT AUTHORIZED BY THE PROCUREMENT ACT

The "exercise of any governmental power . . . 'must stem either from an act of Congress or from the Constitution itself.'" *Medellin v. Texas*, 128 S. Ct. 1346, 1368 (2008) (quoting *Youngstown Sheet & Tube Co. v. Sawyer (Steel Seizure)*, 343 U.S. 579, 585 (1951)). Although a "congressional grant of legislative authority need not be specific in order to sustain the validity of regulations promulgated pursuant to" that grant of legislative authority, "a court must 'reasonably be able to conclude that the grant of authority contemplates the regulations issued.'" *Liberty Mut. Ins. Co. v. Friedman*, 639 F.2d 164, 169 (4th Cir. 1981) (quoting *Chrysler Corp. v. Brown*, 441 U.S. 281, 308 (1979)). In the instant case, the principal grant of legislative authority cited by the Final Rule—the Procurement Act—does not authorize the requirements imposed by the Final Rule. Therefore, those requirements are invalid and must be set aside. *See Liberty Mutual*, 639 F.2d at 172.[6]

[6] The other source of statutory authority cited by the Final Rule—3 U.S.C. § 301—merely provides that "[t]he President of the United States is authorized to designate and empower the head of any department or agency in the executive (continued)

The Fourth Circuit's decision in *Liberty Mutual* provides the framework for this Court to decide whether the requirements imposed by the Final Rule are a valid exercise of the Executive Branch's authority under the Procurement Act. There, the court of appeals held that application of certain regulations promulgated pursuant to Executive Order 11,246—which prohibited federal contractors and subcontractors from engaging in various forms of discrimination and imposed certain affirmative action requirements—was invalid under the Procurement Act. The plaintiffs in *Liberty Mutual* provided workers' compensation insurance to government contractors. *See id.* at 166. A federal agency informed the plaintiff-insurers that they were considered "subcontractors" under regulations promulgated pursuant to Executive Order 11,246, and thus the regulations required the plaintiff-insurers to comply with Executive Order 11,246's requirements. *See id.*

After the plaintiff-insurers' legal challenge was initially rejected, *see* 485 F. Supp. 695 (D. Md. 1979), the Fourth Circuit reversed, finding that application of the Executive Order's requirements to the plaintiff-insurers was "not reasonably within the contemplation of any statutory grant of authority," 639 F.2d at 168. "The question before us," the Fourth Circuit explained, was "not whether Congress *could* require insurance companies providing workers' compensation insurance to federal contractors to comply with the affirmative action requirements of Executive Order 11,246[;] the question is whether or to what extent Congress *did* grant such authority to the executive branch of the government." *Id.* at 168 (emphasis added) (internal citations and quotations omitted).

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branch, or any official thereof who is required to be appointed by and with the advice and consent of the Senate, to perform without approval, ratification, or other action by the President (1) any function which is vested in the President by law, or (2) any function which such officer is required or authorized by law to perform only with or subject to the approval, ratification, or other action of the President . . . ." 3 U.S.C. § 301; *see also* Final Rule, 73 Fed. Reg. at 67,656. On its face, § 301 provides no authority for the promulgation of substantive regulations.

The Fourth Circuit held the Procurement Act did not grant such authority. Although it cited *Kahn* with approval, *see id.* at 170-71, the Fourth Circuit carefully explained that "the several opinions of the [*Kahn*] court took great pains to emphasize that the court's holding was rested narrowly upon the manifestly close nexus between the Procurement Act's criteria of efficiency and economy and the Executive Order's predominant objective of containing procurement costs. . . ." *Id.* at 170.

Applying this "manifestly close nexus" test, the Fourth Circuit was "satisfied that it [was] not met" in the case of the plaintiff-insurers. *Id.* The Fourth Circuit paid particular attention to the absence of record evidence supporting the Federal Government's assertion that there was a manifestly close nexus between the Executive Order, on the one hand, and the goals of promoting efficiency and economy in government procurement. *See id.* at 170-71 (explaining that in other cases in which Executive Orders had been upheld under the Procurement Act, "there were factual findings in the record which tended to show a demonstrable relationship between the" Procurement Act's goals of promoting efficiency and economy in government procurement and the Executive Order in question). "By contrast," the Fourth Circuit explained that "no such findings were made in the case before" it. *Id.* at 170. For example:

> There are no findings that suggest what percentage of the total price of federal contracts may be attributed to the cost of [worker's compensation] insurance. Further, there is no suggestion that insurers have practiced the deliberate exclusion of minority employees found to have occurred in [*Contractors Association v. Secretary of Labor*, 442 F.2d 159 (3d Cir. 1971)]. The connection between the cost of workers' compensation policies, for which employers purchase a single policy to cover employees working on both federal and nonfederal contracts without distinction between the two, and any increase in the cost of federal contracts that could be attributed to discrimination by these insurers is simply too attenuated to allow a reviewing court to find the requisite connection between procurement costs and social objectives.

Id. at 170-71 (citations omitted).

Like the Executive Order and regulations at issue in *Liberty Mutual*, Executive Order 13,465 and the Final Rule's requirement that contractors and subcontractors participate in E-Verify is completely unsupported by record evidence showing a demonstrable relationship between the Procurement Act's goals of promoting efficiency and economy in government procurement and the requirements imposed by Executive Order 13,465 and the Final Rule. Although Executive Order 13,465 and the Final Rule claim a nexus between requiring the use of E-verify and promoting the goals of efficiency and economy in government procurement, *Liberty Mutual* teaches that these unsupported claims are insufficient.[7]

As in *Liberty Mutual*, the question before this Court is not whether Congress could require government contractors and subcontractors to participate in E-Verify; "the question is whether or to what extent Congress did grant such authority to the executive branch of the government." *Liberty Mutual*, 639 F.2d at 168 (internal citations and quotations omitted). As the plain language of IIRIRA clearly demonstrates, Congress gave the Executive Branch no authority to require participation in a pilot program such as E-Verify, going so far as to expressly prohibit the very conduct at issue here. Even if IIRIRA were somehow interpreted not to prohibit the conduct at issue here, the requirements imposed by the Final Rule still have no statutory basis because they are not authorized by the Procurement Act.

[7] The closest thing in Executive Order 13,465 or the Final Rule to "factual findings in the record" called for by *Liberty Mutual* is a series newspaper articles cited in the Final Rule. *See* Final Rule, 73 Fed. Reg. at 67,653. Importantly, even if this Court were to consider such articles a sufficient basis upon which to uphold the attenuated link between Executive Order 13,465's required use of an "electronic employment eligibility verification system designated by the Secretary," on the one hand, and efficiency and economy in government procurement, the articles cited by the Final Rule say nothing of (1) whether the Federal Government's contracting costs were increased by a few "bad apple" employers' alleged use of illegal labor, or (2) whether use of E-Verify by those employers would have succeeded in detecting the employees in question. If anything, the newspaper articles cited by the Final Rule help highlight the fact that Congress has expressly stated that immigration law violators of the type described in those articles *can be* required to participate in a pilot program such as E-Verify. *See* IIRIRA § 402(a), (e)(2). As for everyone else (save for Congress and federal agencies), IIRIRA § 402(a) expressly provides that participation in a pilot program such as E-Verify cannot be required.

Because the requirements imposed by Executive Order 13,465 and the Final Rule are not authorized by the Procurement Act, Plaintiffs are entitled to summary judgment on Count III of their Complaint. *See Chamber of Commerce*, 74 F.3d at 1339 (holding that Executive Order purportedly based on the Procurement Act, which barred the Federal Government from contracting with employers who hired permanent replacement workers during lawful "economic" strikes, was invalid because it was preempted by the National Labor Relations Act); *Liberty Mutual*, 639 F.2d at 172.

IV. THE ELECTRONIC-REVERIFICATION-OF-EXISTING-EMPLOYEES REQUIREMENT IS UNLAWFUL

The statutory authority for the E-Verify program is limited to employment verification of new hires only. *See, e.g.*, IIRIRA §§ 402(c)(2)(A)(i) (describing scope of employer's voluntary election to participate in a pilot program such as E-Verify as being limited to the employer's "hiring (and all recruitment or referral)" and providing no statutory authorization for the use of a pilot program to electronically reverify existing employees), 403(a) (describing employer's voluntary participation in using E-Verify "in the case of the hiring (or recruitment or referral) for employment in the United States" and providing no statutory authorization for the use of a pilot program such as E-Verify to electronically reverify existing employees). That the statutory authority for the E-Verify program is limited to employment verification of new hires only is further evidenced by administrative guidance clearly stating that E-Verify cannot be used with respect to existing employees. *See, e.g.*, Office of Special Counsel for Immigration, U.S. Dep't of Justice, *E-Verify Employer DOs and DON'Ts* (explaining that a "don't" is using E-Verify to "verify current employees"), available at http://www.usdoj.gov/crt/osc/pdf/e_verify.pdf (last visited Jan. 14, 2009) (copy found at Tab 10 of Plaintiffs' Appendix of Exhibits); USCIS, *How Does E-Verify Affect Me as an Employee?* (explaining that "E-Verify "cannot be used to verify the employment eligibility of current employees"), available at

http://www.uscis.gov (last visited Jan. 14, 2009) (copy found at Tab 11 of Plaintiffs' Appendix of Exhibits).

The same is true with respect to the statutory authority for the Form I-9 process. *See* IRCA § 101(a)(1) (codified at 8 U.S.C. § 1324a(b)) (describing requirements of document-based system as applying to any "person or other entity hiring, recruiting, or referring an individual for employment in the United States" and providing no statutory authority for using the document-based system on existing employees).

Executive Order 13,465 and the Final Rule require employers to use E-Verify to electronically reverify the employment eligibility of existing employees hired after November 6, 1986, who are assigned to covered contracts and subcontracts. Because that requirement conflicts with the choices made by Congress that are reflected in IIRIRA and IRCA, the electronic-reverification-of-existing-employees requirement is unlawful and must be set aside. Accordingly, Plaintiffs are entitled to summary judgment on Count IV of their Complaint.

V. THE FINAL RULE IS UNLAWFUL AND MUST BE SET ASIDE BECAUSE DEFENDANTS FAILED TO COMPLY WITH THE PROCUREMENT POLICY ACT'S NOTICE-AND-COMMENT REQUIREMENTS

An obvious procedural error also renders the Final Rule unlawful: namely, Defendants' failure to comply with the unambiguous commands of the Procurement Policy Act that: (1) the full text of the revised MOU be published in the *Federal Register*; and (2) that interested persons be asked to comment on the full text of the revised MOU at least 60 days prior to its use. Because neither requirement has been satisfied—the Final Rule itself indicates that the exact language of the revised MOU has yet to be finalized—the Final Rule was promulgated "without observance of procedure required by law" and therefore must be set aside under 5 U.S.C. § 706(2)(D).

A. The Procurement Policy Act's Notice-and-Comment Requirements Govern the Revised Memorandum of Understanding

The Procurement Policy Act instructs that "no procurement policy, regulation, procedure, or form (including amendments or modifications thereto) relating to the expenditure of appropriated funds that has (1) a significant effect beyond the internal operating procedures of the agency issuing the procurement policy, regulation, procedure or form, or (2) a significant cost or administrative impact on contractors or offerors, may take effect until 60 days after the procurement policy, regulation, procedure, or form is published for public comment in the Federal Register . . . ." 41 U.S.C. § 418b(a). Although the Procurement Policy Act does not define the phrase "procurement policy, regulation, procedure, or form," it defines the qualifying word "procurement" as "includ[ing] *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." § 403(2) (emphasis added). The term "acquisition," on the other hand, is broadly defined to include "contract performance," "management and measurement of contract performance through final delivery and payment," and "technical and management functions directly related to the process of fulfilling agency requirements by contract." § 403(16)(B).

The revised MOU easily qualifies as a "procurement policy, regulation, procedure, or form" within the plain meaning of § 418b(a). Not only is the revised MOU a required, legally binding agreement between the contractor/subcontractor and the Federal Government, the contractor/subcontractor must comply with the revised MOU lest it risk contract termination, suspension or debarment. The Final Rule makes this abundantly clear. *See* Final Rule, 73 Fed. Reg. at 67,705 ("The Contractor shall comply, for the period of performance of this contract, with the requirements of the E-Verify program MOU.") (to be codified at 48 C.F.R. § 52.222-54 as subsection (b)(5) of the required E-Verify contract provision); Final Rule, 73 Fed. Reg. at 67,704 ("If DHS or SSA terminates a contractor's MOU, the

terminating agency *must* refer the contractor to a suspension or debarment official for possible suspension or debarment action.") (to be codified at 48 C.F.R. § 22.1802(e)) (emphasis added). The terms of any such agreement therefore have the potential to profoundly affect the expenditure of appropriated funds. Accordingly, the Procurement Policy Act instructs that before the terms of the revised MOU may be used in the government procurement process, Defendants must comply with the statute's notice-and-comment requirements.

The revised MOU also satisfies either of the additional publication triggers specified in § 418b(a). First, the revised MOU has a "significant effect beyond the internal operating procedures of the agency issuing the procurement policy, regulation, procedure or form." 41 U.S.C. § 418b(a)(1). This is the case because a contractor/subcontractor must comply with the revised MOU or risk contract termination, suspension or debarment.

Second, the revised MOU triggers the Procurement Policy Act's notice-and-comment requirements because the revised MOU carries with it a "significant cost or administrative impact on contractors or offerors." § 418b(a). The Final Rule estimated that in federal fiscal year 2009 alone, employers' startup and training costs for complying with these new requirements, which include the requirement to execute the revised MOU and comply with its terms, would total $188,138,945—some $126,508,205 greater than the cost estimated in the Proposed Rule ($61,630,740). *Compare* Final Rule, 73 Fed. Reg. at 67,702, *with* Proposed Rule, 73 Fed. Reg. at 33,377.

In addition, contractors and subcontractors covered by the Final Rule must comply with the revised MOU or risk contract termination, suspension or debarment. *See* Final Rule, 73 Fed. Reg. at 67,704 ("If DHS or SSA terminates a contractor's MOU, the terminating agency *must* refer the contractor to a suspension or debarment official for possible suspension or debarment action.") (to be codified

at 48 C.F.R. § 22.1802(e)) (emphasis added). In the field of government contracting, there is no greater "cost or administrative impact" than suspension or debarment. For example, the FAR specifically provides that "[c]ontractors debarred, suspended, or proposed for debarment are excluded from receiving contracts, and agencies shall not solicit offers from, award contracts to, or consent to subcontracts with these contractors, unless the agency head determines that there is a compelling reason for such action . . . . Contractors debarred, suspended, or proposed for debarment are also excluded from conducting business with the Government as agents or representatives of other contractors." 48 C.F.R. § 9.405(a); *see also* § 9.407-1(b)(1) (describing suspension as a "serious action to be imposed on the basis of adequate evidence").

B. By Failing To Publish the Revised Memorandum of Understanding in the *Federal Register* and by Failing To Solicit Comments on the Revised Memorandum of Understanding at Least 60 Days Prior to Its Use, Defendants Failed To Comply with the Procurement Policy Act's Notice-and-Comment Requirements

In order to satisfy the Procurement Policy Act, a notice of proposed procurement policy, regulation, procedure or form must satisfy two requirements. First, the notice must include "the text of the proposal or, if it is impracticable to publish the full text of the proposal, a summary of the proposal and 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). Second, the notice must include "a request for interested parties to submit comments on the proposal and shall include the name and address of the officer or employee of the Government designated to receive such comments." § 418b(c)(2). These statutory requirements may only be waived "if urgent and compelling circumstances make compliance with such requirements impracticable." § 418b(d)(1).

Defendants did not publish the revised MOU in the *Federal Register* and they made no finding that it was impractical to do so. Indeed, no such finding could be made.

The *Federal Register* regularly contains the full text of memoranda of understanding far more complex than the revised MOU at issue here. In the month of December 2008, for example, at least two such memoranda were published. *See* Memorandum of Understanding Between the Office of the Assistant Secretary of Defense, the Veterans Health Administration, and the U.S. Food and Drug Administration, 73 Fed. Reg. 76,658 (Dec. 17, 2008) (publishing full text of memorandum of understanding); Memorandum of Understanding Between the U.S. Food and Drug Administration and WebMD, LLC, 73 Fed. Reg. 73,941 (Dec. 4, 2008) (same); *cf.* Documents Acceptable for Employment Eligibility Verification, 73 Fed. Reg. 76,505, 76,512-16 (Dec. 17, 2008) (revising the Form I-9 and including the actual text of the revised form). Given the considerable size of the Final Rule—274 double-spaced pages as it was presented by the Councils to the Office of the Federal Register for publication—it would be outlandish for Defendants to argue that it was somehow impracticable to publish the revised MOU in the *Federal Register* since the version of the revised MOU placed in the rulemaking docket the day after publication of the Proposed Rule was a miniscule 10 pages in length.

Nor did Defendants solicit public comment on the full text of the revised MOU, as required by the Procurement Policy Act. Instead, Defendants claimed—after the fact—that they had

> placed the proposed MOU reflecting the program participation requirements for Federal contractors into the public docket, and discussed the requirements under that document in the preamble of the proposed rule. . . . In response, the Councils received many comments related to the MOU in general and as to specific provisions within the MOU, which are addressed in greater detail later in this section. Accordingly, commenters were afforded an opportunity to comment on the provisions of the MOU and, in fact, did provide such comments to the Councils. . . . .

Final Rule, 73 Fed. Reg. at 67,667.

However, the Procurement Policy Act requires that an agency do more than just afford the public an *opportunity* to comment on a proposed procurement policy, regulation, procedure, or form. When an

agency merely provides an *opportunity* for comment, the agency takes a passive position that assumes the public is aware that comments may be submitted, that the agency will consider and react to such comments and, in this case, that members of the public will be able to access a document included only in the rulemaking docket and not included in the Proposed Rule or the Final Rule. Congress, in contrast, chose not to make assumptions, but to require that the agency take affirmative action to assure public awareness and to encourage public involvement. Thus, the Procurement Policy Act requires that the agency publish the full text of a proposal in the *Federal Register* and that the agency actively solicit (i.e., request) public comment on the full text of that proposal. The Councils did neither.

To make matters worse, the Final Rule states that, by the time the Final Rule was issued on November 14, 2008, a final version of the revised MOU still was not ready for public inspection. *See* Final Rule, 73 Fed. Reg. at 67,667 ("A final version of the MOU *will be* available on the E-Verify Web site . . . .") (emphasis added). Clearly, such a regulate-first-and-ask-questions-later mentality is exactly what the Procurement Policy Act was designed to preclude.

Although few courts have interpreted the Procurement Policy Act's notice-and-comment requirements, a court need not "dodge" legal issues for which there is little interpretive case law. *Pro Football*, 579 F. Supp. 2d at 708. Moreover, the United States District Court for the District of Columbia's decision in *Munitions Carriers Conference, Inc. v. United States*, 932 F. Supp. 334 (D.D.C. 1996), is particularly instructive.

In *Munitions Carriers*, two trade associations representing motor carriers filed suit against the Federal Government alleging that a federal agency had failed to comply with the Procurement Policy Act's notice-and-comment requirements when the agency announced a policy in a *Federal Register* notice, but failed to solicit comments on that policy and made the policy effective less than 60 days after its

publication. The policy in question altered the way in which interstate commercial carriers were required to submit bids for federal contracts related to the movement of certain types of freight. *See* Movement of Foreign Military Sales (FMS) Shipments—Policy Change, 60 Fed. Reg. 64,031 (Dec. 13, 1995).

The plaintiffs argued that the policy was void because the federal agency had failed to comply with the notice-and-comment requirements of the Policy Procurement Act. The district court agreed, even though the policy in question did not alter or amend the FAR. *See Munitions Carriers*, 932 F. Supp. at 338-39. As explained by the district court, the notice established a "new condition precedent for carriers who" sought contracts for the shipment of certain types of freight: "they must agree to accept [foreign military sales] work at the same rate." *Id.* at 336. The district court also held that the policy had a "significant effect and administrative impact on the way carriers bid for work with [the federal agency]." *Id.* at 340. Accordingly, the district court ruled that the policy had been promulgated "without observance of procedure required by law" and had to be set aside under 5 U.S.C. § 706(2)(D), *id.*, a ruling that was not disturbed on appeal, *see Munitions Carriers Conference, Inc. v. United States*, 147 F.3d 1027, 1030 (D.C. Cir. 1998).

Similar to *Munitions Carriers*, Defendants here failed to publish the revised MOU in the *Federal Register* and failed to solicit comments on the revised MOU prior to its use. Because the revised MOU is an essential component of the regulatory scheme established by the Final Rule, the Final Rule is procedurally invalid and its requirements may not be enforced. Accordingly, Plaintiffs are entitled to summary judgment on Count VI of their Complaint.

CONCLUSION

For the foregoing reasons, the Court should grant Plaintiffs' Motion for Summary Judgment and issue an order: (1) declaring Executive Order 13,465, the E-Verify Designation Notice and the Final Rule illegal and void; and (2) enjoining Defendants, their agents, servants, employees, successors and assigns from enforcing the requirements imposed by Executive Order 13,465, the E-Verify Designation Notice and the Final Rule.

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Respectfully submitted,

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