Building on a Broken Employer Sanctions System: The Impact of the Bush Administration's SSA No-Match Letter Proposal

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INTRODUCTION

> "Using unreliable no-match letters for immigration enforcement could result in the large-scale, erroneous firing of U.S. citizens and lawful immigrant workers, and relegate even larger numbers of hard-working immigrant families to the shadows. Sensible immigration enforcement initiatives should be pursued, but this proposed rule falls well wide of the mark. I therefore urge the Department to set aside the ill-considered No-Match Rule."
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> – Excerpt from Senator Edward Kennedy's May 2008 Comments on the Proposed No-Match Letter Rule[1]

In August 2007, approximately one year after Congress's failed attempt at comprehensive immigration reform,[2] the Department of Homeland Security (DHS) took action. Declaring that "until Congress chooses to act, we're going to take some energetic steps of our own,"[3] DHS Secretary Michael Chertoff introduced the Bush Administration's twenty-six policy proposals

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[1] Letter from Edward Kennedy, U.S. Senator, to Marissa Hernandez, U.S. Immigration and Customs Enforcement, Comments to DHS Docket No. ICEB-2006-0004; ICE No. 2377-06; RIN No. 1653-AA50 (May 2, 2008), *available at* http://www.bibdaily.com/pdfs/Kennedy%20ltr-ICE%20No-Match%20Rule%20(5-2-08).pdf (on file with the Harvard Law School Library).

[2] Raquel Aldana, *Of Katz and "Aliens": Privacy Expectations and the Immigration Raids*, 41 U.C. DAVIS L. REV. 1081, 1084 (2008) (indicating that comprehensive immigration reform failed).

[3] Press Release, Dep't of Homeland Security, Remarks by Homeland Security Secretary Michael Chertoff and Commerce Secretary Gutierrez at a Press Conference on Border Security and Administrative Immigration Reforms (Aug. 10, 2007), *available at* http://www.dhs.gov/xnews/releases/pr.1186781502047.shtm (on file with the Harvard Law School Library).

aimed at cracking down on illegal immigration.[4] This Essay focuses on the "linchpin"[5] of the Bush Administration's plan, a revamped Social Security Administration (SSA) no-match letter scheme,[6] a policy that "seem[s] to dominate most public discussions on immigration."[7] This Essay offers analysis of the Final Supplemental Rule, reissued on October 23, 2008.[8]

No-match letters have long informed employers that their employees' wage and earning reports, in the form of W-2 tax forms, do not match official SSA records. Sometimes these letters result from an employee's inclusion of fraudulent personal information on his or her tax forms. In such a case, if an employer had "knowledge"[9] of a worker's unlawful status and hired or employed said worker, employer sanctions result under the Immigration Reform and Control Act of 1986 (IRCA).[10]

In 2006, the Bush Administration began a new chapter in the history of no-match letters when it proposed "Safe-Harbor Procedures for Employers Who Receive a No-Match Letter."[11] This latest permutation of the old no-match scheme broadened the definition of "knowledge" under 8 C.F.R. § 274a.1(l)(1) (2008), the provision that defines how DHS interprets this

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[4] *Oversight of the Department of Homeland Security Before the S. Comm. on the Judiciary*, 110th Cong. (2008) (statement of Michael Chertoff, Secretary, Dep't of Homeland Sec.) (proposals touched on issues ranging from border control to worksite enforcement), *available at* http://www.dhs.gov/xnews/testimony/testimony.1207231284950.shtm (on file with the Harvard Law School Library).

[5] *See* Julia Preston, *Judge Suspends Key Bush Effort in Immigration*, N.Y. TIMES, Oct. 11, 2007, at A1.

[6] The rule was formally called "Safe-Harbor Procedures for Employers Who Receive a No-Match Letter." *See* 72 Fed. Reg. 45,611-01 (Aug. 15, 2007) (codified at 8 C.F.R. § 274).

[7] Mercedes Olivera, *For Employers, Immigration has a Bottom Line*, DALLAS MORNING NEWS, Aug. 9, 2008, at 13B.

[8] 8 C.F.R. § 274a (full text of Supplemental Final Rule [hereinafter Final Rule Text]; *see also* Press Release, DHS Issues Supplemental Final Rule with Guidance for Employers who Receive Social Security 'No-Match' Letters (Oct. 23, 2008), *available at* http://www.dhs.gov/xnews/releases/pr.1224771455239.shtm [hereinafter DHS October Press Release] (on file with the Harvard Law School Library). For further reading on DHS's No-Match plan, *see* Ellinor R. Coder, *The Homeland Security Safe-Harbor Procedure for Social Security No-Match Letters: A Mismanaged Immigration Enforcement Tool*, 86 N.C. L. REV. 493 (2008); Michael Gibek & Joshua Shteierman, *The "No-Match" Letter Rule: A Mismatch Between the Department of Homeland Security and Social Security Administration in Worksite Immigration Law Enforcement*, 25 HOFSTRA LAB. & EMP. L.J. 233 (Fall 2007).

[9] "Knowledge" is a term of art used throughout the Immigration Reform and Control Act of 1986 (ICRA), Pub. L. No. 99-603, 100 Stat. 3359 (1986) (codified as amended in scattered sections of 8 U.S.C.). "IRCA . . . is delicately balanced to serve the goal of preventing unauthorized alien employment while avoiding discrimination against citizens and authorized aliens. The doctrine of constructive knowledge has great potential to upset that balance . . . . To guard against unknowing violations, the employer may, again, avoid hiring anyone with an appearance of alienage. To preserve Congress' intent in passing the employer sanctions provisions of IRCA, then, the doctrine of constructive knowledge must be sparingly applied." Collins Foods Int'l, Inc. v. U.S. I.N.S., 948 F.2d 549, 554-55 (9th Cir. 1991).

[10] *See* 8 U.S.C. § 1324(a).

[11] Press Release, Dep't of Homeland Security, "DHS Announces Federal Regulations to Improve Worksite Enforcement and Asks Congress to Approve Social Security 'No Match' Data Sharing" (Jun. 9, 2006), *available at* http://www.dhs.gov/xnews/releases/press.release.0925.shtm (on file with the Harvard Law School Library).

term,[12] and added receipt of a no-match letter to the list of acts that constitute "knowledge" under IRCA. It also introduced a "safe harbor" provision, which helps employers resolve erroneous no-match letters.

On August 15, 2007, DHS promulgated a final rule that clarified the steps an employer must take to avoid liability under the redefined conception of "knowledge."[13] This rule advises employers to use the "safe harbor" procedure, which gives employers ninety days from the date a no-match letter was received to resolve the dispute. Concomitantly, the Bush Administration submitted budget requests to increase funding for immigration enforcement at worksites.[14] Subsequently, a federal judge enjoined the proposed rule.[15]

In March 2008, DHS released a revised supplemental rule. In April 2008, after the agency received 2950 comments, the official comment period ended.[16] On October 23, 2008, DHS reissued its Supplemental Final Rule.[17] As this Essay goes to publication, DHS is planning to return to federal court in hopes of persuading the judge to remove the preliminary injunction. Though it is unclear how the Obama Administration will approach the issue, if the agency is successful in removing the injunction, the rule would be adopted immediately.[18]

The yet-to-be-adopted no-match rule has already resulted in unlawful discrimination. Such discrimination should inform judgment of the pending rule.[19] Through an examination of the roots of employer sanctions, their

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[12] 8 C.F.R. § 274a.(l)(1) (providing that "the term knowing includes having actual or constructive knowledge. Constructive knowledge is knowledge that may fairly be inferred through notice of certain facts and circumstances that would lead a person, through the exercise of reasonable care, to know about a certain condition." Examples include when an employer: "[f]ails to complete or improperly completes the Employment Eligibility Verification, Form I-9; [a]cts with reckless and wanton disregard for the legal consequences of permitting another individual to introduce an unauthorized alien into its work force or to act on its behalf; and fails to take reasonable steps after receiving information indicating that the employee may be an alien who is not employment authorized.").

[13] Safe-Harbor Procedures for Employers Who Receive a No-Match Letter, 72 Fed. Reg. at 45,611.

[14] The Bush Administration's FY07 budget request sought $41.7 million in new funds and 171 additional agents to enhance ICE's worksite enforcement efforts. *See* Press Release, Office of the White House Press Secretary, Just the Facts: The Bush Administration's Strong Worksite Enforcement Efforts (Jun. 19, 2004), *available at* http://www.whitehouse.gov/news/releases/2006/06/20060619-13.html (on file with the Harvard Law School Library).

[15] Preston, *supra* note 5.

[16] Final Rule Text, *supra* note 8, at 7.

[17] Telephone Interview with David Rosenfeld, Partner, Weinberg, Roger, and Rosenfeld (Apr. 30, 2008).

[18] DHS October Press Release, *supra* note 8.

[19] In the context of this Comment, the term "authorized workers" includes individuals with proper work authorization, naturalized U.S. citizens, and U.S. citizens. While this comment takes a narrow view of the workers affected, the Immigration Policy Center recently published a report about the no-match letter policy which indicated that hardship from the new policy falls on workers, businesses, communities, and the economy as a whole. IMMIGRATION POLICY CENTER, ADMINISTRATION ANNOUNCES NEW NO-MATCH REGULATIONS: DHS REGS PASS BURDENS TO SOCIAL SECURITY ADMINISTRATION, SMALL BUSINESSES, AND CITIZENS (2008), *available at* http://www.immigrationpolicy.org/images/File/factcheck/IPCNoMatch Regs03-08.pdf (on file with the Harvard Law School Library).

impact on authorized employees, the history of the no-match letter scheme, the proposed rule, and finally its pre-adoption impact, I will show that the Bush Administration was seeking to implement a fundamentally flawed rule. The new no-match scheme's reliance on employer sanctions necessarily leads to unlawful discrimination.

Part I examines employer sanctions and explores the history of no-match letters to foreshadow problems under the new scheme. Part II deconstructs the current proposal and describes the antidiscrimination safeguards which protect authorized workers under current law. Part III locates the problematic elements of the promulgated rule in the current enforcement environment. I demonstrate how the logical result of the proposed no-match scheme is employer sanctions, which, in turn, makes unlawful discrimination inevitable. I support my argument with reasoning culled from Judge Charles R. Breyer of the Northern District of California's order enjoining DHS's rule in *AFL v. Chertoff*.[20] Finally, Part IV proffers proof that this proposed rule has already led to unlawful discrimination[21] and predicts further discriminatory impact upon adoption.

I. Laying the Groundwork

This section discusses IRCA's employer sanctions provision and its early impact on workers. It also provides a short history of the no-match scheme and explains its interplay with employer sanctions. At bottom, the section questions whether schemes which use employer sanctions are desirable based on their impact.

A. The Legal Construct of Employer Sanctions

Before President Reagan signed IRCA[22] into law in 1986, the Immigration and Nationality Act[23] ("INA") had laid a foundation for IRCA's employer sanctions provision. INA, enacted in 1952, was the first comprehensive immigration law.[24]

Specific INA provisions address employer duties with regard to hiring and firing workers. INA § 274A(a)(1)(B) makes it unlawful for an employer to hire any person, citizen, or alien, without prior verification that the person

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[20] 552 F. Supp. 2d 999 (N.D. Cal. 2007).

[21] 'Unlawful discrimination' is a term used throughout the Essay. Some discrimination is permitted under IRCA. For example, an employer can lawfully refuse to hire or terminate individuals without proper work authorization. However, an employer cannot lawfully refuse to hire or terminate someone they merely presume does not have proper work authorization but who in fact has proper work authorization. This constitutes 'unlawful discrimination.'

[22] Immigration Reform and Control Act of 1986, *supra* note 10 [hereinafter IRCA].

[23] Immigration and Nationality Act of 1952 [hereinafter INA], Pub. L. No. 82-414, 66 Stat. 163 (1952) (codified in various sections of 8 U.S.C.).

[24] U.S. Citizenship and Immigration Services, *Immigration and Nationality Act*, http://www.uscis.gov/propub/ProPubVAP.jsp?dockey=da248c219560fda2f17211a6e6dfb763 (on file with the Harvard Law School Library).

is authorized to work in the U.S. Employers must examine work-related documents and attest that they are authentic and bear a relationship to the individual.[25] They can only accept documents that on their face can be reasonably construed as genuine and as having a relationship to the person presenting them. INA § 274B indicates that employers may not specify which document(s) a prospective employee or a regular employee must present. INA allows for three categories of documents: (1) those that establish both identity and employment eligibility; (2) those that establish identity only; and (3) those that establish work eligibility only.[26]

The IRCA amended portions of INA. Title I, Part A of IRCA, the employer sanctions provision, adopts INA's language to prohibit U.S. employers from "knowingly" hiring an unauthorized alien[27] to work in the U.S. The section prohibits three kinds of activities: (1) hiring, recruiting, or referring for a fee an alien knowing he or she does not have work authorization; (2) continuing to employ an alien knowing that he or she has become unauthorized; and (3) hiring any person (citizen or alien) without following the record keeping requirements of INA.[28] Some would argue that this provision not only makes it more difficult for employers to hire undocumented workers but also tightens U.S. borders and diminishes incentives to come to the U.S. to work. Under IRCA's employer sanction scheme, an employer may face civil fines, cease and desist orders, or criminal sanctions.[29]

B. Concerns Over Employer Sanctions and Their Early Impact

Prior to IRCA's enactment, some members of Congress[30] and immigrants' rights advocates[31] expressed concern about the impact of sanctions on workers—namely, the possibility for unlawful discrimination.

A series of congressionally commissioned Government Accountability Office (GAO) reports provide assessments of employer sanctions that lend credence to these early concerns.[32] The U.S. Comptroller General testified in 1990 about one such report: "We found that there has been widespread dis-

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[25] INA § 274A(a)(1)(B).

[26] *See* INA § 274B (2000).

[27] 8 U.S.C. § 1324a (2000). In the employment context, an "unauthorized alien" is one who is not at a particular time either lawfully admitted for permanent residence or authorized to be so employed by law or by the Attorney General. 8 U.S.C. § 1324a(h)(3).

[28] 8 U.S.C. § 1324a(a) (2000).

[29] 8 U.S.C. § 1324a((e-f)) (2000).

[30] Representative Barney Frank introduced a bill that reflected "the interest of Hispanics, the preservation of our civil liberties, and adherence to humane immigration policies consistent with our most valued democratic ideals." The bill provided that a person's national origin or alienage could not be grounds for discrimination in hiring practices. See 130 Cong. Rec. 15,935 (1984).

[31] *See*, *e.g.*, Larry M. Eig & Joyce C. Vialet, *Comprehensive Immigration Reform: History and Current Status*, 1 GEO. IMMIGR. L.J. 27, 40 (1985).

[32] *See generally* GENERAL ACCOUNTING OFFICE, REPORT TO THE CONGRESS, IMMIGRATION REFORM: EMPLOYER SANCTIONS AND THE QUESTION OF DISCRIMINATION, GAO/GGD-90-62 (1990), *available at* http://archive.gao.gov/d24t8/140974.pdf [hereinafter GAO REPORT] (on file with the Harvard Law School Library). IRCA required the GAO to review the implemen-

crimination. But was there discrimination as a result of IRCA? That is the key question Congress directed us to answer. Our answer is yes."[33] In addition, the report found a "serious pattern" of discrimination on the basis of national origin.[34]

One GAO report included empirical data that reflected employment practices of employers subject to IRCA's employer sanction provisions. Nearly 350,000 employers reported that they applied IRCA's verification system exclusively to persons with a "'foreign' appearance or accent."[35] A hiring audit performed in Chicago, Illinois and San Diego, California revealed that a "'foreign-sounding' Hispanic . . . was three times more likely to encounter unfavorable treatment than the Anglo non-foreign [individuals]."[36] The report further revealed that discrimination stemmed from: 1) a lack of understanding of the law's major provisions; 2) confusion and uncertainty about how to determine eligibility; and 3) the prevalence of counterfeit and fraudulent documents that contributed to employer uncertainty over how to verify eligibility.[37] The opportunities for unlawful discrimination are only made worse under the Final Supplemental Rule, which uses employer sanctions coupled with strong enforcement measures as a mechanism to promote compliance with its provisions.

Since the release of the first GAO reports, scholars have echoed the early warnings about the discriminatory impact of sanctions.[38] Some of this commentary has reflected the view that enforcement gives bite to sanctions.[39] Specifically, "[a] low level of enforcement activity could lead many employers to discount the possibility that violations will be detected and punished, thus weakening the deterrent effect."[40] More recent studies have posited a possible line of causation between increased enforcement and diminished participation in the U.S. labor market by workers.[41] Enforcement, according to some proponents of such force, makes more real the possibility of sanctions for employers. In such a climate, unlawful discrimination against 'foreign looking' or 'foreign sounding' individuals

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tation and enforcement of employer sanctions to determine if the provision had caused any discrimination or unnecessary burden on employers.

[33] *Immigration Reform: Employer Sanctions and the Question of Discrimination*, *Testimony before the S. Comm. on the Judiciary* 1 (Mar. 30, 1990) (statement of Charles A. Bowsher, Comptroller General of the United States) (on file with the Harvard Law School Library).

[34] *Id.* at 5.

[35] *Id.*

[36] *Id.* at 6.

[37] *Id.* at 8.

[38] *See, e.g.* Michael J. Wishnie, *Prohibiting the Employment of Unauthorized Immigrants: The Experiment Fails*, 2007 U. CHI. LEGAL. F. 193, 194 (2007).

[39] *Id.*

[40] Peter Brownell, *The Declining Effect of Employer Sanctions*, MIGRATION INFO. SOURCE, Sept. 2005, http://www.migrationinformation.org/Feature/display.cfm?id=332, (on file with the Harvard Law School Library).

[41] *See* STEVEN A. CAMAROTA & KAREN JENSENIUS, CTR. FOR IMMIGR. STUD., HOMEWARD BOUND: RECENT IMMIGRATION ENFORCEMENT AND THE DECLINE IN THE ILLEGAL ALIEN POPULATION, July 2008 (providing proof that increased enforcement expenditures leads to a decrease in the numbers of illegal immigrants in the U.S.), *available at* http://www.cis.org/trends.and.enforcement (on file with the Harvard Law School Library).

presumed to be unauthorized to work may seem necessary to employers. This impulse towards unlawful practices poses a problem in the current no-match context.

C. No-Match History

In addition to the problems employer sanctions pose are those already inherent in previous no-match schemes. The IRS began using no-match letters in 1979 to check the validity of the information employees submitted to their employers on their W-2s. Since early letters were sent to employees, employers rarely participated in the resolution of a no-match dispute.

The year 1994 marked the beginning of Employer Correction Request, or educational correspondence (EDCOR), no-match letters, which are at issue in the current DHS promulgation.[42] These letters inform employers that their employees' personal information does not match records contained in SSA's official database.[43]

SSA modified its practice again in 2003 and adopted the current policy, which focuses on employers with a workforce of a specific size.[44] The government sent out 138,000 no-match letters in the year 2006 alone.

D. Data Problems

One longstanding issue with no-match letters is that the process that generates them is riddled with errors. In the SSA database, something as common as a clerical mistake, a name change resulting from marriage or divorce, or multiple surnames can result in a no-match.[45] Other problems occur at the employer level. One study identified several problems, including employer misuse of the database to prescreen job applicants; employer action against workers who receive a tentative non-confirmation in the first phase of verification; and employer failure to institute appropriate privacy safeguards.[46]

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[42] Migration Policy Institute, Social Security "No-Match" Letters: A Primer, Oct. 2007, http://www.migrationpolicy.org/pubs/BR5.SocialSecurityNoMatch.101007.pdf (on file with the Harvard Law School Library).

[43] *Id.*

[44] The focus is on employers with more than 10 W-2 forms with unmatchable data and for whom the number of unmatched W-2 forms constitutes more than one-half of one percent of the total number of employee W-2 forms that the employer submits. *See id.* at 4.

[45] *See* Press Release, Am. Civ. Liberties Union, Government Abandons Current "No Match" Rule Harmful to Legal Workers (Nov. 24, 2007), *available at* http://www.aclu.org/immigrants/workplace/32870prs20071124.html (on file with the Harvard Law School Library).

[46] *See* CHIRAG MEHTA ET AL., SOCIAL SECURITY ADMINISTRATION'S NO-MATCH LETTER PROGRAM: IMPLICATIONS FOR IMMIGRATION ENFORCEMENT AND WORKERS' RIGHTS, CTR. FOR URBAN ECON. DEV. (2003) *available at* http://www.nilc.org/immsemplymnt/SSA.no-match.survey.final.report.11-20-03.pdf (on file with the Harvard Law School Library).

SSA maintains the earnings information of workers for the purpose of determining Social Security benefits.[47] Annually, when employers submit their employees' W-2 forms, the information contained in those forms goes into an Earnings Suspense File, which credits workers with the Social Security benefits commensurate with their hours worked.[48] If SSA cannot match a particular worker's name and Social Security Number (SSN) with SSA's master data, the workers' earnings appear in the SSA Earnings Suspense File where they remain until they are matched with existing SSA records.[49] Employer no-match letters were implemented in 1994 to inform employers of such no-match situations.

This section has provided the reader with basic information necessary to evaluate the new no-match scheme. The next section examines DHS's pending no-match rule, which promotes employer sanctions in the context of heightened immigration enforcement.

II. DHS's Latest No-Match Scheme

This section discusses DHS's latest no-match proposal, now a final rule awaiting adoption, and highlights the legal safeguards under IRCA to protect workers who are improperly targeted by those charged with implementing the scheme.

A. The Pending Rule

The Administration's safe harbor rule, backed by DHS and ICE, provides a process by which employers can avoid sanctions upon receipt of a no-match letter. In theory, if an employer follows the safe harbor procedure, the employer avoids an allegation that she had constructive knowledge that an employee did not have proper work authorization. The pending rule is distinct from previous versions because of its ICE-regulated enforcement procedure, which takes effect in the event that an employer does not follow the safe harbor procedure.

The first step toward the new rule came in June 2006 when the Bush Administration proposed amendments to 8 C.F.R. § 274a.1, which governs how DHS is to interpret "knowledge" and forms the basis for employer liability. The Administration hoped to add receipt of a no-match letter to a list of ways to show that an employer had constructive knowledge of an employee's unauthorized status.[50] The Bush Administration also proposed a safe harbor rule whose stated intent was to help employers avoid a DHS finding that they had constructive knowledge that an employee mentioned in

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[47] *See* 42 U.S.C. § 405(c)(2)(A) (2000).
[48] *Id.*
[49] *See* 20 C.F.R. § 422.120(a) (1995).
[50] Safe-Harbor Procedures for Employers Who Receive a No-Match Letter, 71 Fed. Reg. 34,281-01 (June 14, 2006) (codified at 8 C.F.R. pt. 86).

a no-match letter was not properly authorized to work in the United States.[51] Following a comment period in which advocates submitted approximately 5000 comments, the Administration promulgated its final rule in August 2007.[52]

The no-match scheme at the center of this analysis builds on the 2006 DHS "Safe Harbor" rule. The main points of the regulation are as follows: following through with the 2006 proposals, the new rule broadens DHS's definition of 'knowing' to include actual or constructive knowledge. Actual knowledge can be imputed to an employer either when an illegal immigrant claims an employer's knowledge of his illegal status or if an employer admits that he or she knew about an employee's illegal status.[53] Constructive knowledge is defined as knowledge that may "fairly be inferred through notice of certain facts and circumstances that would lead a person, through the exercise of reasonable care, to know about a certain condition."[54]

Another major idea set forth in the no-match letter proposal is its safe harbor provision. As long as an employer takes the prescribed course of action, DHS cannot use the no-match letter as evidence of constructive knowledge.[55] The safe harbor procedure advises employers who want to avoid sanctions to first check their own records within a thirty-day period to determine whether there is an error regarding an employee's SSN.[56] In the event that this cannot be resolved, workers are contacted.[57] If an employee indicates that the employer records are correct, she must then pursue the matter with SSA.[58] After ninety days, if the employee has not resolved the issue with SSA, the employer has three days to complete a new Form I-9.[59] The employer may not verify an employee's authorization to work using any document that was the subject of the SSA no-match letter or that contains the disputed SSN.[60] The employee must also present a document that contains a photograph in order to establish either identity or both identity and employment authorization.[61]

To keep step with DHS' safe harbor rule, SSA altered its no-match letter in three ways: first, SSA's model 2007 no-match letter for Tax Year 2006 includes possible reasons why, other than fraud, a no-match letter might be generated;[62] second, the new letter informs employers that a no-match letter

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[51] *Id.*

[52] *AFL-CIO*, 552 F. Supp. 2d at 1003.

[53] Martha J. Schoonover & Marti Nell Hyland, *Employment Authorization Regulations and I-9 Compliance*, SF82 A.L.I.-A.B.A. 243, 262 (2001).

[54] 8 C.F.R. § 274a.1(1).

[55] Safe-Harbor Procedures for Employers Who Receive No-Match Letter, 72 Fed. Reg. 45,611, 46523 (Aug. 15, 2006) (to be codified at 8 C.F.R. pt. 274a).

[56] *See* Insert to SSA no-match letter from Immigration and Customs Enforcement, U.S. Dep't of Homeland Security, *available at* http://www.ssa.gov/legislation/ICEinsertletter.pdf (on file with the Harvard Law School Library).

[57] *Id.*

[58] *Id.*

[59] *Id.*

[60] *Id.*

[61] *See id.*

[62] *Id.*

"does not, by itself, make any statement about an employee's immigration status";[63] finally, the new letter advises that employers follow the instructions contained in a DHS letter inserted in the no-match mailing.[64]

The insert provides that an employer cannot disregard a no-match letter without violating the law. It also indicates that if employers follow the safe harbor provision, even if it means terminating an employee, they will not be held liable for their actions under INA's anti-discrimination provision as long as they take similar actions for all employees referenced in the no-match letter.

As previously noted, some opponents believe the insert is controversial because it gives employers authorization to fire suspect employees at their discretion. Employers become *de facto* immigration agents with little accountability: employers can make decisions about who can lawfully work and who cannot. They have power to turn over individuals, often in error, to authorities based on what they believe their immigration status to be. Under this new scheme, proactive employers who falsely deem an employee unauthorized are rewarded in that they avoid liability.

B. Enforcement

To consider DHS' proposal in full, it must be placed in a more complete context. In 2006, ICE began its quest to create "a culture of compliance by enlisting responsible employers of every size and description in partnerships designed to prevent the hiring of illegal aliens in the first place."[65] During FY 2007, ICE made 863 criminal arrests following worksite enforcement investigations.[66] Of the more than 1000 arrests so far in FY 2008, 116 were owners, managers, supervisors, or human resources employees subject to criminal charges that included harboring or knowingly hiring undocumented aliens.[67] Such commitment to enforcement has already and will likely continue to promote fear of the results of non-compliance among employers.

C. Anti-Discrimination Mechanisms Under Current Law

In the face of a stringent rule and stepped up enforcement, there exist some theoretical safeguards. IRCA's anti-discrimination provision prohibits discrimination based on national origin or citizenship in hiring, recruitment, or firing practices.[68] 8 U.S.C. §1324b(a)(1) (2000) provides:

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[63] *Id.*
[64] *Id.*
[65] U.S. Immigration and Customs Enforcement, Fact Sheets, Frequently Asked Questions About Worksite Enforcement (Aug. 12, 2008), http://www.ice.gov/pi/news/factsheets/worksite.htm [hereinafter ICE Worksite Enforcement Fact Sheet] (on file with the Harvard Law School Law Library); *see also*, Spencer S. Hsu, *Illegal Hiring Is Rarely Penalized: Politics, 9/11 Cited in Lax Enforcement*, WASH. POST, June 19, 2006, at A01.
[66] ICE Worksite Enforcement Fact Sheet, *supra* note 65.
[67] *Id.*
[68] 8 U.S.C. § 1324b(2)(B) (2000).

> It is an unfair immigration-related employment practice for a person or other entity to discriminate against any individual (other than an unauthorized alien, as defined in section 1324a (h)(3) of this title) with respect to the hiring, or recruitment or referral for a fee, of the individual for employment or the discharging of the individual from employment—
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> (A) because of such individual's national origin, or
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> (B) in the case of a protected individual (as defined in paragraph (3)), because of such individual's citizenship status.

This provision contains a number of exceptions. Discrimination is permissible if an employer has three or fewer employees[69] or if the discrimination is of the same type permitted under the Civil Rights Act of 1964.[70] Moreover, the section specifies protected classes of individuals: citizens and nationals of the United States,[71] as well as immigrants who are lawfully admitted for either permanent or temporary residence in the United States,[72] or are lawfully granted asylum under certain conditions.[73] This provision also refrains from imposing liability on employers who choose citizens over documented immigrants.[74] Finally, intimidation and retaliation is prohibited,[75] as are requests for additional documentation if an employee's documents appear authentic.[76]

Many, including Doris Meissner, former Commissioner of the now defunct Immigration and Naturalization Service (INS)[77] and proponent of employer sanctions, have expressed a lack of confidence in IRCA's anti-discrimination provision and have classified it as "chronically flawed."[78]

This section has offered a DHS no-match proposal primer. In so doing, it has established a foundation for Part III, which focuses on ways that the no-match rule increases the incidence of employer sanctions and thus makes more real the possibility of unlawful discrimination.

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[69] 8 U.S.C. § 1324b(a)(2)(A) (2000).
[70] 42 U.S.C.S. § 2000e-2 § 73 (1991).
[71] 8 U.S.C. § 1324b(a)(3)(A) (2000).
[72] 8 U.S.C. § 1324b(a)(3)(B) (2000).
[73] *Id.*
[74] 8 U.S.C. § 1324b(a)(4) (2000).
[75] 8 U.S.C. § 1324b(a)(5) (2000).
[76] 8 U.S.C. § 1324b(a)(6) (2000).
[77] On March 1, 2003, the INS officially became the Bureau of Citizenship and Immigration Services (BCIS), operating under DHS. *See* Ogundipe v. Mukasey, 541 F.3d 257, n.1 (4th Cir. 2008).
[78] Spencer S. Hsu, *In Immigration Cases, Employers Feel the Pressure*, WASH. POST, July 21, 2008, at A1 (on file with the Harvard Law School Library). Some courts, however, have expressed confidence in statutory safeguards. In *Incalza v. Fendi North America, Inc.*, the Ninth Circuit in dicta states that the law protects lawful employees. 479 F.3d 1005, 1012 (9th Cir. 2007). *But see* Ellinor R. Coder, *The Homeland Security Safe-Harbor Procedure for Social Security No-Match Letters: A Mismanaged Immigration Enforcement Tool*, 86 N.C. L. REV. 493, 507 (2008).

III. How the Supplemental Final Rule Promotes Unlawful Discrimination

This section applies the conclusion that employer sanctions alone promote unlawful discrimination in light of two components of the proposed no-match scheme—namely, the SSA's data source problems and the rule's safe harbor procedure. It demonstrates how this nexus will heighten the likelihood of employer sanctions and thus of unlawful discrimination. This section uses Judge Breyer's October 2007 order to enjoin the August 2007 version of the rule as evidence that the rule contains problematic provisions, even as it stands in the final stages before implementation. The section concludes by demonstrating how today's enforcement context, alluded to in previous sections, makes this proposal even more pernicious.

A. Data Flaws Revisited

As previously noted, DHS's no-match scheme would cull information from a system riddled with errors that disproportionately burden classes of people often presumed to be undocumented workers.[79] An April 2006 report notes that data errors often negatively affect foreign-born American citizens and permanent residents who can legally work.[80] Drawing the conclusion that "workers falsely accused of being unauthorized based on a no-match letter may be unfairly harmed," the former SSA Commissioner explained that foreign-born workers with lawful status are particularly likely to be subject to an SSA data discrepancy.[81] But data errors affect all citizens, not just those that are foreign-born. The Inspector General's report estimates that the database utilized to collect suspicious SSNs contains records that would incorrectly identify 17.8 million people as no-matches. The report further states that 70% of those individuals are native-born U.S. citizens.[82]

Even if the actual error rate is far lower than this data suggests, labor leaders posit that unscrupulous employers will take preemptive action to avoid receipt of no-match letters and will simply not hire workers who seem likely to receive no-match letters or are presumed undocumented.[83] A 2003 survey examining the practices of nearly 1000 employers who had received

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[79] The suggestion here is individuals who would fall under IRCA's terminology: "foreign looking" or "foreign sounding."

[80] Office of Inspector Gen., Congressional Response Report: Accuracy of the Social Security Administration's Numident File, A-08-06-26100, ii (2006) *available at* http://www.ssa.gov/oig/ADOBEPDF/A-08-06-26100.pdf (on file with the Harvard Law Library).

[81] Reply in Support of ex Parte Application for Temporary Restraining Order and Order to Show Cause Why Preliminary Injunction Should Not Issue, AFL-CIO, 552 F. Supp. 2d 999 (N.D. Cal. 2007) (No. C07-4472) 2007 WL 2915335.

[82] Spencer S. Hsu, *U.S. Tweaks Proposal On Illegal Workers Employers Could Get Warnings in June*, Wash. Post, Mar. 22, 2008, at A03 (on file with the Harvard Law School Library).

[83] *Id.*

no-match letters determined that employers tended to discharge the employees for whom they received a no-match letter.[84] Furthermore, almost 60% of the surveyed employers who terminated the suspect employees did not probe more deeply to see if a mistake had been made.[85] Approximately one-third of the terminated employees were not given an opportunity to resolve their no-match disputes.[86] These findings indicate that many employers do not heed SSA advice against taking employment action based on the no-match letter.[87] These realities make the results of data errors detrimental to the livelihood of workers who are deprived of a fair opportunity to be hired, even if they have proper legal status.[88] Heavy enforcement, as discussed, only exacerbates such realities.

To counter arguments about data errors, no-match proponents point to developing efforts to improve data, such as E-Verify.[89] E-Verify (formerly known as the Basic Pilot/Employment Eligibility Verification Program) is a joint operation of DHS and SSA that provides a means for employers to electronically verify the employment eligibility of their newly hired employees.[90] Participating employers can confirm the authenticity of their employees' Form I-9 information, including an employee's name, SSA number, date of birth, citizenship status, and any other non-citizen information, with a new online program that checks employer records against information contained in SSA and DHS databases.[91] While there are efforts afoot to diminish the number of errors in SSA's database, the system remains riddled with errors that have turned up in studies commissioned by DHS itself.[92]

B. Procedures for Resolving a No-Match

Another problematic area under the proposed no-match scheme is the fixed timeline for resolution of an erroneous no-match, a marked change

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[84] Mehta et al., *supra* note 46. *But see* Safe-Harbor Procedures for Employers Who Receive a No-Match Letter, 72 Fed. Reg. at 45,621 ("The firing of any employee or 'churning' of the workforce because of the receipt of a no-match letter is speculative, and is neither required by nor a logical result of the rule being adopted.").

[85] Mehta et al., *supra* note 46, at 15.

[86] Safe-Harbor Procedures for Employers Who Receive a No-Match Letter, 72 Fed. Reg. at 45,621.

[87] *See id.* (indicating that "employers in the past have been confused about their responsibilities . . . [resulting] in unwarranted termination of work-authorized individuals.").

[88] IMMIGRATION POLICY CENTER, *supra* note 18.

[89] A more complete review of E-Verify is available at http://www.dhs.gov/xprevprot/programs/gc.1185221678150.shtm (on file with the Harvard Law School Library).

[90] *See id.*

[91] *Id.*

[92] *See, e.g.*, Alexandra Marks, *With E-Verify, Too Many Errors to Expand Its Use*, CHRISTIAN SCI. MONITOR, July 7, 2008, at p.8 ("A study commissioned by DHS itself found that for every thousand names put into the system, 58 come back as tentative non-confirmation. Of those, about five people successfully contest the finding that they're not legally eligible to work in the U.S.").

from earlier no-match plans.[93] To review, the rule's "safe harbor" provision provides employers a way to avoid liability based on a finding that she did not have constructive knowledge when she hired an undocumented worker. Specifically, an employer must check her records for the source of the mismatch within thirty days.[94] If the discrepancy did not result from an employer's records, the employer must request that the employee authenticate his or her information, and advise the employee that the problem must be resolved with SSA within ninety days of the date the employer received the no-match letter.[95] If the discrepancy is not resolved within ninety days, a new Form I-9 is required.[96] Any document that contains a disputed SSN is unacceptable.[97] Even if an SSN is accurate and the no-match letter was generated in error, an employee cannot use that SSN to verify his or her status.[98]

Recently, the U.S. Chamber of Commerce commissioned an assessment of the impact that proscribed timelines would have on workers. Econometrica, Inc. estimated that up to 3.9 million authorized employees, including U.S. citizens, would receive no-match letters and need to physically go to an SSA office to correct their records.[99] Of those, up to 70,781 workers would be fired because of their inability to resolve a no-match discrepancy within the specified time period in the proposed rule.[100]

Other advocacy organizations underscored real life issues that complicate compliance with fixed deadlines, including an employee's inability to lose a day's wages and an employers' inability and/or unwillingness to allow a worker to resolve a no-match. The ACLU elaborated on these concerns in its initial complaint filed in the Northern District of California.[101] The organization explained the types of problems that could arise in resolving no-match disputes in terms of employer, employee, and administrative concerns.

> These workers would face a 90-day deadline to resolve a data mismatch with the SSA bureaucracy. As with most Government agencies, SSA field offices generally are open only during normal business hours, so many employees would have to take time off—without pay—to bring their identification to the field offices to attempt to clear up the data problem. That loss of pay could not be remedied after the fact. SSA field offices, moreover, are likely to

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[93] Judge Breyer found that this marked change in policy raised a "serious question" about whether DHS had acted in violation of the Administrative Procedure Act. *See* AFL v. Chertoff, 552 F. Supp. 2d 999, 1010 (N.D. Cal. 2007).

[94] *See* 8 C.F.R. § 274a.1(l)(2)(i)(A) (2000).

[95] 8 C.F.R.§274a.1(l)(2)(i)(B) (2000).

[96] 8 C.F.R.§ 274a.1(l)(2)(iii) (2000).

[97] *See id.*

[98] 8 C.F.R.§ 274a.1(l)(2)(iii)(2) (2000)

[99] Tyler Morgan, *Don't Turn Social Security Into an Immigration Agency*, NEW AM. MEDIA, Apr. 24, 2008, http://news.ncmonline.com/news/view.article.html?article.id=be7880449bb7427ea29f30a7b371a02e (on file with the Harvard Law School Library).

[100] *See id.*

[101] First Amended Complaint for Declaratory and Injunctive Relief, Am. AFL, 552 F.Supp.2d 999 (N.D. Cal. 2007) (No. 07-4472-CRB), 2007 WL 5136848.

be busy with similar mismatch issues raised by millions of other workers.

Rather than deny the complications that arise from fixed timelines, proponents of the safe harbor procedure highlight the merits of fixed timelines. They contend that the timelines provide guidance to employers on how to meet INA's mandate that employers only hire employees with proper legal status. Specifically, some proponents characterize the safe harbor as a generous and sensible provision that grants employers and employees reasonable time to verify records and creates more scrupulous employment practices.[102] Chertoff stated: "These new regulations will give U.S. businesses the necessary tools to increase the likelihood that they are employing workers consistent with our laws."[103]

C. No-Match Litigation: AFL v. Chertoff

In *AFL v. Chertoff*,[104] Judge Breyer heard arguments put forward by DHS and a collection of plaintiffs, including the AFL-CIO, the U.S. Chamber of Commerce, and the ACLU. The court restricted its analysis to "whether preliminary relief is warranted to prevent irreparable harm."[105]

At the outset, the court flagged problematic areas under the no-match scheme. It noted that employers are more likely to experience higher "compliance costs" and that employees are more likely to be fired.[106] The court foresaw as problematic for employers the ninety-day time frame for resolution of erroneous no-matches.[107] It indicated that there is a "strong likelihood that employers may simply fire employees who are unable to resolve the discrepancy within ninety days, even if the employees are actually authorized to work."[108]

The court concluded that while there remained uncertainty over whether DHS had exceeded its authority with the new rule,[109] as long as employers follow the safe harbor rule and abide by IRCA's anti-discrimination provision, they will not be subject to liability, even if they engage in dicriminatory practices.[110]

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[102] *See* James Jay Carafano, *Court Stops Social Security "No-Match" Immigration Enforcement*, HERITAGE FOUND., Sept. 6, 2007, http://www.heritage.org/Research/Immigration/wm1600.cfm (on file with the Harvard Law School Library).

[103] *See* Press Release, U.S. Dep't of Homeland Sec., DHS Announces Fed. Regulations to Improve Worksite Enforcement and Asks Congress to Approve Social Security "No Match" Data Sharing (June 9, 2006), *available at* http://secure.democracyinaction.org/dia/organizationsORG/NILC/images/SSNReleaseFINAL.doc (on file with the Harvard Law School Library).

[104] 552 F. Supp. 2d 999 (N.D. Cal. 2007).

[105] *Id.* at 1005.

[106] *Id.* at 1013.

[107] *Id.* at 1014.

[108] *Id.*

[109] *Id.* at 1011.

[110] *Id. See also* Safe-Harbor Procedures for Employers Who Receive a No-Match Letter, 72 Fed. Reg. at 45, 613–14.

On November 27, 2007, the government entered a motion to stay proceedings in the case pending new rulemaking. In its motion, the United States stated that DHS intended to conduct additional rulemaking proceedings and create an amended rule that addressed the court's concerns.[111] On March 21, 2008, DHS announced its proposed amended rule and invited comments.[112] In response to the court's analysis that it trampled the Department of Justice's jurisdiction over enforcement of IRCA's anti-discrimination provision, DHS rescinded statements describing employers' obligations under anti-discrimination law or discussing potential liability on discrimination grounds for employers who follow the safe harbor procedures.[113] On October 23, 2008, DHS introduced a Final Supplemental Rule.[114] The rule has yet to be adopted; DHS plans to return to federal court shortly.[115]

This section has presented an argument that the Final Supplemental Rule, which uses unprecedented employer sanctions as enforcement tools, contains flawed elements. The next section uses a recent Ninth Circuit decision as the basis for a discussion of what the Final Supplemental Rule's adoption would look like.

IV. Evidence of Unlawful Discrimination Under the Pending Rule

As some supporters of the proposed rule and its heightened enforcement mechanism have argued, less enforcement means that employer sanctions have less bite and employers will continue to hire undocumented workers.[116] More enforcement diminishes the incentive to hire undocumented immigrants.[117] If the incentive to hire is decreased, the actual number of undocumented workers will likely decrease as well. However, as the Ninth Circuit's decision in *Aramark Facility Services v. Service Employees International Union*[118] demonstrates, the result of a no-match scheme that

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[111] Motion to Stay Proceedings Pending New Rulemaking, AFL, 552 F. Supp. 2d 999 (N.D. Cal. 2007) (No. 07-4472 CRB), 2007 WL 5136846.

[112] DHS Issues Supplemental Proposed Rule With Employer Guidance Regarding No-Match Letters, March 21, 2008, *available at* http://www.dhs.gov/xnews/releases/pr.1206124972832.shtm (on file with the Harvard Law School Library). The amended rule addressed the District Court's three major concerns: 1) whether there had been a marked change in agency position; 2) whether DHS had exceeded its authority by interpreting IRCA's anti-discrimination provisions; and 3) whether a Regulatory Flexibility Act analysis should be conducted. *See* Final Rule Text, *supra* note 8.

[113] Department of Homeland Security, Supplemental Proposed Rule with Employer Guidance Regarding No-Match Letters, *available at* http://edocket.access.gpo.gov/2008/E8-6168.htm at 26-27 (on file with the Harvard Law School Library).

[114] DHS October Press Release, *supra* note 8.

[115] *Id.*; *see also* Press Release, Nat'l Immigration Law Ctr., Civil Rights Coalition Charges That Finalized "No-Match" Rule Will Hurt American Workers and the U.S. Economy (Oct. 23, 2008), *available at* http://nilc.org/immsemplymnt/SSA.Related.Info/ssa010.htm (on file with the Harvard Law School Library).

[116] *See* Brownell, *supra* note 40.

[117] *Id.*

[118] 530 F.3d 817 (9th Cir. 2008).

threatens employers with sanctions in an environment of heightened immigration enforcement is illegal discrimination.[119]

In June 2008, the Ninth Circuit decided *Aramark*, the first federal court of appeals decision to examine no-match letters in the current climate.[120] Aramark, a company that provides services to Los Angeles' Staples Center, received a no-match letter indicating that it had submitted tax data on behalf of forty-eight employees that did not match that of the SSA database. The company gave the implicated workers three days to resolve the issue and asked them to show that they had applied for new Social Security cards.[121] Only fifteen complied.[122] Aramark fired the remaining employees.[123] The company later admitted that it did not have confirmation that the fired employees were undocumented.[124] Subsequently, the Service Employees International Union (SEIU) filed a grievance for violation of the workers' collective bargaining agreement.[125] The matter was submitted to arbitration.[126] The court arbitrator found that Aramark had no cause to terminate the employees, that there was no proof that they were not documented, and that the employees were to be reinstated with back pay.[127] The district court, however, invalidated the arbitration award, holding that it contravened public policy because Aramark had constructive knowledge the employees were ineligible to work. Such knowledge would have violated immigration laws had the company continued to employ the individuals in question.[128]

In considering the district court's holding, the Ninth Circuit underscored two facts it believed gave rise to the company's constructive notice of immigration violations: (1) the no-match letters themselves and (2) the employees' responses to the company's directive to fix their no-match problems.[129] The court held that while it may have been reasonable for Aramark to suspect that some of the employees who were flagged as potential no-matches were undocumented immigrants, it was not proper for the district court to rely on this unconfirmed belief as a grounds to vacate the arbitration award.[130]

Although the court did not address the DHS letters *per se*, implicit in its decision is an understanding and affirmation of my central argument—that no-match letters can promote employers' erroneous assumptions and fear of

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[119] For further evidence of the rule's discriminatory impact, *see* Gibek & Shteierman, *supra* note 8 at 261.

[120] Bob Egelko, *Janitors Reinstated by Appeals Court*, S.F. CHRON., June 17, 2008, at B-2.

[121] *Id.* at 821.

[122] *Id.*

[123] *Id.*

[124] *Id.* at 822.

[125] *Id.*

[126] *Id.*

[127] *Id.*

[128] *Id.* at 820.

[129] *Id.* at 825.

[130] *Id.* at 827-28 (rejecting Aramark's argument that DHS's no-match letters were sufficient to prove constructive knowledge).

being sanctioned. This, in turn, provokes unlawful discrimination. Presumably out of fear of the repercussions of enforcement for non-compliance, Aramark gave its workers an unreasonably short amount of time to resolve their no-match problems. When the employees could not comply with this time frame, they were fired unlawfully. In this case, thanks to zealous union representation, the workers were reinstated with back pay.[131] However, it is not hard to imagine scenarios where, for example, authorized workers lack representation of any kind, cannot afford representation, or are fearful of pursuing a claim and employers are not held accountable for their actions.

Through an examination of current case law, this section lends credence to my argument that the government's scheme promotes unlawful discrimination. While enforcement may be important to achieve the goal of a fully authorized workforce, it comes at a high cost.

V. Conclusion

In light of its reliance on and promotion of employer sanctions, DHS's latest no-match proposal necessarily leads to unlawful discrimination. Even before its adoption, the rule has taken a toll on authorized employees. Such impact is due, in part, to the tenor of today's increased enforcement environment, illustrated by ICE's well-documented worksite enforcement efforts.[132] Employers are simply less likely to hire workers who may provoke a no-match letter. As the U.S. immigrant population rises,[133] policymakers will continue to encounter unique, workplace-related challenges. The inauguration of a new presidential administration offers policymakers an opportunity to urge the rejection of this no-match letter scheme and to critically examine the policies that regulate immigrant participation in the U.S. job market.

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[131] *Id.* at 820.

[132] *See* Julia Preston, *Immigration Sweep Ends in 280 Arrests at 5 Plants*, N.Y. Times, Apr. 17, 2008, at A20; Dianne Solís, *In Case of Mistaken Identity, Wrong Pilgrim's Pride Plant Worker Arrested, Released*, Dallas Morning News, Apr. 19, 2008, at 11A; Pamela Constable, *59 Immigrant Hotel Workers Arrested in Raid,* Wash. Post, Apr. 9, 2008, at B05.

[133] Jerry S. Passel & D'Vera Cohn, Pew Research CTR., U.S. Population Projections: 2005-2050 (2008) *available at* http://pewhispanic.org/files/reports/85.pdf (on file with the Harvard Law School Library).