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**UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA**

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

Plaintiff,

v.

MICHAEL CHERTOFF, Secretary of
Homeland Security; DEPARTMENT OF
HOMELAND SECURITY; JULIE
MYERS, Assistant Secretary of Homeland
Security; U.S. IMMIGRATION AND
CUSTOMS ENFORCEMENT; MICHAEL
ASTRUE, Commissioner of Social

Case No. 07-04472(CRB)

**CORRECTED AMICUS
MEMORANDUM OF POINTS AND
AUTHORITIES OF AMICUS CURIAE
NATIONAL FEDERATION OF
INDEPENDENT BUSINESS LEGAL
FOUNDATION IN SUPPORT OF
PLAINTIFF INTERVENORS '
REGULATORY FLEXIBILITY ACT
CAUSE OF ACTION**

CASE NO. 07-04472(CRB)

CORRECTED AMICUS MEMO OF P/A OF AMICUS CURIAE NFIB LEGAL FOUNDATION ISO PLTF
INTERVENORS' REGULATORY FLEXIBILITY ACT CAUSE OF ACTION

Ogletree
Deakins

1 Security; and SOCIAL SECURITY
2 ADMINISTRATION,

3
4 Defendants.

5 SAN FRANCISCO CHAMBER OF
6 COMMERCE CHAMBER OF
7 COMMERCE OF THE UNITED STATES
8 OF AMERICA, GOLDEN GATE
9 RESTAURANT ASSOCIATION,
10 NATIONAL ROOFING CONTRACTORS
11 ASSOCIATION, AMERICAN NURSERY
& LANDSCAPE ASSOCIATION,
INTERNATIONAL FRANCHISE
ASSOCIATION, and UNITED FRESH
PRODUCE ASSOCIATION

12 Plaintiff-Intervenors

13 v.

14 MICHAEL CHERTOFF, Secretary of
15 Homeland Security; DEPARTMENT OF
16 HOMELAND SECURITY; JULIE
17 MYERS, Assistant Secretary of Homeland
18 Security; U.S. IMMIGRATION AND
19 CUSTOMS ENFORCEMENT; MICHAEL
20 ASTRUE, Commissioner of Social
21 Security; and SOCIAL SECURITY
22 ADMINISTRATION,

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28 Defendants

1 UNITED FOOD AND COMMERCIAL
2 WORKERS INTERNATIONAL UNION;
3 UNITED FOOD AND COMMERCIAL
4 WORKERS LOCAL 5; UNITE HERE; and
UNITE HERE LOCAL 2,

5 Plaintiff, Intervenors

6 v.

7 MICHAEL CHERTOFF, Secretary of
8 Homeland Security; DEPARTMENT OF
9 HOMELAND SECURITY; JULIE
10 MYERS, Assistant Secretary of Homeland
11 Security; U.S. IMMIGRATION AND
12 CUSTOMS ENFORCEMENT; MICHAEL
13 ASTRUE, Commissioner of Social Security;
14 and SOCIAL SECURITY
15 ADMINISTRATION,

16 Defendants.

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1 By contemporaneously filed Ex Parte Request, the National Federation of Independent
 2 Business Legal Foundation (“NFIB Legal Foundation”) has moved to participate in this action as
 3 an amicus curiae with respect to Plaintiff-Intervenors’ First Cause of Action. Plaintiff-Intervenors
 4 there allege that Defendants violated the Regulatory Flexibility Act, 5 U.S.C. §§ 601-612 (“RFA”),
 5 in promulgating a new rule, “Safe-Harbor Procedures for Employers Who Receive a No-Match
 6 Letter” set forth at 72 Fed. Reg. 45611 (Aug. 15, 2007) (hereinafter the “Final Rule”). In
 7 summary, Plaintiff-Intervenors’ First Cause of Action takes cogent issue with the Department of
 8 Homeland Security’s (“DHS”) finding, purportedly made pursuant to the RFA, 5 U.S.C. § 605(b),
 9 that the interim final rule at issue will not have a “significant impact on a substantial number of
 10 small entities,” or “SEISNSE.”

11 Proposed Amicus NFIB Legal Foundation respectfully submits the following
 12 (Proposed) Amicus Memorandum of Points and Authorities Supporting Plaintiff-
 13 Intervenors’ RFA Cause of Action. Not only does the Proposed Amicus NFIB Legal
 14 Foundation have members adversely affected by DHS’s failure to comply with the RFA,
 15 NFIB has a special and demonstrated interest and expertise in Federal Government-wide
 16 RFA compliance. Proposed Amicus thus respectfully submits that it will present additional
 17 argument and perspective that will inform this Court’s consideration of Plaintiff-
 18 Intervenors’ well-founded RFA claim.

19 **I. NFIB LEGAL FOUNDATION’S STATEMENT OF INTEREST**

20 The National Federation of Independent Business (“NFIB”) is the nation’s oldest
 21 and largest, non-profit, national organization dedicated to representing the interests of
 22 small-business owners throughout all 50 states, including over 22,000 members in the state
 23 of California. NFIB’s national membership consists of independently-owned and operated
 24 businesses that have non-dominant market positions within their industry. The majority of
 25 NFIB members have an average of five employees and annual net profits of \$40,000 to
 26 \$50,000 annually.

27 In 2000, NFIB established the NFIB Legal Foundation to help ensure that federal
 28 and state agencies comply with the law in their treatment of small businesses. The NFIB

1 Legal Foundation is an Internal Revenue Code § 501(c)(3) public interest law firm created
2 to protect the rights of America's small-business owners by ensuring that the voice of small
3 business is heard in the nation's courts.

4 One of the NFIB Legal Foundation's primary concerns is agency compliance with
5 the RFA, 5 U.S.C. § 601 *et seq.* (2006), the federal law charged with protecting small
6 businesses from onerous regulations. The NFIB Legal Foundation has filed over 20
7 comments with various federal agencies on RFA compliance matters. The D.C. Court of
8 Appeals has acknowledged the RFA's importance in federal rulemaking when it held that
9 an agency's failure to undertake required regulatory flexibility analysis is not an error that
10 can be considered "harmless." *U.S. Telecomm. Ass'n v. FCC*, 400 F.3d 29, 42 (D.C. Cir.
11 2005). In addition to the submission of comments to agencies, the NFIB Legal Foundation
12 has vindicated its members' interests in RFA compliance in court. *Nat'l Ass'n of Home*
13 *Builders v. U.S. Army Corps of Engineers*, 417 F.3d 1272 (D.C. Cir. 2005) (finding RFA
14 applied to Army Corps' Clean Water Act nationwide permit rulemaking).

15 The interests of the NFIB Legal Foundation in a meaningful and thorough regulatory
16 flexibility analysis are harmed by DHS's Final Rule. This rule was promulgated without
17 adherence to the requirements of the RFA. Specifically, the Secretary of Homeland Security
18 refused to adequately consider the effects of the rule and possible exemptions or less
19 stringent standards for compliance by small businesses.

20 The purpose of this brief is to assist the court by providing several important factual
21 and policy considerations for its review. First, the brief summarizes the history, need for
22 and relevant provisions of the RFA. Second, the brief addresses the policy behind the RFA
23 and reviews the statutory requirements that an agency must follow to comply with the law.
24 Finally, by applying the RFA requirements to the case at hand and using a persuasive
25 federal case as a guide, the brief explores the inadequacy of DHS's rulemaking.

26 **II. STATEMENT OF FACTS**

27 On June 14, 2006, the Secretary of Homeland Secretary issued a notice of proposed
28 rulemaking concerning a plan to use "No-Match" letters from the Social Security

1 Administration (“SSA”) to police illegal immigration. 71 Fed. Reg. 34281 (June 14, 2006).
 2 In the notice, the Secretary certified that the new rule “would not have a significant
 3 economic impact on a substantial number of small entities,” and “would not affect small
 4 entities as that term is defined in 5 U.S.C. 601(6).” *Id.* at 34284. He further stated that “the
 5 rule would not mandate any new burdens on the employer.” *Id.*

6 On August 15, 2007, DHS issued its Final Rule, entitled “Safe-Harbor Procedures
 7 for Employers Who Receive a No-Match Letter,” to become effective on September 14,
 8 2007. See 72 Fed. Reg. 45611 (Aug. 15, 2007). The effect of the Final Rule is to amend
 9 the Immigration Reform and Control Act of 1986 (“IRCA”), which prohibits employers
 10 from hiring an alien while “knowing the alien is an unauthorized alien.” 8 U.S.C. §
 11 1324a(a)(1)(A). IRCA also prohibits continued employment of an alien while “knowing
 12 the alien is (or has become) an unauthorized alien with respect to such employment.” 8
 13 U.S.C. § 1324a(a)(2). The Final Rule amends the definition of “knowing” in these
 14 passages to include the “constructive knowledge” of an employer who has received a no-
 15 match letter and has not taken “reasonable steps” to ascertain the employee’s status. 72
 16 Fed. Reg. 45611.

17 The Final Rule allows employers to avoid the penalties of the IRCA if they take
 18 certain steps. The employer must verify within 30 days that the failure to match the
 19 employee’s Social Security information with federal records was not due to the employer’s
 20 error and advise the employee to correct the problem through SSA within 90 days. *Id.* at
 21 45624. If the discrepancy between records still exists, the employer must either terminate
 22 the employee or have the employee complete a new set of employment eligibility
 23 verification documents on a new Form I-9 with a document that contains photo
 24 identification, within three days. *Id.* These documents may not contain the disputed Social
 25 Security Number, even if the employee maintains that the disputed number is correct. *Id.*

26 On August 31, 2007, this Court’s Temporary Restraining Order halted the issuance
 27 of the first wave of no-match letters, which SSA intended to mail between September 4,
 28

1 2007 and November 9, 2007. It was estimated that approximately 140,000 employers
2 would have received letters affecting approximately 8.7 million employees.

3 **III. ARGUMENT**

4 The RFA requires an agency to consider the economic impact that any new
5 regulation would have on so-called “small entities.” 5 U.S.C. § 601(3)(b). If the agency
6 concludes that there is such an impact, it must engage in the analysis required by the RFA.
7 5 U.S.C. § 603(a). If the agency concludes that there is no such impact, or that such an
8 impact is insignificant, then the agency may certify this finding, preempting the need for a
9 complete RFA analysis. 5 U.S.C. § 605(b). This certification is subject to judicial review,
10 and may be set aside if it is found to be “arbitrary and capricious” or “unwarranted by the
11 facts.” 5 U.S.C. § 706(2).

12 The Secretary of Homeland Security’s determination that the Final Rule would have
13 no “significant economic impact on a substantial number of small entities” is arbitrary and
14 capricious and unwarranted by the facts. His assertion that the Final Rule does not mandate
15 any new burdens on employers is plainly false. Therefore, the Final Rule should be set
16 aside, and the Secretary should be required to analyze all economic costs to small
17 businesses before issuing a final rule.

18 **A. Background and Mechanics of the Regulatory Flexibility Act**

19 The costs of regulatory compliance are often constant and fixed, with no
20 consideration of the size of the entity being regulated. Nevertheless, an entity’s size
21 determines its ability to comply with onerous regulations while continuing to invent,
22 produce and compete. In September 1980, Congress passed the RFA to address these
23 concerns. 5 U.S.C. §§ 601-612. The RFA was not intended to create special treatment for
24 small businesses. Instead, it was designed to ensure that agencies consider the possible
25 anti-competitive effects their regulations might have on small businesses. Sixteen years
26 later, Congress enacted the Small Business Regulatory Enforcement Fairness Act of 1996
27 (SBREFA) to, *inter alia*, provide a private right of action for small entities that are
28 adversely affected by final agency action to obtain judicial review of an agency’s

1 compliance with key provisions of the RFA. Congress found that judicial review was
 2 necessary because the requirements of the RFA “ha[d] too often been ignored by
 3 government agencies, resulting in greater regulatory burdens on small entities than
 4 necessitated by statute.” P.L. 104-121, § 202(5)-(6).

5 Small businesses face a disproportionate burden in complying with federal
 6 regulations.¹ These businesses often have a smaller volume of production over which to
 7 spread the costs of compliance. Concerning the effect of regulations in general, NFIB polls
 8 have found that 26% of employers name “extra paperwork” as the single greatest burden
 9 imposed by new regulations. William J. Dennis, Jr., *NFIB National Small Business Poll:
 10 Coping with Regulation*, vol. 1, issue 5 (2001), at 3, available at
 11 <http://www.nfib.org/object/3105105.html>. The RFA was intended to ease the burdens
 12 faced by small businesses in complying with federal regulations. It achieved this objective
 13 by increasing both agency awareness and agency understanding of the impact of expansive
 14 regulations on small businesses. Congress explained that the RFA was designed to:

15 [E]stablish as a principle of regulatory issuance that agencies
 16 *shall* endeavor, consistent with the objectives of the rule and of
 17 applicable statutes, to fit regulatory and informational
 18 requirements to the scale of the businesses, organizations, and
 19 governmental jurisdictions subject to regulation. To achieve this
 20 principle, agencies are required to solicit and consider flexible
 21 regulatory proposals and to explain the rationale for their
 22 actions to assure that such proposals are given serious
 23 consideration.

24 *RFA, Congressional Findings and Declaration of Purposes*, Pub. L. No. 96-354, 94 Stat.
 25 1164, § 2(b) (codified at 5 U.S.C. § 601) (emphasis added).

26 _____
 27 ¹ See W. MARK CRAIN, *THE IMPACT OF REGULATORY COSTS ON SMALL FIRMS* 4 (2005)
 28 (finding that small firms paid \$7,647 per employee to comply with federal regulations – 45% more
 than the \$5,282 spent by large firms).

1 The RFA places the onus of performing regulatory analyses on the regulating
2 agencies.² The RFA exempts an agency from the requirement to conduct a regulatory
3 flexibility analysis for a proposed or final rule “if the head of the agency certifies that the
4 rule will not, if promulgated, have a significant economic impact on a substantial number of
5 small entities.” The statute requires that the certification be accompanied by “a statement
6 providing the factual basis of such certification.” 5 U.S.C. § 605(b). The requirement for
7 a “factual basis” for the certification -- as opposed to “the reasons” -- was added to the RFA
8 by SBREFA in 1996.

9 In performing the RFA analysis, agencies must identify and publicize the cost
10 consequences of a proposed regulatory action. This facilitates communication between the
11 agency and those affected by the proposed action. Requiring agencies to analyze and
12 consider the impacts on small businesses also serves to evoke alternative regulations —
13 such as extending timelines, imposing different requirements on different entities based on
14 a specified standard, or foregoing regulation of these businesses — that can serve the dual
15 purposes of meeting the regulatory goal and protecting small businesses against impulsive
16 regulations.

17 _____
18 ² Specifically, the RFA (as amended by SBREFA) states that “whenever an agency is
19 required. . . to publish a general notice of proposed rulemaking for any proposed rule, the
20 agency shall prepare and make available for comment an initial regulatory flexibility
21 analysis. . . [(IRFA)]” that “describe[s] the impact of the proposed rule on small entities.” 5
22 U.S.C. § 603(a). The IRFA must contain certain elements, including “an estimate of the
number of small entities to which the proposed rule will apply” and “a description of any
significant alternatives to the proposed rule which accomplish the stated objectives of
applicable statutes and which minimize any significant economic impact of the proposed
rule on small entities.” 5 U.S.C. § 603(b).

23 The RFA further states that “when an agency promulgates a final rule. . . after being
24 required. . . to publish a general notice of proposed rulemaking. . . the agency shall prepare
25 a final regulatory flexibility analysis.” 5 U.S.C. § 604(a). The statute specifies, *inter*
26 *alia*, that the regulatory flexibility analysis must include (1) “a description of and an
27 estimate of the number of small entities to which the rule will apply or an explanation of
28 why no such estimate is available”; and (2) “a description of the steps that the agency has
taken to minimize the significant economic impact on small entities consistent with the
stated objectives of the applicable statutes, including a statement of the factual, policy, and
legal reasons for selecting the alternative adopted in the final rule and why each of the other
significant alternatives to the rule considered by the agency which affect the impact on
small entities was rejected.” 5 U.S.C. §§ 604(a)(3) & (5).

1 Finally, the RFA seeks to remove barriers to the marketplace and foster continued
 2 growth of small businesses. Monies spent on complying with cumbersome regulations
 3 cannot also be spent expanding the business, hiring additional employees or providing
 4 existing employees with greater benefits. Thus, enforcing the RFA is paramount to
 5 removing the regulatory barriers to entrepreneurial success.

6 **B. There is No Record Basis for Defendants' No SEISNSE Certification**

7 The RFA requires an agency head to make a "certification" of no SEISNSE for the
 8 agency to discharge itself from further RFA obligations. As Plaintiff-Intervenors have
 9 demonstrated, DHS failed to conduct a proper regulatory flexibility analysis of the Final
 10 Rule, and DHS's conclusory conjecture that it "has reviewed this regulation and, by
 11 approving it, certifies that this rule would not have a significant economic impact on a
 12 substantial number of small entities" (72 Fed. Reg. 45623) is insufficient. The law requires
 13 more. The RFA places the affirmative duty on the regulating agency to calculate its rule's
 14 economic impact on small businesses. *See North Carolina Fisheries Ass'n v. Daley*, 16 F.
 15 Supp. 2d 647, 653 (E.D. Va. 1997).

16 DHS has attempted to skirt its RFA requirements by falsely declaring that the Final
 17 Rule imposes no new requirements on businesses and instead merely provides "guidance"
 18 to employers who receive no-match letters. Specifically, DHS asserted that the Final Rule
 19 "would merely add specific examples and a description of a 'safe harbor' to an existing
 20 DHS regulation for purposes of enforcing the immigration laws and providing guidance to
 21 employers." 72 Fed. Reg. 45623.

22 DHS's description belies the Final Rule's true impact. What DHS characterizes as
 23 "specific examples" is in fact an enormous expansion of IRCA liability. The law
 24 previously applied only to employers who had knowledge that alien employees are
 25 unauthorized, regardless of whether or not they had received a no-match letter. 8 U.S.C. S
 26 1324a(a)(1)(A)-(2). The Rule would expand this pool of employers to those who have
 27 "constructive knowledge" of an alien's unauthorized status; moreover, employers in receipt
 28 of no-match letters would be imputed to have such constructive knowledge. *See* 72 Fed.

1 Reg. 45611. This change will vastly broaden the field of employers affected and
2 potentially penalized by IRCA. As mentioned above, this group would initially include
3 140,000 employers, with more to follow. It is, therefore, difficult to see how DHS
4 concluded that the regulation would have no effect on small entities or impose no added
5 burdens on such entities.

6 Nevertheless, in an attempt to justify its SEISNSE certification, the Secretary of
7 Homeland Security indicated that “[t]he rule does not mandate any new burdens on the
8 employer and does not impose any new or additional costs on the employer, but merely
9 adds specific examples and a description of a ‘safe-harbor’ procedure to an existing DHS
10 regulation for purposes of enforcing the immigration laws and providing guidance to
11 employers.” 72 Fed. Reg. 45623. In reality, the Final Rule presents employers with a
12 Hobson’s choice and effectively imposes substantive new mandates on employers who
13 receive no-match letters. If employers are faced with a choice of complying with the
14 specified “safe harbor” procedures or confronting liability for illegally employing
15 unauthorized workers, no rational employer would choose to ignore the “safe harbor”
16 procedures. Employers now have a duty to investigate and resolve inconsistencies by
17 following the detailed interactive process proscribed in the Final Rule. The Final Rule
18 imposes a number of new requirements on employers who receive a no-match letter from
19 the Social Security Administration that will have a significant monetary and administrative
20 impact on small entities, including the following:

- 21 ➤ Employer “must check its records to determine whether the discrepancy results from
22 a typographical, transcription, or similar clerical error.”
- 23 ➤ Employer “must correct [any clerical] error and inform the Social Security
24 Administration of [any clerical error] (in accordance with the written notice’s
25 instructions, if any).”
- 26 ➤ Employer “must also verify with the Social Security Administration that the
27 employee’s name and social security account number, as correct, match Social
28 Security Administration records. The employer should make a record of the manner,

1 date, and time of such verification, and then store such record with the employee's
2 Form I-9(s)."

- 3 ➤ Employer "must again verify the employee's employment authorization and identity
4 within an additional three days by following the verification procedure specified in
5 paragraph (l)(2)(iii) of this section" . . . "if the employer [wa]s unable to verify with
6 the Social Security Administration within ninety days of receiving the written notice
7 that the employee's name and social security account number matches the Social
8 Security administration's records."

9 72 Fed. Reg. 45624 (Aug. 15, 2007).

10 In addition to failing to quantify the administrative costs associated with
11 investigating no-match letters, the Final Rule fails to consider the economic impact that
12 employee terminations will have on small businesses who are unable to resolve no-match
13 discrepancies. Under the Final Rule employers will be forced to terminate employees if no-
14 match discrepancies remain after 93 days. This will undoubtedly result in the termination
15 of many employees and create job vacancies that are particularly problematic for small
16 businesses.

17 NFIB has conducted several polls of its members to determine the effect that the
18 hiring and firing processes have on small businesses. One poll concluded that 71% of
19 employers found it difficult to find qualified employees and 75% stated that they would
20 rather "do all they can to keep employees" rather than find new ones. William J. Dennis,
21 Jr., *NFIB National Small Business Poll: The Changing Search for Employees*, vol. 1, issue
22 1 (2001), at 2-6, available at <http://www.nfib.org/object/2937236.html>. Moreover, 68% of
23 small-business owners reported that they have responded to tight labor markets, at least in
24 part, by going without needed employees. The lack of a full employee complement has its
25 most severe impact on small employers themselves. In 83% of the cases where small
26 employers are short-handed, the owners are personally required to work more hours. *Id.* at
27 3.

1 Furthermore, 64% of employers polled found that when a small business lacks
 2 qualified employees, the business must spend time and resources on extensive training. *Id.*
 3 at 3. In fact, 90% of employers reported that it takes up to a year to train employees to
 4 perform their jobs to a satisfactory level. William J. Dennis, Jr., *NFIB National Small*
 5 *Business Poll: Training Employees*, vol. 5, issue 1 (2005), at 18, available at
 6 <http://www.nfib.org/object/training.html>. These research findings demonstrate the
 7 economic costs that small businesses will incur from terminations imposed by the Final
 8 Rule.

9 **C. Courts Have Carefully Scrutinized No SEISNSE Certifications**

10 Turning to this Court’s review authority, the RFA’s judicial review provisions state
 11 that review is subject to the standards set forth in “Chapter 7” of the Administrative
 12 Procedure Act (“APA”), specifically 5 U.S.C. § 706. 5 U.S.C. § 611(a)(1) & (2); *see also*
 13 *Nat’l Ass’n for Home Care v. Shalala*, 135 F. Supp. 2d 161, 168 (D.D.C. 2001); *Blue Water*
 14 *Fisherman’s Ass’n v. Mineta*, 122 F. Supp. 2d 150, 175 (D.D.C. 2000) (“The standard of
 15 review is the same as that under the APA”). According to the legislative history for
 16 SBREFA, which enacted the RFA’s judicial review provisions: “[I]f the court finds that a
 17 final agency action was arbitrary, capricious, an abuse of discretion or otherwise not in
 18 accordance with the law, the court may set aside the rule or order the agency to take other
 19 corrective action.”³ 142 CONG. REC. S3245 (daily ed. Mar. 29, 1996) (statement of Sen.
 20 Bond). While judicial review under APA standards is limited, it is not perfunctory.
 21 *Oceana, Inc. v. Evans*, 384 F. Supp. 2d 203, 212 (D.D.C. 2005) (“[T]his Court undertakes a
 22

23 ³ Similarly, SBREFA’s main drafter confirmed sub-section 611(a)(1) & (2)’s express
 24 terms, stating:

25 Review under these sections is not limited to the agency’s compliance with
 26 the procedural aspects of the RFA; final agency actions under these sections
 will be subject to the normal judicial review standards of Chapter 7 of Title 5.

27 142 Cong. Rec. E571-01, E574 (daily ed. Apr. 19, 1996) (remarks of Rep. Hyde).
 28 Chairman Hyde further specifically stated that the “normal” standards include the “arbitrary and
 capricious” standard. *Id.*

1 ‘searching and careful’ examination’) (quoting *Marsh v. Oregon Natural Res.*
2 *Council*, 490 U.S. 360, 378 (1989)).

3 Nor can Defendants water down their obligations under the RFA. Agencies must do
4 more than give RFA compliance a try. The standard for RFA compliance was derived from
5 one of the first cases brought under the SBREFA amendments to the RFA, *Associated*
6 *Fisheries of Maine, Inc. v. Daley*, 127 F.3d 104, 114 (1st Cir. 1997). In that case, the First
7 Circuit found that the RFA imposes upon agencies obligations similar to those under the
8 National Environmental Protection Act (“NEPA”). The court explained that, as with the
9 RFA’s analytical requirements, “[t]he [environmental impact statement] requirement is
10 meant to inform the agency and the public about potential adverse ecological effects and
11 about the availability, if any, of less harmful alternatives prior to a final decision on the fate
12 of a particular project or rule.” *Id.* See also *Nat’l Ass’n of Psychiatric Health Sys.*, 120 F.
13 Supp. 2d 33, 44 n.8 (D.D.C. 2000) (also analogizing the RFA to NEPA EIS requirements).

14 *Associated Fisheries of Maine* then proceeded to analogize judicial review of agency
15 RFA compliance to that respecting NEPA. 127 F.3d at 114. In both instances, judicial
16 review is subject to APA standards. While deferential, it is not toothless. For instance,
17 *American Oceans Campaign v. Daley*, 183 F. Supp. 2d 1, 4 (D.D.C. 2000), found NEPA
18 violations based on the Commerce Department’s failure to consider whether more
19 comprehensive analyses were required, consider a reasonable range of alternatives, and
20 explain the impacts of the proposed action and alternatives.⁴ *Id.* at 20-21. The RFA

21 _____
22 ⁴ Furthermore, while the RFA is considered primarily procedural, *U.S. Cellular Corp. v. FCC*,
23 254 F.3d 88 (CA DC 2001), that statute imposes “action forcing provisions” that require agencies
24 to focus attention on the impacts of various proposed alternatives on small businesses, just as
25 NEPA does through the procedural requirement of “evaluating a proposed project’s environmental
26 impact.” See *North Buckhead Civic Ass’n v. Skinner*, 903 F.3d 1533, 1540 (11th Cir. 1990), citing
27 *Robertson v. Methow Valley Citizens Ass’n*, 490 U.S. 332, 348-49 (1989). And, failure to adhere
28 even to the RFA’s purely procedural mandates is not an error which can be considered “harmless.”
See *U.S. Telecom Ass’n v. F.C.C.*, 400 F.3d at 42 (stating there is no “argument that the
Commission’s failure was harmless, as it is impossible to determine whether a final regulatory
flexibility analysis which must include an explanation for the rejection of alternatives designed to
minimize significant economic impact on small entities, see [5 U.S.C.] § 604(a)(3) - would have
affected the final order when it was never prepared in the first place”).

1 requires consideration of similar factors, but from a small business perspective. Thus,
 2 while subsequent decisions have distilled the NEPA-based standards set forth in *Associated*
 3 *Fisheries of Maine*, they do not and should not truncate courts' and agencies' APA-based
 4 obligations.

5 In fact, under the RFA, courts have reviewed no SEISNSE certifications such as
 6 DHS's in the case at bar carefully, especially where, as here, the agency's finding of no
 7 SEISNSE is cursory and hedged. *See, e.g., Nat'l Ass'n of Psychiatric Health Sys.*, 120 F.
 8 Supp. 2d at 43-44; *Southern Offshore Fishing Ass'n v. Daley*, 995 F. Supp. 1411, 1436
 9 (M.D. Fla 1998); *North Carolina Fisheries Ass'n v. Daley*, 27 F. Supp. 2d 650, 654-55
 10 (E.D. Va. 1998) ("*NCFA II*"). It is thus simply not the case that the RFA is subject to a
 11 standard of review regarding whether the agency simply checked the appropriate
 12 procedural boxes as it proceeded through the rulemaking.

13 One notable federal case, *NCFA II, supra*, 27 F. Supp. 2d at 650, paralleled the case
 14 at hand. In *Daley*, the Department of Commerce imposed a quota on summer flounder
 15 catches in North Carolina. *Id.* at 654. The agency certified under the RFA that the rule
 16 would not have a significant economic impact on small businesses and did not complete a
 17 regulatory flexibility analysis. *Id.* at 655. As support for the certification, the agency
 18 merely stated that the quota had remained constant from the previous year. *Id.* The district
 19 court ruled that the agency improperly certified the rule and ordered an economic analysis
 20 to determine the effect of the rule on small entities. *Id.* The government's refusal to
 21 recognize the economic impact of its regulatory actions caused the court to "question the
 22 agency's willingness to consider less severe alternatives" and accuse the agency of
 23 certifying the rule as a means to avoid preparing a regulatory flexibility analysis or
 24 considering any suitable alternatives. *Id.*

25 DHS's Final Rule and certification raises markedly similar concerns. The Secretary
 26 for Homeland Security did not conduct a regulatory flexibility analysis in connection with
 27 the no-match rule as required by 5 U.S.C. § 604. In fact, by certifying the Final Rule, the
 28 agency seemingly ignored the RFA concerns that many business entities, including NFIB,

