

No. 09-2006

In the United States Court of Appeals for the Fourth Circuit

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,

Plaintiffs-Appellants,

v.

JANET NAPOLITANO,
ALBERT A. MATERA, and UNITED STATES OF AMERICA,

Defendants-Appellees.

**On Appeal From the United States District Court
for the District of Maryland**

**APPELLANTS' EMERGENCY MOTION
FOR AN INJUNCTION PENDING APPEAL (CONSIDERATION
BY SINGLE CIRCUIT JUDGE REQUESTED PRIOR TO SEPTEMBER 8, 2009)**

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TABLE OF CONTENTS

	Page
PRELIMINARY STATEMENT	1
PROCEDURAL BACKGROUND.....	3
STANDARD OF REVIEW	6
ARGUMENT	6
I. THE ASSOCIATIONS ARE LIKELY TO SUCCEED ON THE MERITS OF THEIR APPEAL.....	6
II. MANY OF THE ASSOCIATIONS’ MEMBERS WILL BE IRREPARABLY HARMED ABSENT AN INJUNCTION PENDING APPEAL	11
III. THE GOVERNMENT WILL NOT BE SUBSTANTIALLY HARMED BY AN INJUNCTION PENDING APPEAL	16
IV. AN INJUNCTION PENDING APPEAL IS IN THE PUBLIC INTEREST	18
CONCLUSION.....	20
CERTIFICATE OF COMPLIANCE	
CERTIFICATE OF SERVICE	
ADDENDUM*	

* The Addendum (“Add.”) has been submitted as a separate file due to its size.

Because action by a three-judge panel of this Court would be impractical due to the requirements of time, Plaintiffs-Appellants 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, the “Associations”) respectfully submit this Emergency Motion for an Injunction Pending Appeal pursuant to Rule 8(a)(2) of the Federal Rules of Appellate Procedure and Local Rules 8 and 27(e). Absent intervention by this Court, federal authorities will enforce the regulations challenged by this appeal beginning September 8, 2009. Therefore, the Associations respectfully request that a single judge of this Court consider this emergency motion prior to that date.

PRELIMINARY STATEMENT

In the district court below, Defendants-Appellees Janet Napolitano, Albert A. Matera, and the United States of America (collectively, the “Government”) asked for and received almost six months to decide whether to defend the legality of the Executive Order and regulations at issue in this case. During that time, the Government voluntarily agreed to delay enforcement of the regulations on four separate occasions. Each time the Government asked the district court for additional time to evaluate the Executive Order and regulations, the Associations consented to the delay.

As evidenced by the Government's own decision to delay their enforcement, the regulations do not address any national emergency. Instead, they require federal contracting officers to insert a standardized clause into countless federal contracts. That standardized clause requires contractors and their subcontractors to participate in an experimental pilot program called "E-Verify." 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. The statutory authority for E-Verify, however, assigns responsibility for that program to the Secretary of Homeland Security ("Secretary") and 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.*

Illegal Immigration Reform and Immigrant Responsibility Act of 1996 ("IIRIRA"), Pub. L. No. 104-208, div. C, § 402(a), 110 Stat. 3009-546, 3009-655 (codified as amended at 8 U.S.C. § 1324a note) (emphasis added).

After a six-month delay in the district court, the Government eventually decided that it would defend the legality of the Executive Order, regulations, and a notice published by the Secretary designating E-Verify as the electronic employment verification system government contractors and subcontractors were required

to use. The district court later awarded the Government summary judgment. Armed with a favorable district-court opinion, the Government has since refused the Associations' request to delay enforcement of the regulations while this Court considers the significant legal questions of first impression presented by this case.

Beginning Tuesday, September 8, 2009, all federal contracting officers must do two things. First, they must include a contract clause in solicitations for most new contracts that requires government contractors and subcontractors to participate in E-Verify. *See* Fourth Delay Notice, 74 Fed. Reg. 26,981 (June 5, 2009) (Add. 52a) (explaining September 8, 2009 enforcement of the Final Employment Eligibility Verification Rule ("Final Rule"), 73 Fed. Reg. 67,651 (Nov. 14, 2008) (Add. 44a)). Second, all federal contracting officers must "modify" certain *existing* contracts to include the E-Verify contract clause. *Id.* Therefore, the impact of the Final Rule's September 8, 2009 enforcement deadline will be immediate and widespread unless this Court grants the Associations' emergency motion for an injunction pending appeal.

PROCEDURAL BACKGROUND

On August 25, 2009, the United States District Court for the District of Maryland (Hon. Alexander Williams, Jr., presiding) signed a memorandum opinion deciding several questions of first impression relating to the authority of the President of the United States, the Secretary and other federal actors under the

IIRIRA; the Federal Property and Administrative Services Act of 1949 (“Procurement Act”), 40 U.S.C. §§ 101-1315; and the Office of Federal Procurement Policy Act (“Policy Act”), 41 U.S.C. §§ 403-438. *See Chamber of Commerce of the U.S. v. Napolitano*, ___ F. Supp. 2d ___, Civil Action No. AW-08-3444, 2009 WL 2632761 (D. Md. Aug. 25, 2009) (Add. 1a-13a). The district court entered its memorandum opinion and a final order denying the Associations’ motion for summary judgment and granting the Government’s cross-motion for summary judgment on August 26, 2009. Add. 14a. After studying the district court’s memorandum opinion, the Associations noticed an appeal of the district court’s final order on August 31, 2009. Add. 15a-16a.

On September 1, 2009, the Associations filed an emergency motion in the district court seeking an injunction pending appeal pursuant to Rule 62(c) of the Federal Rules of Civil Procedure. Add. 17a-36a. On the afternoon of September 3, 2009, counsel for the Associations initiated a conference call with the Government and the district court to discuss whether the district court would be able to decide the Associations’ emergency motion in sufficient time to allow recourse to this Court, if necessary, prior to the Final Rule’s September 8, 2009 effective date. During that call, the Government explained that it would file an opposition brief later that day, which it did. *See* Add. 37a-43a. In order to expedite the district

court's consideration of their emergency motion, the Associations waived their right to file a reply brief.

The district court denied the Associations' emergency motion in the early evening of September 4, 2009. Add. 279a-285a. Based on a recent decision of this Court that not even the Government argued applied to a motion seeking an injunction pending appeal,¹ the district court held that, "while the Court recognizes that Plaintiffs have presented a serious question, and arguably a factually novel case, the Court does not find that presentation of a serious question is sufficient to show it is more likely than not that the plaintiff will succeed on the merits in this case." *Id.* at 281a. As for irreparable harm, contractors could avoid any injury, the district court reasoned, because "contractors can avoid contracting with the government if they do not want to use E-Verify, for whatever reason." *Id.* at 283a. Meanwhile,

¹ That decision, *Real Truth About Obama, Inc. v. FEC*, No. 08-1977, 2009 WL 2408735 (4th Cir. Aug. 5, 2009), *pet. for reh'g en banc filed Aug. 17, 2009*, held that the Supreme Court's recent decision in *Winter v. Natural Resources Defense Council, Inc.*, 129 S. Ct. 365 (2008), abrogated this Court's long-established standard for obtaining *preliminary* injunction relief. However, *Winter* and *Real Truth About Obama* have no application to this motion, which seeks an injunction pending appeal. With respect to motions seeking an injunction pending appeal, *Long v. Robinson*, 432 F.2d 977 (4th Cir. 1970) (Winter, J., in chambers), has long been applied as the law of this Circuit, not the case abrogated by *Real Truth About Obama: Blackwelder Furniture Co. of Statesville v. Seilig Manufacturing Co.*, 550 F.2d 189 (4th Cir. 1977). The district court's decision does not cite *Long*. Quite simply, the district court applied the wrong standard. *See also* Add. 280a (section II of order entitled "Preliminary Injunction Standard").

the Government's own six-month delay of the Final Rule's enforcement was "for the valid purpose of allowing the new President to review it," and as such did not "legitimate further delay of implementation of the order." *Id.* at 284a. Finally, with respect to the public interest, the district court believed that "granting the injunction, which would reverse the Executive Order of two Presidents for the benefit of private subcontractors, is not in the public interest." *Id.* at 284a.

STANDARD OF REVIEW

Fed. R. App. P. 8(a)(2) instructs that a circuit court or a single judge thereof may issue an injunction pending appeal. Four factors are considered when deciding whether to grant an injunction pending appeal: (1) whether the movant has demonstrated that it is likely to succeed on the merits of its appeal, (2) whether the movant will be irreparably harmed absent an injunction, (3) whether the non-moving party will be substantially harmed by an injunction, and (4) whether an injunction is in the public interest. *Long*, 432 F.2d at 979. These four factors should be considered individually and then weighed together in order to determine whether an injunction is warranted. *See id.* at 981.

ARGUMENT

I. THE ASSOCIATIONS ARE LIKELY TO SUCCEED ON THE MERITS OF THEIR APPEAL

As Judge Frank Kaufman explained in deciding a motion for an injunction pending appeal under Fed. R. Civ. P. 62(c), the "likelihood-of-success standard

does not mean that the trial court needs to change its mind or develop serious doubts concerning the correctness of its decision in order to grant a stay pending appeal.” *Goldstein v. Miller*, 488 F. Supp. 156, 172 (D. Md. 1980), *aff’d*, 649 F.2d 863 (4th Cir. 1981) (unpublished table decision).² When there is “little doubt that at least some of the issues raised in [a case] present serious questions of first impression,” the likelihood-of-success factor is satisfied even if the district court possesses a “strong belief as to the correctness of its” prior ruling. *Id.* at 175; *accord Peck v. Upshur County Bd. of Educ.*, 941 F. Supp. 1478, 1481 (N.D. W. Va. 1996) (“What is fairly contemplated is that tribunals may properly stay their own orders when they have ruled on an admittedly difficult legal question and when the equities of the case suggest that the *status quo* should be maintained.”).

In *Goldstein*, for example, Judge Kaufman was asked to decide whether the Federal Government, acting pursuant to its taxing authority, could issue regulations establishing an exclusive list of bottle sizes that could be used in bottling distilled spirits in Maryland for sale within Maryland’s borders. *See* 488 F. Supp. at 157. Maryland officials and various private corporations filed two separate lawsuits against federal officials to enjoin enforcement of the federal regulations, which

² Circuit courts generally apply the same standard for deciding a motion under Fed. R. App. P. 8(a)(2) as do district courts under Fed. R. Civ. P. 62(c). *See* 20 *Moore’s Federal Practice* § 308.02 at 308-7 (3d ed. 2009) (explaining that Fed. R. App. P. 8 should be “read in conjunction with” Fed. R. Civ. P. 62(c)).

conflicted with a Maryland regulation specifically authorizing the use of certain bottle types prohibited by the federal regulations. *See id.* Although the federal regulations were scheduled to take effect on January 1 the next year, the defendants voluntarily agreed to stay the regulations' enforcement until after the district court ruled on the merits of the plaintiffs' legal claims. *See id.*

The plaintiffs' principal argument was that the Twenty-First Amendment to the United States Constitution prohibited the Federal Government from preventing the use of certain bottles sizes when liquor is bottled solely for intrastate use. *See id.* at 162. The district court eventually rejected the plaintiffs' legal challenge after examining a long line of Supreme Court and circuit courts decisions. *See id.* at 168-71.

Shortly thereafter, the plaintiffs filed a motion under Rule 62(c) asking the district court to issue an injunction pending their appeal to this Court. *See id.* at 171. In granting the injunction, Judge Kaufman emphasized that he had no doubt that his previous ruling on the merits was correct. *See id.* at 172-75. "However, despite this Court's strong belief as to the correctness of its" earlier opinion, the district court explained there was "little doubt that at least some of the issues raised in these cases present serious questions of first impression." *Id.* at 175. Therefore, the district court concluded that the plaintiffs had satisfied the likelihood-of-success factor. *Id.*

The same is true of this case. As in *Goldstein*—which the Government made no effort to distinguish and the district court failed to address—there is little doubt that many of the issues raised by this case present serious questions of first impression. For example, the district court’s opinion is the first and only decision to address (1) the scope of IIRIRA § 402(a) as it relates to the Federal Government and (2) whether Executive Order 13,465 is a proper exercise of the President’s Procurement Act authority. The district court’s opinion is also the first such ruling in this circuit to interpret the meaning of the Policy Act’s notice-and-comment rule-making requirements. As such, this case presents serious legal questions of first impression that this Court will eventually review *de novo* and, as discussed below, the equities of the case suggest that the *status quo* should be maintained pending the Associations’ appeal.

In addition, while space and time preclude the Associations from cataloging the numerous legal errors made by the district court, its ruling contains several questionable passages that, on their face, should give this Court significant pause. For example, the district court held that the Secretary was not a proper party defendant because “[i]t is the Final Rule and Executive Order 13,465 that affect” the Associations’ members, not the Designation Notice issued by the Secretary. Add. 3a. The district court “fail[ed] to see how the Secretary’s Designation adversely affected [the Associations’ members] or caused them to suffer legal harm.” *Id.*

In fact, what the district court failed to recognize is that, *without* the Secretary's Designation Notice, the Associations would not be able to establish Article III standing because the Associations' members would not be at risk of suffering any injury in fact. In other words, *without* the Secretary's Designation Notice, the Associations' members would not be required to participate in E-Verify because Executive Order 13,465 directs *the Secretary* to designate which pilot program must be used by government contractors and subcontractors.³

In addition, the district court suggested that courts should not subject questions related to the President's Procurement Act Authority to careful scrutiny. According to the court below, this Court's decision in *Liberty Mutual Insurance Co. v. Friedman*, 639 F.2d 164 (4th Cir. 1981), "requires that there be a 'reasonably close nexus' between the Executive Order and the Procurement Act's policy goals. . . . The Court understand [sic] this close nexus requirement to man [sic] little

³ As the Associations explained in their district-court briefing, the Administrative Procedure Act ("APA") expressly provides that a reviewing court shall hold unlawful and set aside "agency action" found to be "in excess of statutory jurisdiction, authority, or limitations, or short of statutory right." 5 U.S.C. § 706(2)(C). The term "agency action" includes "the whole or a part of an agency rule." § 701(b)(2) (incorporating § 551(13)'s definition of "agency action"). A "rule," in turn, means "the whole or a part of an agency statement of general or particular applicability and future effect *designed to implement . . . law or policy.*" *Id.* (incorporating § 551(4)'s definition of "rule") (emphasis added). Therefore, the Secretary's Designation Notice clearly qualifies as "agency action" subject to judicial review.

more than that President's explanation for how an Executive Order promotes efficiency and economy must be reasonable and rational." Add. 9a.

This is a clear misreading of this Court's decision in *Liberty Mutual*, which, in reversing a district-court decision similar to the one below, 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 Liberty Mutual*, 639 F.2d at 170-71. No evidence of the type described by *Liberty Mutual* was presented in the district court below.

II. MANY OF THE ASSOCIATIONS' MEMBERS WILL BE IRREPARABLY HARMED ABSENT AN INJUNCTION PENDING APPEAL

The second factor courts are to consider in deciding a motion for an injunction pending appeal is whether the movant will be irreparably harmed absent an injunction pending appeal. *See Long*, 432 F.2d at 979. As Judge Kaufman explained in *Goldstein*, the word "irreparable" in the context of suits against federal officers means "without adequate remedy against the federal government, should plaintiffs ultimately prevail" on appeal. *Goldstein*, 488 F. Supp. at 17; *see also Multi-Channel TV Cable Co. v. Charlottesville Quality Cable Operating Co.*, 22 F.3d 546, 551 (4th Cir. 1994) ("Irreparable harm is suffered when monetary damages are difficult to ascertain or are inadequate."); *Rum Creek Coal Sales, Inc. v. Caperton*, 926 F.2d 353, 361 (4th Cir. 1991) (finding that the absence of an effective

money-damages remedy against government officials counsels in favor of finding that a plaintiff will suffer irreparable harm if an injunction is not granted).

For example, in *Rum Creek Coal*, a mining company filed suit against the state police, arguing that its refusal to enforce certain laws against striking workers violated the company's constitutional rights and therefore was actionable under 42 U.S.C. § 1983. On appeal, this Court found that the district court had erred in refusing to issue a preliminary injunction. *See id.* at 354. Among other things, this Court held that the lack of an adequate money-damages remedy against the police meant that the "showing necessary to meet the irreparable harm requirement for a preliminary injunction should be less strict than in other instances where future monetary remedies are available." *Id.* at 362. This was true even though the mining company could obtain declaratory and injunctive relief against the police at a later date. *See id.* In addition, the fact that the mining company could seek monetary damages from individual striking workers did not affect the Fourth Circuit's conclusion, for such actions would "not redress the § 1983 cause of action." *Id.*

The Ninth Circuit's recent decision in *California Pharmacists Ass'n v. Maxwell-Jolly*, 563 F.3d 847 (9th Cir. 2009), is to the same effect. There, various hospitals appealed a district-court ruling that concluded they were not entitled to preliminary injunctive relief to stop California from reducing the hospitals' Medicaid reimbursement. *See* 563 F.3d at 849. The district court had denied the plain-

tiff-hospitals' request for preliminary injunctive relief on the ground that the plaintiff-hospitals had failed to demonstrate irreparable harm would be caused in the absence of an injunction. *See id.* The plaintiff-hospitals appealed the district court's ruling to the Ninth Circuit and later asked the court of appeals to issue an emergency injunction to stop the rate cuts while the Ninth Circuit considered the merits of their appeal. *See id.*

In granting the emergency injunction, the court of appeals found that the plaintiff-hospitals had demonstrated they were likely to suffer irreparable harm in the absence of preliminary injunctive relief. *See id.* at 850-52. Although the court of appeals recognized the general rule that financial harm does not constitute irreparable harm, it explained that the underlying basis for the general rule was that such injuries can later be remedied by a money-damages award. *See id.* at 851-52. The plaintiff-hospitals, however, argued that they could not obtain a money-damages award against state officials because of the Eleventh Amendment. *See id.* at 852. The Ninth Circuit agreed with the plaintiff-hospitals' argument, explaining: "Because the economic injury doctrine rests only on ordinary equity principles precluding injunctive relief where a remedy at law is adequate, it does not apply where, as here, the [plaintiff-hospitals] can obtain no remedy in damages against the [S]tate because of the Eleventh Amendment." *Id.*

The appeal before this Court presents a similar situation. According to the Federal Government, implementation of the Final Rule will cost government contractors and subcontractors approximately \$190 million in startup costs during the first fiscal year in which the Final Rule is in effect. Final Rule, 73 Fed. Reg. at 67,702 (Add. 45a). The Final Rule also estimates \$246 million in combined costs to government contractors, subcontractors and their employees during the first fiscal year in which the Final Rule is in effect, with a ten-year cost of approximately \$1.1 billion. *Id.* These costs are more than just theoretical. As exemplified by the declarations filed in support of the Associations' motion for summary judgment (which the Government made no effort to refute in opposing the Associations' motion for summary judgment), government contractors and subcontractors throughout the United States will incur significant costs if the Final Rule is enforced beginning September 8, 2009. *See, e.g.*, Decl. of Mario DiFranco ¶¶ 22-32, Dist. Ct. Dkt. No. 18-11 (filed Jan. 14, 2009) (Add. 53a-64a) (describing financial and business impact imposed if Landover, Maryland-based Quality Support, Inc. is contractually obligated to participate in E-Verify); Decl. of Margie Jones ¶¶ 17-24, Dist. Ct. Dkt. No. 18-12 (filed Jan. 14, 2009) (Add. 65a-73a) (same with respect to Intel Corporation).

Should the Associations succeed in their appeal, however, the Associations' members will not have access to a money-damages remedy to compensate them for

the time and money spent on complying with the Final Rule and the contract provision it will add to countless government contracts and subcontracts. By its own terms, the APA only provides for declaratory and injunctive relief. *See* 5 U.S.C. § 703. The APA also does not waive the Government's sovereign immunity with respect to actions seeking monetary relief. *See* § 702. Furthermore, even if this Court concludes that the Final Rule or other aspects of the Government's conduct were illegal, tens of thousands of government contractors and subcontractors will be unable to unilaterally withdraw from participation in E-Verify because, by the time this Court issues its decision, most government contractors and subcontractors will be *contractually obligated* to participate in E-Verify. In other words, an appellate ruling striking down the Final Rule will not automatically strike the E-Verify contract provision from every contract and subcontract in which it exists.

Therefore, like the situation presented by *Rum Creek Coal* and *California Pharmacists Ass'n*, the Associations' members will suffer irreparable harm in the absence of an injunction pending appeal. In addition, as explained by the brief filed by *amici curiae* in the district court, enforcement of the Final Rule poses significant challenges for thousands of individual employees who will be burdened by the E-Verify program and who, *amici* argue, will face an increased risk of employment discrimination. *See* Mem. of *Amici Curiae* National Immigration Law

Center et al. in Supp. of Pls.' Mot. for Summ. J., Dist. Ct. Dkt. No. 42-2 (filed Aug. 3, 2009) (Add. 234a-254a).

III. THE GOVERNMENT WILL NOT BE SUBSTANTIALLY HARMED BY AN INJUNCTION PENDING APPEAL

The third factor courts are to consider in deciding a motion for an injunction pending appeal is whether the non-moving party will be substantially harmed by an injunction pending appeal. *See Long*, 432 F.2d at 979. In that regard as well, this case is substantially similar to the situation presented by *Goldstein*.

Again, the federal-defendants in *Goldstein* had voluntarily agreed to stay enforcement of the challenged regulations until after the district court ruled on the merits of the plaintiffs' legal claims. *See* 488 F. Supp. at 157. When the federal-defendants later opposed the plaintiffs' motion for an injunction pending appeal, the district court explained that the federal-defendants' previous agreement to postpone enforcement of the challenged regulations counseled in favor of granting an injunction pending appeal, explaining: "Such postponement seemingly did not cause any irreparable injury to defendants." *Id.* at 175.

Likewise, in this case, the Government has delayed enforcement of the Final Rule four times since the Associations commenced their lawsuit on December 23,

2008.⁴ Furthermore, the Associations consented each time the Government asked the district court for more time to evaluate Executive Order 13,465, the Final Rule, and the Secretary's Designation Notice.⁵

In total, the Government received almost six months to evaluate the Final Rule, during which time litigation in the district court was stayed in its entirety. There is no reason to believe that a delay of a few months more will substantially injure the Government as the Associations ask this Court to address the important legal questions raised by this case. *See United States v. Philip Morris Inc.*, 314

⁴ *See* Final Rule, 73 Fed. Reg. 67,651 (original enforcement deadline of January 15, 2009) (Add. 44a), *enforcement delayed by* First Delay Notice, 74 Fed. Reg. 1937 (Jan. 14, 2009) (until February 20, 2009) (Add. 49a), *enforcement further delayed by* Second Delay Notice, 74 Fed. Reg. 5621 (Jan. 30, 2009) (until May 21, 2009) (Add. 50a), *enforcement further delayed by* Third Delay Notice, 74 Fed. Reg. 17,793 (Apr. 17, 2009) (until June 30, 2009) (Add. 51a), *and enforcement further delayed by* Fourth Delay Notice, 74 Fed. Reg. 26,981 (June 5, 2009) (until September 8, 2009) (Add. 52a).

⁵ *See* Defendants' Consented-To Emergency Motion for a Stay of Proceedings to Permit the Newly Inaugurated Administration an Opportunity to Review the Final Rule at 3, Dist. Ct. Dkt. No. 20 (filed Jan. 27, 2009) (arguing that "[d]enial of the requested relief will prejudice Defendants by denying the new Administration sufficient time to review the Final Rule before taking a position with the Court"); Defendants' Consent Motion Seeking Extension of Stay at 3, Dist. Ct. Dkt. No. 22 (filed Apr. 17, 2009) (same); Defendants' Consent Motion for Extension of Time of Stay at 3, Dist. Ct. Dkt. No. 24 (filed May 29, 2009) (same).

F.3d 612, 622 (D.C. Cir. 2003) (“A mere assertion of delay does not constitute substantial harm.”).⁶

IV. AN INJUNCTION PENDING APPEAL IS IN THE PUBLIC INTEREST

The fourth and final factor courts are to consider is whether an injunction pending appeal is in the public interest. *See Long*, 432 F.2d at 979. This Court has not issued much in the way of guidance regarding the public-interest factor. *Cf. Rum Creek Coal*, 926 F.2d at 366 (“The public interest factor does not appear always to be considered at length in preliminary injunction analyses.”). That being said, Judge Kaufman’s thorough opinion in *Goldstein* indicates that, because the brief delay the Associations seek will benefit the greatest number of persons—approximately 168,624 contractors and subcontractors and roughly 3.8 million employees, according to the Final Rule, 73 Fed. Reg. at 67,702 (Add. 45a)—the public interest lies in granting an injunction pending this appeal.

⁶ Should the Court deem it necessary to its granting an injunction pending appeal, the Associations agree to abide by an expedited briefing schedule on the merits in order to minimize any delay. *See Goldstein*, 488 F. Supp. at 176 n.5 (explaining that, in proceedings on a successful motion for an injunction pending appeal, “counsel for plaintiffs agreed to comply with as reasonably fast briefing and oral argument schedules as the government desires and as the Fourth Circuit establishes. The parties have already fully briefed the legal issues in the course of their presentations to this Court. Thus, all counsel should be able to submit briefs and prepare for oral argument on a rapid basis.”).

The likelihood that legislative action will be taken during the coming weeks to resolve this controversy also counsels that the public interest lies in granting an injunction pending appeal. The statutory authority for E-Verify is set to expire on September 30, 2009. *See Omnibus Appropriations Act, 2009, Pub. L. No. 111-8, div. J, § 101, 123 Stat. 524, 988.* Congress is currently considering the Department of Homeland Security's fiscal year 2010 appropriations bill, which would not only extend the life of E-Verify, but would require government contractors to participate in E-Verify. *See H.R. 2892, 111th Cong. § 545 (as passed by the Senate).* The version of House Bill 2892 that previously passed the House of Representatives does not include language requiring contractors to participate in E-Verify. *See H.R. 2892, 111th Cong. (as passed by the House); see also H.R. Rep. No. 111-157, at 228 (2009) (explaining that E-Verify language was rejected in committee).*

The Senate has requested a conference with the House to resolve differences in the two different versions of House Bill 2892. *See 155 Cong. Rec. S7311-12 (daily ed. July 8, 2009).* The House, which has not yet appointed conferees, is scheduled to return from its summer recess the same day federal contracting officers are required to enforce the Final Rule (i.e., September 8, 2009). *See H.R. Con. Res. 172, 111th Cong. (2009).* In all likelihood, congressional action on House Bill 2892 will be completed prior to the October 1, 2009 start of federal fiscal year 2010. Therefore, granting the requested injunction will give members of

the Conference Committee and Congress as a whole the opportunity to address many of the core legal questions raised by this case.⁷

On the morning of September 4, 2009, the Associations informed the Government that, in the event the district court denied the emergency motion for an injunction pending appeal, the Associations intended to file this motion as soon as possible and to seek consideration by a single judge of this Court. The Government stated that it would oppose this motion, including the motion's request for consideration by a single judge of this Court.⁸

CONCLUSION

The Court should issue an order enjoining the Government from enforcing the Final Rule during the pendency of this appeal. Because the Final Rule goes into effect on September 8, 2009, the Associations request that a single judge of this Court take action on this emergency motion prior to that date.

⁷ Fed. R. App. P. 8(a)(2)(E) provides that a circuit court "may condition relief on a party's filing a bond or other appropriate security in the district court." In opposing the Associations' emergency motion in the district court, the Government did not contend that any such security was necessary.

⁸ A motion for an injunction pending appeal may be granted before the normal eight-day period runs for filing a response to a motion if the Court gives reasonable notice to the parties that it intends to act sooner. Fed. R. App. P. 27(a)(3)(A). In light of the time-sensitivity of this matter, the Associations respectfully request that the Court direct the Government to file its response electronically no later than 11:59 pm on Sunday, September 6, 2009. The Associations waive their right to file a reply to the Government's response.

CERTIFICATE OF COMPLIANCE

Pursuant to Rule 27(d)(2) of the Federal Rules of Appellate Procedure, the undersigned certifies that Appellants' Emergency Motion for An Injunction Pending Appeal complies with the typeface requirements of Rule 32(a)(5) and the type-style requirements of Rule 32(a)(6) because the motion has been prepared in a proportionally spaced typeface using Microsoft Word 2002 in 14-point Times New Roman font.

s/John R. Ingrassia

JOHN R. INGRASSIA

CERTIFICATE OF SERVICE

The undersigned certifies that on this fourth day of September, 2009, he did cause Appellants' Emergency Motion for An Injunction Pending Appeal and Addendum to be filed using the Court's Case Management/Electronic Case Filing System. By prior agreement of the parties, one (1) true and correct copy of the foregoing filings was also served by electronic mail upon each of the following counsel for Defendants-Appellees:

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