DISPARATE OPPORTUNITIES FOR EMPLOYMENT: E-VERIFY'S EQUAL PROTECTION CONCERNS

Dorian Slaybod†

I. INTRODUCTION

Each year, over one million seasonal farmworkers travel to work in America.[1] Seventy percent of all agricultural workers are foreign-born.[2] They take conditional employment that "shifts with the changing demands of planting, tending, and harvesting our nation's crops."[3] They are often subjected to harsh treatment and poor living conditions.[4] Instead of creating a smoother stream for employers

† LL.M. in Agricultural and Food Law, The University of Arkansas School of Law.

1. United States Department of Agriculture, Economic Research Service, Farm Labor Overview, http://www.ers.usda.gov/topics/farm-economy/farm-labor/background.aspx#Numbers (last updated Oct. 30, 2014).

2. Andrew Wainer, *The 2014 Hunger Report*, Bread for the World Institute, Dec. 2011, http://hungerreport.org/featured/immigrants-us-food-system/#_ftn1.

3. DANIEL ROTHENBERG, WITH THESE HANDS: THE HIDDEN WORLD OF MIGRANT FARMWORKERS TODAY (2000).

4. *See* Steven Greenhouse, *In Florida Tomato Fields, A Penny Buys Progress*, N.Y. TIMES, Apr. 24, 2014, http://www.nytimes.com/2014/04/25/business/in-florida-tomato-fields-a-penny-buys-progress.html?ref=business (describing coalition support for Florida tomato pickers).

to find willing and capable employees for these tenuous jobs, some states have created legal barriers to make it more difficult to fill the positions.

A series of anti-immigration laws have given rise to Equal Protection concerns. The laws were passed with the intent to prevent people who were not born on American soil from finding employment. Without comprehensive immigration reform likely to pass anytime soon, a constitutional challenge could shine a light on the rights of workers from—and perceived to be from—other countries.

One of the states that instituted anti-immigration policy is Arizona, which passed several laws intended to reduce the number of undocumented immigrants within its borders. One of these laws, the Legal Arizona Workers Act, often referred to as S.B. 1040, penalizes employers for hiring undocumented workers.[5] The law also mandates all employers to check each potential employee's immigration status before hiring.[6] The primary procedure for employers to verify immigration status is to use a federal database called E-Verify.[7] Arizona pushes employers to use the E-Verify system even though it is not required under federal law.[8]

The Arizona law was challenged, and upheld on preemption grounds.[9] But, what if the law was challenged under the 14th Amendment, alleging that Hispanics are disparately impacted? How would such a challenge proceed, and would the challenge be successful?

II. AGRICULTURAL LABOR AND THE E-VERIFY PROGRAM

A. Employer Difficulties and the Labor Shortage

The American agriculture industry cannot meet labor demands solely by employing domestic workers.[10] The industry depends upon migrant labor. Farmers who have attempted to rely upon hiring only documented workers for agricultural labor have oftentimes been left without enough help.[11]

5. ARIZ. REV. STAT. ANN. § 23–212 (2010).

6. *Id*. at § 23–214(A).

7. *Id*. at § 23-212(I) (verifying an employee's status through the E-Verify program creates a rebuttable presumption that the employer complied with the law).

8. *See* Chamber of Commerce of U.S. v. Whiting, 131 S. Ct. 1968, 1995 (2011) (Breyer, J., dissenting).

9. *See id*.

10. *See* Lee Davidson, *Utah Farmers Say They Need More Foreign Help*, SALT LAKE TRIBUNE, Sept. 6, 2013, http://archive.sltrib.com/article.php?id=28093408&itype=story10.

11. *See* Kirk Johnson, *Hiring Locally for Farm Work Is No Cure*-All, N.Y. TIMES, Oct.

During President Obama's tenure, the federal government has led one of the "most aggressive and efficient efforts in decades to round up and deport people who are in the United States unlawfully."[12] More undocumented immigrants were deported during President Obama's first term than were deported during both of President George W. Bush's terms combined.[13] Obama's recent immigration plan will safeguard millions of people, but it provides no specific protections for farmworkers.[14] In fact, Obama's plan may push many farmworkers to leave the agricultural profession altogether.[15]

Agricultural employers are thus put between a rock and a hard place. They are expected, under the H-2A program, to aggressively seek local domestic employees—a very small group of applicants.[16] They also have to supplement domestic hiring by employing foreign workers in a hostile political environment that has a history of deporting willing and able workers.[17]

United Farm Workers, a non-profit advocacy organization, led a "Take Our Jobs" campaign that invited domestic workers to sign up for agricultural labor positions.[18] The campaign was initiated in order to show that migrant agricultural labor did not contribute to domestic unemployment.[19] The campaign offered to help find employment for any domestic worker who wanted a job as a farmworker. At the height of the economic recession with high unemployment rates, the program only received 8,600 inquiries, and only seven people followed through to become hired as farmworkers.[20]

5, 2011, http://www.nytimes.com/2011/10/05/us/farmers-strain-to-hire-american-workers-in-place-of-migrant-labor.html.

12. Michael D. Shear, *Seeing Citizenship Path Near, Activists Push Obama to Slow Deportations*, N.Y. Times, Feb. 22, 2013, http://www.nytimes.com/2013/02/23/us/advocates-push-obama-to-halt-aggressive-deportation-efforts.html.

13. *Id*.

14. Michael D. Shear and Robert Pear, *Obama's Immigration Plan Could Shield Five Million*, N.Y. Times, Nov. 19, 2014, A1, *available at* http://www.nytimes.com/2014/11/20/us/politics/obamacare-unlikely-for-undocumented-immigrants.html.

15. Scott Smith, *Farmers Brace for Labor Shortage Under New Policy*, Associated Press, Dec. 28, 2014, http://news.yahoo.com/farmers-brace-labor-shortage-under-policy-164205729.html.

16. Elizabeth Dwoskin, *Why Americans Won't Do Dirty Jobs*, BUSINESSWEEK, Nov. 9, 2011, http://www.businessweek.com/magazine/why-americans-wont-do-dirty-jobs-11092011.html.

17. *See Obama Administration Sets Deportation Record: 409,849*, USA TODAY, Dec. 21, 2012, http://www.usatoday.com/story/news/nation/2012/12/21/record-2012-deportations/1785725/.

18. *See* TAKE OUR JOBS, http://www.takeourjobs.org/ (last visited Jan. 23, 2015).

19. *Id*.

20. Hari Sreenivasan, *Colbert Stays in Character at Congressional Hearing on Farm*

The Take Our Jobs Campaign received widespread, national attention when television host and author, Stephen Colbert, testified before Congress about the plight of migrant farmworkers.[21] He also dedicated a segment on his television show to demonstrate the difficulty of farm labor.[22] While testifying before Congress, Colbert was asked why he was interested in the issues surrounding migrant farmworkers.[23] He answered that migrant farmworkers are "the least powerful people in the United States."[24] He pointed out the contradiction of inviting workers to come to the United States, and then requiring them to leave soon after finding employment.[25] It is a system that inadequately serves both employers and employees.

B. The H-2A Program

The H-2A Visa program allows farmers and other agricultural employers to hire seasonal employees.[26] The Federal Government created the H-2A program in order to help agricultural employers fill in the gaps created by domestic labor shortages.[27] Before hiring foreign workers under the program, employers must show an expected shortage of labor.[28] Employers must then actively recruit American workers before the federal government will approve the hiring of foreign workers.[29]

H-2A workers may stay on-site to work for as long as requested by the employer, up to a maximum of three years.[30] Workers must be re-approved after each

Jobs, The Rundown, PBS.ORG (Sept. 24, 2010, 11:00AM) http://www.pbs.org/newshour/rundown/2010/09/colbert-stays-in-character-at-congressional-hearing/.

21. *Id*.

22. *Id*.

23. *See Stephen Colbert & Farmworkers Take Fight to Congress*, UNITED FARM WORKERS http://action.ufw.org/page/s/colbert92410 (last visited Feb. 5, 2015).

24. *Id*.

25. *Id*.

26. USCIS, DEP'T HOMELAND SEC., H-2A TEMP. AGRIC. WORKERS http://www.uscis.gov/working-united-states/temporary-workers/h-2a-agricultural-workers/h-2a-temporary-agricultural-workers (last visited Jan. 23, 2015).

27. 20 C.F.R. § 655 (2010).

28. EMP'T. & TRAINING ADMIN., US DEP'T OF LABOR, Employer Guide to Participation in the H-2A Temporary Agricultural Program, 2012, *available at* http://www.foreignlaborcert.doleta.gov/pdf/h-2a_employer_handbook.pdf (last visited Jan. 23, 2015).

29. *Id*.

30. USCIS, *supra* note 26.

year, until they reach the three-year maximum.[31] Once the work project has been completed, the employee must return to his or her home country for at least three months.[32]

Guest workers under the H-2A program are afforded certain legal protections. Federal regulations provide benefits, including guarantees of minimum wage, worker's compensation for injuries, and reimbursement for travel costs.[33] Some individual states also provide additional protections. New York and Ohio, for example, require employers to accommodate migrant farmworkers with certain, basic living conditions if the farmworkers will be living in housing provided by their employer.[34] Other protections, such as against discrimination or abuse by employers, are not fully provided to workers under the current system.[35]

C. E-Verify

The Immigration and Natural Service (now the U.S. Citizenship and Immigration Services or "USCIS") and the Social Security Administration created E-Verify in 1997 as a pilot program in six states.[36] In fact, it was originally called the "Basic Pilot Program."[37] The program was completely voluntary, and allowed employers to check the immigration status of the workers they hired.[38] Arizona was not one of the original states.[39]

The program was renamed "E-Verify" in 2007, and is now run by USCIS.[40] In 2007, the program was improved with new features.[41] One of the new features allows employers to match photos with an online database.[42] Employers who hire

31. *Id*.
32. *Id*.
33. 20 C.F.R. § 655 (2010).
34. N.Y. PUB. HEALTH LAW § 1330(3)(a) (2014).
35. *See* Marsha Chien, *When Two Laws Are Better Than One: Protecting the Rights of Migrant Workers*, 28 BERKELEY J. INT'L L. 15, 26 (2010).
36. U.S. CITIZENSHIP & IMMIGRATION SERV., HISTORY AND MILESTONES http://www.uscis.gov/sites/default/files/USCIS/Verification/E-Verify/HistoryMilestones/E-Verify_History_and_Milestones.pdf (last visited Jan. 23, 2015).
37. *Id*.
38. *Id*.
39. *Id*.
40. *Id*.
41. U.S. CITIZENSHIP & IMMIGRATION SERV., HISTORY AND MILESTONES, *supra* note 37, at 3.
42. *Id*.

agricultural workers under the H-2A Visa program are encouraged, but not incentivized, to use E-Verify to confirm the immigration status of a newly hired farmworker.[43]

The primary problem with E-Verify is its high frequency of errors. The Social Security Administration estimated that as many as 17 million discrepancies exist in the system.[44] The Intel Corporation did its own study in 2008, and found that twelve percent of its employees were inaccurately labeled by E-Verify.[45] Even more troubling, only a fraction of inaccurately flagged applicants are ever given a fair opportunity to be hired for the job to which they applied.[46]

Some states have begun to compel the use of E-Verify, creating a chilling effect upon employers who need to hire reliable labor to keep up with agricultural production.[47] It has become easier for an employer to move on to the next applicant instead of expending time and resources when a first applicant is flagged by the system.[48] Even employers who take the extra time will have to deal with the inconveniences of a faulty system. In the view of one agricultural employer, laws like E-Verify "prevent him from fielding a steady, reliable work force."[49]

A majority of migrant workers in the United States are from Mexico.[50] Employers who fear hiring an employee with a particular name that could trigger an E-Verify alarm may "opt for a white employee without a foreign (or at least not

43. *Id*.

44. Shelly Chandra Patel, *E-Verify: An Exceptionalist System Embedded in the Immigration Reform Battle Between Federal and State Governments*, 30 B.C. THIRD WORLD L.J. 453, 463 (2010); OFFICE OF THE INSPECTOR GEN., SOC SEC. ADMIN., No. A-08-06-26100, CONGRESSIONAL RESPONSE REPORT: ACCURACY OF THE SOCIAL SECURITY ADMINISTRATION'S NUMIDENT FILE 5 (2006), http://oig.ssa.gov/sites/default/files/audit/full/pdf/A-08-06-26100_0.pdf.

45. *See Employment Verification System: Hearing Before the Subcomm. On Immigration, Refugees and Border Security of the S. Comm. on the Judiciary*, 110th Cong. (2009) (statement of Sen. Charles E. Schumer, Chairman, Subcomm. on Immigration, Refugees, and Border Security).

46. *Id*.(An independent examination of the E-Verify program disclosed that many recently naturalized citizens are subject to misidentification).

47. MICHAEL WILDES, EXPERT GUIDANCE: E-VERIFY'S IMPOSSIBLE CHOICE – DISCRIMINATE OR RISK SUBSTANTIAL LOSS, CCH Human Resources Compliance Library (Wolters Kluwer 2011) (2011).

48. *See id*. at 2.

49. Jennifer Medina, *California Farmers Short of Labor, and Patience*, N.Y. TIMES, March 29, 2014, at A15.

50. Jeffrey S. Passel, D'Vera Cohn, Ana Gonzalez-Barrera, *Net Migration Falls to Zero-and Perhaps Less*, PEW RESEARCH: HISPANIC TRENDS PROJECT (APR. 23, 2012), *available at* http://www.pewhispanic.org/2012/04/23/net-migration-from-mexico-falls-to-zero-and-perhaps-less/ (stating that as of 2012, over 12 million documented and undocumented American residents were born in Mexico).

Spanish) sounding accent."[51] Compelling employers to use E-Verify pushes them to "discriminate or risk substantial loss."[52]

D. Senate Bill 1070

Arizona passed Senate Bill 1070 into law in 2010 in order to reduce the amount of undocumented immigrants within the state.[53] The bill was created to help federal immigration enforcement, and "to discourage and deter the unlawful entry and presence of aliens and economic activity by persons unlawfully present in the United States."[54] The statute explains that a law enforcement official may not "*solely* consider race, color, or national origin" when enforcing it.[55] The law goes no further in prohibiting law enforcement officials from considering race.

S.B. 1070 also places a burden upon employers, prohibiting them from hiring undocumented workers. For a first violation, the statute allows Arizona to penalize employers who hire undocumented workers by: (1) terminating the employment of undocumented workers, (2) requiring employers to file quarterly reports, and to (3) suspend business licenses.[56] For a second violation, an employer may have his business licenses permanently revoked.[57] Under the statute, an employer can create a rebuttable presumption that an employee is a legal resident by using the E-Verify system.[58]

III. CHAMBER OF COMMERCE V. WHITING

A. Procedural History

Arizona bill S.B. 1070 passed through the state legislature, and went into

51. WILDES, *supra* note 47.
52. *Id*. at 3.
53. S. 1070, 49th Leg., § 1 (AZ. 2010).
54. *Id*.
55. *Id*. at § 2(B) (emphasis added).
56. S. 1070, Arizona Statute 23-212, *available at* http://www.azleg.state.az.us/FormatDocument.asp?inDoc=/ars/23/00212.htm&Title=23&DocType=ARS (last visited Jan. 23, 2015).
57. *Id*.
58. *Id*.

effect on January 1, 2008.[59] Shortly thereafter, it was challenged by local interest groups through the Arizona court system.[60] The case eventually made its way to the United States Supreme Court.[61] The case, entitled *Chamber of Commerce of U.S. v. Whiting*, was argued in December of 2010.[62] Petitioners challenged S.B. 1070 based upon preemption grounds.[63] It was their contention that the law, which compelled the use of E-Verify, was preempted by a federal law that set up a voluntary licensing framework for businesses regarding immigration.[64] The federal statute, 8 U.S.C. section 1373, disallows states from interfering with federal immigration enforcement.[65] However, this federal statute also discusses a system in which states can utilize the federal system for their own immigration-related practices, one practice being the verification of immigration status.[66] *Whiting* revolved around whether the state of Arizona could compel employers to use the federal system.[67] The Court had to decide whether or not Arizona could compel the use of E-Verify.[68]

B. Opinion

The Supreme Court held that the Arizona law was not preempted by federal law. In a 5-3 decision, Justice Roberts stated:

> "[t]he simple fact that federal law creates procedures for federal investigations and adjudications culminating in federal civil or criminal sanctions does not indicate that Congress intended to prevent States from establishing their own procedures for imposing their own sanctions through licensing."[69]

Arizona was free to develop its own law which used the E-Verify system.

Roberts's decision found discrimination not to be an issue. In his view, federal and state antidiscrimination laws would prevent discrimination and "provide

59. ARIZONA REV. STAT. ANN. §23-212 (2010).

60. *See generally* Ariz. Contractors Ass'n v. Napolitano, 526 F.Supp.2d 968 (D. Ariz. 2007).

61. Petition for Writ of Certiorari, Chamber of Commerce of U.S. v. Whiting, 131 S.Ct. 1968 (2011) (No. 09-115).

62. Whiting, 131 S. Ct. 1968, at 1995 (full transcript of oral argument).

63. *Id*. at 1973.

64. *Id*. at 1974.

65. 8 U.S.C.A. § 1373(a) (1996).

66. *Id*. at § 1373(c).

67. Whiting, 131 S. Ct. 1968, at 1995.

68. *See id*.

69. *Id*. at 1979.

employers with a strong incentive not to discriminate."[70] The Roberts decision presupposed that employers are "rational" enough to follow the Arizona law, while not discriminating.[71] He found that employers will not discriminate in order to avoid sanctions, because license suspensions, under the law, are only available for "egregious violations."[72]

Justice Breyer and Justice Ginsburg, in dissent, raised concerns about the law's potential effect of encouraging employers to discriminate based upon national origin.[73] They also expressed concerns about the effectiveness of the E-Verify program, going as far as to say that the system is "prone to error."[74] In their view, the Arizona law improperly incentivized employers to err on the side of discrimination by establishing larger penalties for hiring an undocumented person.[75] They believed it was the power of Congress to decide when to compel the use of E-Verify.[76] They also did not share Roberts's faith in rational employers, as they concluded that most employers would become more cautious about hiring undocumented workers "without counterbalancing protection against unlawful discrimination."[77]

Justice Sotomayor also issued a dissent which questioned whether Congress's intent was being followed. She stated, "I cannot believe that Congress intended for the 50 States and countless localities to implement their own distinct enforcement and adjudication procedures for deciding whether employers have employed unauthorized aliens."[78] In her view, even if federal law had not preempted the Arizona law, Arizona should still have not have been allowed to compel the use of E-Verify.[79]

70. *Id*. at 1972.

71. *See id*.

72. *Id*. at 1971.

73. *See id*. at 1993 ("Such laws might prove more effective in stopping the hiring of unauthorized aliens. But they are unlikely to do so consistent with Congress' other critically important goals, in particular, Congress' efforts to protect from discrimination legal workers who look or sound foreign.").

74. *See id*. at 1996 ("Congress had strong reasons for insisting on the voluntary nature of the program. E-Verify was conceived as, and remains, a pilot program. Its database consists of tens of millions of Social Security and immigration records kept by the Federal Government. These records are prone to error.").

75. *See id*.

76. *Id*. at 1997.

77. *Id*. at 1992.

78. *Id*. at 2003.

79. *See id*. at 2005.

C. Opening the Door for Discrimination

By finding that discrimination was not at issue with S.B. 1070, *Whiting* created a framework for businesses to discriminate based upon national origin.[80] Before S.B. 1070, federal E-Verify provisions were calculated to prevent discrimination. Federal provisions were tempered because "Congress carefully balanced its desire to reduce illegal immigration with its desire to maintain protections against national origin discrimination by including a provision that is supplemental to Title VII."[81] This balance was lost when S.B. 1070 did not include penalties for employers who purposefully fail to hire due to national origin.[82]

The *Whiting* decision has opened the door for states to adopt racially discriminatory, anti-immigration legislation.[83] The holding "laid unprecedented groundwork for federal and state laws addressing the ever changing unauthorized alien employment atmosphere."[84] Since the decision, "more expansive and harsh state laws" have been passed to prevent the hiring of undocumented workers.[85]

In 2011, Alabama passed the "Beason-Hammon Alabama Taxpayer and Citizen Protection Act" ("H.B. 56").[86] The statute used "essentially the same language" as S.B. 1070, but extended it further to require police officers to verify immigration status if the detained person was unable to produce a valid license.[87] The statute put employers at risk for sanctions if it was shown they did not hire a U.S. citizen or a documented immigrant "while retaining or hiring an employee who the business entity or employer knows, or reasonably should have known, is

80. WILDES, *supra* note 47.

81. *See* H.R. REP. No. 99-1000, at 87-88; Bianca B. Garcia, *Chamber of Commerce of the United States v. Whiting: Giving the Green Light to States' Broad Use of Immigration-Related Employer Sanctions*, 20 AM. U. J. GENDER SOC. POL'Y & L. 925, 954 (2012).

82. WILDES, *supra* note 47 ("rules that prohibit prescreening and adverse actions are needed to protect vulnerable citizens from an extremely faulty system").

83. *See* Emily Sitton, *Challenging State and Local Anti-Immigrant Employment Laws: An Evaluation of Preemption, Equal Protection, and Judicial Awareness Tactics*, 91 OR. L. REV. 961, 978 (2013).

84. Bryant Jones, *Employment Law-Legal Arizona Workers Act-Arizona Law Neither Conflicts with Nor Is Preempted by Existing Federal Law*, 42 CUMB. L. REV. 217, 228 (2012).

85. Krystal D. Norton, *Chamber of Commerce v. Whiting: Why the States Are Permitted to Pass A Tidal Wave of New State Laws So Dangerously Intertwined with Federal Immigration Law*, 57 LOY. L. REV. 673, 697 (2011).

86. Beason-Hammon Alabama Taxpayer and Citizen Protection Act, ALA. CODE § 31-13-10 (2011) *preempted* by U.S. v. Alabama, 691 F.3d 1269 (11th Cir. 2012).

87. Erica L. Sharp, *The Resolution of the "Show Me Your Papers" Circuit Split: Constitutionality and Consequences of Enforcing State and Local Immigration Laws*, 19 WIDENER L. REV. 465, 473 (2013).

an unauthorized alien."[88] The statute also stated that the federal government would make all determinations as to immigration status, signaling the same E-Verify concerns as Arizona.[89]

The Northern District of Alabama soon granted an injunction to stop several parts of the law under preemption grounds.[90] The 11th Circuit eventually invalidated much of the law the following year.[91] The court found that the employer sanctions in H.B. 56 were preempted by federal law.[92] The employer sanctions went beyond mere licensing sanctions, which were allowed to stand in *Whiting*.[93]

The Alabama law, which was invalidated, actually bares a strong resemblance to the Arizona law, which was upheld. Both the Arizona and Alabama laws created incentives for employers to actively avoid hiring Hispanic workers. The difference between whether an employer receives licensing sanctions for employing an undocumented worker, as in Arizona, as opposed to "compensatory damages, mandatory attorneys' fees, and mandatory court costs" as in Alabama, does not create a difference in employer behavior.[94] Both laws provide an incentive for employers to use discriminatory practices when hiring employees, and Arizona's sanctions can be just as severe for employers as those proposed in Alabama. As Justice Breyer stated in the *Whiting* dissent, hiring an undocumented worker in Arizona could result in a permanent ban: a "business death penalty."[95]

It is disconcerting to consider what future laws may be based upon *Whiting*. Alabama's law was bluntly drawn, but what if a future law is more nuanced like Arizona's S.B. 1070? How many sanctions can reasonably fall within the "licensing" umbrella? *Whiting* has created a situation in which documented citizens may end up unemployed after having their immigration status incorrectly flagged by E-Verify, and then left without a job or proper legal recourse.[96] Laws that disproportionately affect a protected class can be challenged under the Equal Protection clause by showing disparate impact, but such a challenge carries a difficult legal burden.

88. ALA. CODE § 31-13-17(a) (2011), *preempted by* Ala., 691 F.3d 1269.

89. *See id*. at § 31-13-17(e).

90. United States v. Alabama, 813 F. Supp. 2d 1282, 1351 (N.D. Ala. 2011) *aff'd in part, rev'd in part, dismissed in part*, 691 F.3d at 1351.

91. *See* Alabama, 691 F.3d at 1277 *cert. denied*, 133 S. Ct. 2022 (2013).

92. *See* 8 U.S.C. § 1324a (1996) ("The provisions of this section preempt any State or local law imposing civil or criminal sanctions (other than through licensing and similar laws) upon those who employ, or recruit or refer for a fee for employment, unauthorized aliens.").

93. Alabama, 691 F.3d at 1291.

94. *See id*.

95. Chamber of Commerce of U.S. v. Whiting, 131 S. Ct. 1968, 1990 (2011) (Breyer J., dissenting).

96. Sitton, *supra* note 83, at 981.

IV. ARE HISPANIC WORKERS DISPARATELY IMPACTED BY E-VERIFY?

A. *Constitutional Protections*

The difficulty with challenging anti-immigrant laws under a traditional Equal Protection argument is that the intent demonstrated by legislators is most ostensibly anti-immigrant, which is subject to a lesser form of scrutiny.[97] Instead of strict scrutiny, the court would likely use a "heightened rational basis test," as was used in the Supreme Court case, *Plyler v. Doe*.[98] This "heightened rational basis test" can be applied even to egregiously immigrant-biased laws like S.B. 1070, which was "literally designed to drive immigrants (both legal and illegal) out of Arizona."[99]

The lesser protections afforded in *Plyler* are also difficult to invoke because the holding in *Plyler* was so specific. It held that the government did not have a "substantial state interest" in denying immigrant children access to public education.[100] Courts have been hesitant to extend this holding, which allowed undocumented children to attend public school, to other fact patterns. In fact, "no court has ever used [*Plyler*] to overturn a statute disadvantaging unauthorized migrants outside the context of K-12 public education."[101]

Also, the circuit courts have watered down immigrant rights since the *Plyler* decision. The 5th and 6th circuits have referred to undocumented persons as "nonimmigrant aliens" with even less constitutional protection than heightened rational basis.[102] These courts have assessed discrimination against undocumented persons with only a rational basis review, which is the lowest form of judicial scrutiny.[103]

---

97. *See* Ashleigh Bausch Varley & Mary C. Snow, *Don't You Dare Live Here: The Constitutionality of the Anti-Immigrant Employment and Housing Ordinances at Issue in Keller v. City of Fremont*, 45 CREIGHTON L. REV. 503, 548 (2012).

98. *Id*.

99. Sharp, *supra* note 87, at 488.

100. Plyler v. Doe, 457 U.S. 202, 230 (1982).

101. Hiroshi Motomura, *The Rights of Others*: *Legal Claims and Immigration Outside the Law*, 59 DUKE L.J. 1723, 1732 (2010); *see* Hiroshi Motomura, *Immigration Outside the Law*, 108 COLUM. L. REV. 2037, 2075-76 (discussing Plyler's narrow doctrinal scope).

102. Comment, Adam Bryan Wall, *Justice for All?: The Equal Protection Clause and Its Not-So-Equal Application to Legal Aliens*, 84 TUL. L. REV. 759, 760 (2010); *see e.g.*, LULAC v. Bredesen, 500 F.3d 523, 533 (6th Cir. 2007); *see e.g.*, LeClerc v. Webb, 419 F.3d 405, 417-19 (5th Cir. 2005).

103. *See id*. at 760.

Undocumented workers have also been continually and intentionally left out of federal protections against employment discrimination. The federal Immigration Reform and Control Act (IRCA) explicitly prohibits discrimination based upon national origin or citizenship status, except when applied to undocumented workers.[104] Therefore, "unauthorized immigrants cannot file an IRCA complaint if a company commits national origin discrimination against them."[105]

Title VII of the Civil Rights Act, in contrast, does not require proof of citizenship to bring a claim, as is required under the IRCA.[106] If a *prima facie* case of discrimination is established by a plaintiff, the burden then shifts to the defendant employer to demonstrate that the challenged discrimination is a business necessity.[107] A discriminatory employment practice is prohibited if it "cannot be shown to be related to job performance."[108] But this cause of action is difficult to use against an employer's use of E-Verify. SB 1070 gives businesses an explicit business necessity defense when they use E-Verify, which would cause most Title VII claims to fail.

B. Disparate Impact Against Hispanic workers

Since these laws do not discriminate on their face based upon race or national origin, plaintiffs must show that a "facially neutral law has an impact and a purpose that discriminate on such basis" in order to be subjected to strict scrutiny.[109] Showing a disparate impact towards a protected class—for example, a group of Mexicans and Latinos who were disproportionately denied employment because of E-Verify—would create a *prima facie* case under the Equal Protection Clause.

Even if litigants were to show that anti-immigrant laws have a discriminatory impact on people with a shared national origin that would only meet the first part of the test. They would also have to show that the ostensible legislative bias against immigrants was, in fact, actually intended to discriminate based upon national origin. This can be difficult to demonstrate. Legislatures often cloud antipathy towards national origin in discussions with other outward motives. It has been a

104. 8 U.S.C. § 1324b(a)(1) (1996).

105. Keith Cunningham-Parmeter, *Redefining the Rights of Undocumented Workers*, 58 AM. U. L. REV. 1361, 1375 (2009).

106. *See id*.

107. *See* Griggs v. Duke Power Co., 401 U.S. 424, 431 (1971).

108. *Id*.

109. Note, Sofia D. Martos, *Coded Codes: Discriminatory Intent, Modern Political Mobilization, and Local Immigration Ordinances*, 85 N.Y.U. L. REV. 2099, 2114 (2010); *see e.g.*, Davis, 426 U.S. at 242.

common tactic that a "state would facially discriminate on the basis of a different characteristic that happened to correlate with race."[110] Race and national origin discrimination is unlawful even if it is not the primary motivating force behind the passage of a law.[111] However, proving a discriminatory intent is difficult when it "requires that a plaintiff present a court with 'smoking gun' evidence at a time when overt manifestations of racial bias are highly suspicious and well-policed."[112]

It would be insufficient for workers to show that they were delayed or denied employment because the E-Verify system unfairly singled them out based upon their surnames' shared national origin. A law will not be struck down based upon impact alone, and the Roberts Court is reluctant to speculate regarding potential future impacts.[113] The Supreme Court has held that "official action will not be held unconstitutional solely because it results in a racially disproportionate impact."[114] Plaintiffs must show that the legislature had a discriminatory purpose, and that such a purpose was used during the passing of the legislation.[115] This means that a discriminatory purpose must have been a "motivating factor" during the legislative process.[116]

Determining whether a discriminatory purpose was a motivating factor requires "sensitive inquiry into such circumstantial and direct evidence of intent."[117] Plaintiffs must show evidence beyond the mere fact that the legislature knew discrimination was a possible result of the legislation.[118] They must show that legislators "selected or reaffirmed a particular course of action at least in part 'because of,' not merely 'in spite of,' its adverse effects upon an identifiable group."[119]

In 2007, the Middle District of Pennsylvania heard a challenge from a group of documented and undocumented workers.[120] Similar to the law in *Whiting*, the

110. Daniel Ortiz, *The Myth of Intent in Equal Protection*, 41 STAN. L. REV. 1105, 1118 (1989).

111. *See* Washington v. Davis, 426 U.S. 229, 242 (1976) (including other policy goals such as violence and economic loss).

112. Darren Lenard Hutchinson, *Critical Race Theory: History, Evolution, and New Fronteirs: Foreward: Critical Race Histories: In and Out*, 53 Am. U.L. Rev. 1187, 1195 (2004).

113. Catherine Gage O'Grady, *The Role of Speculation in Facial Challenges*, 53 ARIZ. L. REV. 867, 911 (2011).

114. Vill. of Arlington Heights v. Metro. Hous. Dev. Corp., 429 U.S. 252, 264-65 (1977).

115. *Id*. at 265.

116. *Id*. at 266.

117. *Id*.

118. Pers. Adm'r of Mass. v. Feeney, 442 U.S. 256, 279 (1979).

119. *Id*.

120. *See* Lozano v. City of Hazleton, 496 F. Supp. 2d 477, 540 (M.D. Pa. 2007) *aff'd in part, vacated in part*, 620 F.3d 170 (3d Cir. 2010) *cert. granted, judgment vacated sub nom*. City of Hazleton, Pa. v. Lozano, 131 S. Ct. 2958, (2011) *and aff'd in part, rev'd in part*, 724 F.3d 297 (3d Cir. 2013).

Pennsylvania law in *Lozano v. City of Hazelton* made it unlawful to employ undocumented workers.[121] The workers claimed the law actually discriminated based upon race.[122] The Pennsylvania law was also similar to the law in *U.S. v. Alabama*, in that the City of Hazelton went beyond just sanctioning employers, and also attempted to punish the employee applicants who were found to be undocumented.[123]

The City of Hazelton removed the discriminatory language from the law before trial, rendering much of the court's Equal Protection analysis moot.[124] Nevertheless, the court held that while comments by the City's mayor may have shown that he was aware discrimination could take place in the future, there was "no evidence" that the mayor "approved of the ordinances because of their potential discriminatory impact."[125] Therefore, plaintiffs would have been unable to show discriminatory purpose under a disparate impact claim.[126]

Without being able to show discriminatory intent, an equal protection challenge cannot succeed.[127] That said, if plaintiffs can show evidence of disparate impact and discriminatory purpose, courts are not afraid to strike down laws of discrimination. Finding evidence, though, can be difficult.

Future legislation could provide undocumented workers more protection and stability. However, the reality is that "immigrants' rights will remain undefined for the indefinite future."[128] As it stands, undocumented people remain inadequately protected by the political and judicial processes.[129]

V. THE QUAGMIRE OF AGRICULTURAL LABOR

It is practical for a government to create a citizenship distinction. There are

121. *Id*. at 515.

122. *Id*. at 540.

123. Marisa S. Cianciarulo, *The "Arizonification" of Immigration Law: Implications of Chamber of Commerce v. Whiting for State and Local Immigration Legislation*, 15 HARV. LATINO L. REV. 85, 128 (2012).

124. City of Hazleton, 496 F. Supp. 2d at 539.

125. *Id*. at 541.

126. *Id*. (Equal Protection claims were not brought before the 3rd Circuit nor the Supreme Court, because the city amended their statute to remove the alleged discriminatory language).

127. Sitton, *supra* note 83, at 990.

128. Cunningham-Parmeter, *supra* note 106, at 1371; *see* Comment, Katherine E. Seitz, *Enter at Your Own Risk: The Impact of Hoffman Plastics Compounds v. NLRB on the Undocumented Worker*, 82 N. C. L. REV. 366, 372-73 (2003) (arguing immigration laws are generally silent as to its effect on labor laws).

129. *See* Geoffrey Heeren, *Persons Who Are Not the People: The Changing Rights of Immigrants in the United States*, 44 COLUM. HUM. RTS. L. REV. 367, 435 (2013).

many good reasons for a country to ascribe certain rights after a person demonstrates dedication to living in a particular country. But recent case law has shown that citizenship can be used to unfairly burden the path towards employment. States can use citizenship not only as a shield to protect American-born persons, but also as a sword against immigrants.

In an exceedingly global economy, "the value of citizenship seems to have greatly decreased."[130] Yet, laws still exist that make it difficult for employers to hire real, working people. A person's ability to perform a job and to find satisfaction through work is not conditional upon his or her immigration status.

> The notion that only citizens can comprehend or benefit from the dignity and status-promoting dimensions of work is belied by the experiences of the millions of immigrants—documented and undocumented—who come to this country seeking, and in many cases, to secure, a better way of life for themselves and their families.[131]

Immigrants, especially Hispanics, are "perceived as intruders."[132] This causes the lives of many hardworking people and their families to be seen as "less valuable."[133] Undocumented workers are relegated to a limbo of inferior status and unstable employment, and employers are forced to take substantial risks to hire them. This occurs even though the American agriculture industry relies upon their effort.

130. Matthew Lister, *Citizenship, in the Immigration Context*, 70 MD. L. REV. 175, 183 (2010); *see generally* DAVID JACOBSON, RIGHTS ACROSS BORDERS: IMMIGRATION AND THE DECLINE OF CITIZENSHIP (John Hopkins University Press, Sept. 5, 1997).

131. Jennifer Gordon & R.A. Lenhardt, *Rethinking Work and Citizenship*, 55 UCLA L. REV. 1161, 1197 (2008).

132. William Arrocha, *From Arizona's S.B. 1070 to Georgia's H.B. 87 and Alabama's H.B. 56: Exacerbating the Other and Generating New Discourses and Practices of Segregation*, 48 CAL. W. L. REV. 245, 246 (2012).

133. *Id*. at 248.