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## E-Verify: Chamber of Commerce v. Whiting

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# PANEL

## E-VERIFY: *CHAMBER OF COMMERCE V. WHITING*

*This Article is an annotated transcript of a panel that occurred on February 22, 2011 at the American University Washington College of Law. The podcast of the event can be found on the AMERICAN UNIVERSITY LABOR & EMPLOYMENT LAW FORUM’S website at <http://aulaborlawforum.org/events/e-verify/>. The event was co-sponsored by the Immigrants’ Rights Coalition.*

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### PANELIST BIOGRAPHIES

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**Bruce A. Morrison** is Chairman of the Morrison Public Affairs Group (MPAG), which he founded in 2001 to conduct and supervise a broad practice involving strategic advice and representation for both domestic and international clients. He is also an attorney and provides legal advice and assistance in immigration matters. His consulting work involves advocacy to Congress and the Executive branch, as well as building alliances within the private sector. His areas of expertise include financial services, housing

finance, privacy, immigration policy, and intellectual property.

From 1983 to 1991, Mr. Morrison represented the Third District of Connecticut (New Haven) in the U.S. House of Representatives. He also served on the Judiciary Committee, where he specialized in immigration, as well as intellectual property issues, bankruptcy law, and consumer protection policy, including privacy. As chairman of the Immigration Subcommittee, he led the passage of the Immigration Act of 1990, a comprehensive reform, which included expanded admission of skilled workers. This legislation created the "Morrison visa" program under which almost 50,000 Irish men and women received green cards in the early 1990s.

While in Congress, Mr. Morrison was involved with human rights advocacy in many areas of the world, including Chile, Central America, South Africa, Haiti, Paraguay, and the Middle East. Through his interest in human rights, he became involved in Northern Ireland, where he first visited in 1987. In Congress, he also served on the Banking Committee, playing a leadership role in financial services oversight, housing and housing finance, economic development, and U.S. policy regarding the World Bank, the IMF, and LDC debt.

After leaving Congress to run for Governor of Connecticut in 1990, he established a law firm specializing in immigration representation of firms and individuals. He also served from 1992 to 1997 on the U.S. Commission on Immigration Reform, which conducted a comprehensive study of U.S. immigration law.

Since 1991, Mr. Morrison has traveled frequently to Northern Ireland and has been involved in many aspects of the Peace Process. In 1992, he advised Bill Clinton, while a Presidential candidate, on issues related to Northern Ireland. He continued to provide advice and information to the Clinton White House from 1993 to 2001, including assistance on negotiations leading to IRA cessations in 1994 and 1997. In 1992 and 1996, he was Co-Chairman of Irish-Americans for Clinton-Gore.

Also during the Clinton Administration, he was appointed by the President as Chairman of the Federal Housing Finance Board, an independent agency regulating the twelve Federal Home Loan Banks, a wholesale banking system with assets in excess of \$600 billion. In this role from 1995 to 2000, he developed and implemented a far-reaching strategy to modernize the business of the Banks.

Mr. Morrison holds a bachelor's degree in chemistry from MIT and a master's degree in organic chemistry from the University of Illinois. He is a graduate of the Yale Law School.

**Marc Rosenblum** is a Senior Policy Analyst at the Migration Policy Institute where he works on U.S. immigration policy, U.S. regional migration relations with the Regional Migration Study Group, and the MPI Labor Markets Initiative. Dr. Rosenblum is the author of *THE TRANSNATIONAL POLITICS OF U.S. IMMIGRATION POLICY* (University of California, San Diego Center for Comparative Immigration Studies, 2004) and has published over thirty academic journal articles, book chapters, and policy briefs on immigration, immigration policy, and U.S.-Latin American relations. He is the co-editor (with Daniel Tichenor) of *THE OXFORD HANDBOOK OF INTERNATIONAL MIGRATION* (Oxford University Press, forthcoming 2011). Dr. Rosenblum earned his B.A. from Columbia University and his Ph.D. from the University of California, San Diego, and is an Associate Professor of Political Science at the University of New Orleans. He was a Council on Foreign Relations Fellow detailed to the office of U.S. Sen. Edward Kennedy during the 2006 Senate immigration debate and was involved in crafting the Senate's immigration legislation in 2006 and 2007. He also served as a member of President Obama's Immigration Policy Transition Team in 2009.

**Emily Tulli** is a Policy Attorney for the National Immigration Law Center. Ms. Tulli's advocacy focuses on maintaining and expanding the rights of low-wage immigrant workers; she monitors and analyzes federal legislative developments affecting immigrants in the workplace. Prior to joining NILC, Ms. Tulli served as a staff attorney at Change to Win in Washington, D.C., and, prior to that, at Legal Services of New Jersey in Bridgeton, N.J. While at Legal Services, she represented low-wage immigrant clients in a variety of wage and hour cases, including a class action lawsuit, and participated in a significant amount of farm labor camp outreach and community education. Ms. Tulli holds a Juris Doctorate from The College of William and Mary.

**John Feere** is a Legal Policy Analyst for the Center for Immigration Studies. Mr. Feere began working at the Center early 2002. He received his B.A. from the University of California, Davis and his J.D. from American University Washington College of Law. While in law school he worked for the U.S. House of Representatives Judiciary Committee, specifically, the Subcommittee on Immigration, Border Security, and Claims. He also interned as an Assistant Prosecutor for the Montgomery County Maryland Office of the State's Attorney.

**Carl Hampe** is a Partner at Baker McKenzie. Mr. Hampe was Counsel to the U.S. Senate Immigration Subcommittee during the enactment of IRCA (1986) and the Immigration Act of 1990. From 1991 to 1993, he was Deputy Assistant Attorney General, Legislative Affairs, for the U.S. Department of Justice. In private practice, he has represented companies that were the targets of ICE enforcement, litigated against USCIS in federal court challenges to Service actions, represented companies and coalitions in rulemaking proceedings, and

obtained amendments to the Immigration and Nationality Act on behalf of companies and industry groups. He is exceptionally fluent in all aspects of immigration law and has testified before Congress on key immigration issues. He obtained his undergraduate degree with honors from Stanford University in 1982 and his juris doctorate from Georgetown

**Stephen I. Vladeck** is a Professor of Law at American University Washington College of Law where his teaching and research focus on federal jurisdiction, national security law, constitutional law (especially the separation of powers), and international criminal law. A nationally recognized expert on the role of the federal courts in the war on terrorism, he was part of the legal team that successfully challenged the Bush Administration's use of military tribunals at Guantánamo Bay, Cuba in *Hamdan v. Rumsfeld*, 548 U.S. 557 (2006), and has co-authored amicus briefs in a host of other lawsuits challenging the U.S. government's surveillance and detention of terrorism suspects. Professor Vladeck graduated from Yale Law School in 2004, after which he clerked for the Honorable Marsha S. Berzon on the U.S. Court of Appeals for the Ninth Circuit, and the Honorable Rosemary Barkett on the U.S. Court of Appeals for the Eleventh Circuit.

# E-VERIFY: *CHAMBER OF COMMERCE V. WHITING*

## ANNOTATED TRANSCRIPT

**PETER ASAAD:** I'd like to welcome everyone to this informative program entitled E-Verify and *Chamber of Commerce v. Whiting*.<sup>1</sup> I'd like also to thank our panelists for volunteering their time today and we would like to extend our appreciation to American University Washington College of Law, the Immigrants' Rights Coalition, and the LABOR & EMPLOYMENT LAW FORUM who put a lot of time and energy into organizing today's panel.

Before we get started with our panelists, I will provide a brief history and introduction to the topic.

For the first time ever, in 1986, Congress made it illegal for employers to knowingly hire, recruit, or continue to employ undocumented workers through the Immigration Reform and Control Act, otherwise known as IRCA.<sup>2</sup> Since 1986, controlling illegal immigration by regulating who is entitled to work in the United States has been a key component of the U.S. immigration policy. For the first time, IRCA required all employers to examine documents to verify their employees' identity and citizenship or immigration status and to attest to the verification on the paper-based I-9 form. President Reagan described the

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1. In a 5-3 decision, with the majority opinion authored by Chief Justice John Roberts, the Court held that the Legal Arizona Workers Act—that provides for the suspension and/or revocation of the business license of Arizona employers who knowingly or intentionally employ unauthorized aliens—is not preempted by the federal Immigration Reform and Control Act. Additionally, the Court held that Arizona's requirement to mandate the usage of the E-Verify system preempted federal law. 131 S. Ct. 624 (2011).

2. Immigration Reform and Control Act of 1986, Pub. L. No. 99-603, 100 Stat. 3359.

I-9 provision<sup>3</sup> as the keystone of IRCA in 1986.<sup>4</sup>

Under the paper-based I-9 scheme, the employee offers identity documents, such as a driver's license, and an employment eligibility document, such as a social security card. The employer then looks at these documents, and the employer is presumed safe if the documents reasonably appear authentic on their face. This is the so-called good faith defense. The employer is then in the clear unless there is evidence that the employer knowingly hired the unauthorized worker.

In 1994, a unanimous recommendation was made by the bipartisan U.S. Commission on Immigration Reform to institute an electronic employment verification system. Our panelist today, Representative Morrison, was on that commission. It wasn't until 1996 that a more mechanized system of employment verification was introduced through the Illegal Immigration Reform and Immigrant Responsibility Act, otherwise known as IIRIRA.<sup>5</sup> But, even then, the program was only authorized as a pilot program which, after one year, became the Basic Pilot Program.

In 1997, the Basic Pilot Program allowed employers, on a voluntary basis and only in five states, to electronically verify the work eligibility of a new hire. Congress extended the program to all fifty states, but it continued on a pilot and voluntary basis. Now, in 2007, the Department of Homeland Security ("DHS") changed the name of the Basic Pilot Program to E-Verify, and, the same year, the Office of Management and Budget instructed federal agencies to utilize the E-Verify system for all new employees.

E-Verify is an Internet-based system designed as a tool for employers to electronically verify employment eligibility. E-Verify is a complement to the I-9 paperwork process; it doesn't replace it. Specifically, E-Verify compares employee information required by the I-9 form against more than 455 million Social Security Administration ("SSA") records, more than 122 million Department of State passport records, and more than eighty million [DHS] immigration records. So it's pinging these databases to verify both identity and employment eligibility, using the information that was put into the I-9 form upon hire.

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3. The I-9 is a paper-based form through which employees record identification documents demonstrating employment eligibility. Employers must examine the identification documents and keep records of compliance with the I-9 paper-based, employment eligibility verification system. *See* *Ariz. Contractors. Ass'n, Inc. v. Napolitano*, 526 F. Supp. 2d 968, 972 (D. Ariz. 2007).

4. Transcript of Oral Argument at 28, *Chamber of Commerce v. Whiting*, 131 S. Ct. 624 (2011), available at <http://online.wsj.com/public/resources/documents/scotus10-chamber1208.pdf> (last visited July 28, 2011).

5. Illegal Immigration Reform and Immigrant Responsibility Act of 1996, Pub. L. No. 104-208, 110 Stat. 3009 (codified in scattered sections of 8 U.S.C.).

Expanding yet again, beginning September 8, 2009, federal contractors and subcontractors became required to participate in E-Verify pursuant to federal regulation.

Then in January 2008, Arizona enacted the Legal Arizona Workers Act,<sup>6</sup> requiring all public and private employers to check the employment eligibility of new employees through E-Verify. This Arizona law is the subject of current litigation before the U.S. Supreme Court in a case entitled *Chamber of Commerce v. Whiting*.<sup>7</sup>

Now, stepping back and looking at IRCA, Congress developed this as a comprehensive scheme to prohibit unauthorized employment. Congress was focusing on balancing at least three difficult problems: first, minimizing burdens on the employer; second, minimizing discrimination against people who are permitted to be hired—so this isn't supposed to be a system that discriminates, this is supposed to be a mechanism that eliminates discrimination; and third, it is supposed to minimize the hiring of people who are not permitted to be hired.

The resulting IRCA scheme is a careful and delicate balance. It imposes both a fine for illegal hiring and a fine for discrimination. The Legal Arizona Workers Act provides that if an employer hires an unauthorized worker, the employer loses its license to do business, instead of merely being fined.

As Justice Breyer noted during the U.S. Supreme Court oral argument on June 8, 2010, that scheme amplifies the incentive to terminate those who appear unauthorized to work because it's actually silent as to the disincentive to discriminate. He explains, "If you're a businessman, every incentive under that law is to call close questions against hiring this person." In contrast, "[u]nder the Federal law, every incentive is to look at it carefully [so as not to discriminate]."<sup>8</sup>

The Legal Arizona Workers Act also requires businesses to use E-Verify, and, if they fail to do so, they cannot receive any grants, loans, or performance-based incentives. As one of our panelists, Dr. Marc Rosenblum, explains in his recent report on E-Verify,<sup>9</sup> fourteen other states also require certain employees in the state to be checked using E-Verify, including four states—Alabama, Mississippi, South Carolina, and Utah—which similar to Arizona, require all employers to participate in E-Verify.

Mandatory use of E-Verify has been a subject of proposed federal legislation for years. In 2005, a bill, passed in the House by a vote of 239 to 182,

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6. Ariz. Rev. Stat. Ann. § 23-212 (2011).

7. *Chamber of Commerce v. Candelaria*, 130 S. Ct. 3498 (2010), *cert. granted*, 78 U.S.L.W. 3762 (U.S. Jun. 28, 2010) (No. 09-115).

8. Transcript of Oral Argument at 33, *Chamber of Commerce v. Whiting*, 131 S. Ct. 624 (2010), *available at* <http://online.wsj.com/public/resources/documents/scotus10-chamber1208.pdf> (last visited July 28, 2011).

9. MARC ROSENBLUM, MIGRATION POLICY INST., *E-VERIFY: STRENGTHS, WEAKNESSES, AND PROPOSALS FOR REFORM* (2011).

sought to make employment verification a requirement for all employers.<sup>10</sup> Both major pieces of proposed legislation on comprehensive immigration reform in 2006<sup>11</sup> and 2007<sup>12</sup> also contained provisions to mandate electronic employment verification by employers. In addition to the mandatory use of E-Verify, it was also the subject of the [Secure America Through Verification and Enforcement Act] (“SAVE”) Act,<sup>13</sup> a bill in the 110th Congress that almost garnered the requisite number of signatures for a successful discharge petition in the House of Representatives. Finally, in the new Congress, leaders in the new Republican majority have actively voiced their interest in making E-Verify mandatory for all employers.

It is becoming clear that the expansion or mandatory use of E-Verify is potentially on the horizon. Our panelists today will not only help us understand the legal battle currently before the Supreme Court in *Chamber of Commerce v. Whiting*, but also help us understand the policy implications of any expansion of the use of E-Verify. *Chamber of Commerce v. Whiting* represents the possibility that states and even local municipalities may have the ability to make E-Verify mandatory for employers in their jurisdiction—creating a patchwork of rules nationwide. Some states require E-Verify, whereas other states may not.

Furthermore, statements by Representative Gallegly, Chairman of the House Judiciary Committee’s Immigration Panel, and many other Republicans as well as many Democrats and Obama Administration officials, represent a willingness to make E-Verify mandatory. So we’re looking at both what’s happening in the Supreme Court and what could happen in the states as well as on the federal level.

First, there is the issue of effectiveness, which our panelists will speak of, in catching unauthorized workers. Independent analyses of the E-Verify program by the Government Accountability Office and a Maryland research group known as Westat shows that if an unauthorized worker presents genuine identity and employment eligibility documents that are borrowed or stolen, E-Verify will erroneously confirm them as an authorized worker. The report estimated, in 2009, that fifty-four percent of unauthorized workers screened through E-Verify were erroneously approved as work authorized. That means that E-Verify failed to do the job it is intended to do more than half the time.

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10. Border Protection, Antiterrorism, and Illegal Immigration Control of 2005, H.R. 4437, 109th Cong. (2005).

11. Comprehensive Immigration Reform Act of 2006, S. 2611, 109th Cong. (2006).

12. Comprehensive Immigration Reform Act of 2007, S. 1348, 110th Cong. (2007).

13. Secure America Through Verification and Enforcement Act of 2009, H.R. 3308, 111th Cong. (2009).

Now the supporters of E-Verify will say, “Well, so it’s not perfect. So what? At least it does something. At least it catches some of them.” Well, there’s another issue that our panelists will discuss, which is the harm it does to lawful workers. The mandatory use of E-Verify does not mean employment authorization inquiries are only for foreign workers. When it’s mandatory, it’s mandatory for all workers. Obviously you can’t decide who’s the worker that you’re going to check. It’s a check on all workers.

Thus, a federally commissioned study of E-Verify<sup>14</sup> showed that over ninety-six percent of workers queried through E-Verify were approved as authorized workers. However, while E-Verify’s accuracy rates have increased, the [DHS] and Social Security Administration databases, upon which E-Verify relies, contain errors. So how do those errors affect U.S. workers? Well, for example, workers who naturalize through marriage or have multiple or hyphenated surnames may receive erroneous results from E-Verify. When problems are found, employers are required, to notify workers of a tentative nonconfirmation, known as a “TNC,” and give the employee an opportunity to contest the initial finding.

The Westat report finds that 0.8 percent of authorized workers were shown to be unauthorized. So authorized workers were shown to be unauthorized. Another report by Los Angeles County<sup>15</sup> showed that error rate to be as high as 2.7 percent. But let’s say that if it’s made mandatory, even if the error rate were only one percent, that would be one percent of 163 million, if we’re looking at 163 million workers in the United States. Well, 1.6 million authorized workers would be unable to work until they could verify their work authorization status.

More troubling is the incentive to terminate that Justice Breyer mentioned, under the Arizona Legal Workers Act. A survey of immigrant workers in Arizona found that 33.5 percent of those found tentatively unconfirmed initially through the system, had been unlawfully fired. They weren’t given the chance to correct their tentative nonconfirmation; to fix the database; to say, “I’ve changed my name since I was married.” And as a result, if we look at whether it’s made mandatory with an error rate of one percent of authorized workers shown to be unauthorized and if a third are terminated without being notified of the tentative nonconfirmation to contest and seek corrections to those databases, we’re looking at over 536,000 work authorized people per year who will lose their jobs. You can extrapolate that there will be that type of discrimination that authorized workers will lose their jobs.

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14. WESTAT, FINDINGS OF THE E-VERIFY® PROGRAM EVALUATION (2009), [http://www.uscis.gov/USCIS/E-Verify/E-Verify/Final%20E-Verify%20Report%2012-16-09\\_2.pdf](http://www.uscis.gov/USCIS/E-Verify/E-Verify/Final%20E-Verify%20Report%2012-16-09_2.pdf) (last visited August 18, 2011).

15. COAL. FOR HUMANE IMMIGRANT RIGHTS OF LOS ANGELES, ANALYSIS: E-VERIFY OF LOS ANGELES COUNTY (2009), <http://www.chirla.org/sites/default/files/E-Verify.pdf>.

Third, there's a financial cost which I will let our guests speak on—for example, Bloomberg News Service said that making E-Verify mandatory would cost \$2.7 billion a year and would also burden businesses.<sup>16</sup> There's the issue of prescreening—using E-Verify before someone is even employed—which raises issues as well, which our guests will speak of. Some businesses lack the resources to even use E-Verify.

Then, there's the elephant in the room. I-9 is a compliance mechanism. E-Verify is also a compliance mechanism, but somewhere along the way, it became confused with a deportation strategy. Calls for mandatory E-Verify tend to portray the program as the solution to our illegal immigration problem and a way to generate jobs for unemployed Americans. The elephant in the room is that significant portions of the U.S. economy depend on documented, immigrant, foreign labor. Not only that, but looking at E-Verify as becoming mandatory, individuals are focused on it as the solution to the immigration problem without looking at comprehensive immigration reform and understanding the needs of our employers.

**CONGRESSMAN MORRISON:** First of all, thank you all for coming. It's a pleasure to have a chance to talk to people who may get to resolve this problem in their professional careers. I've been working on it for twenty-five years and we're not there yet, so we probably have plenty to do in this field—if you're interested in it.

I'd like to suggest that it's very important to put this discussion in a context, and the context is, how does the United States operate a successful legal immigration regime that has credibility with the American people? I think I'm the only person on this panel who has ever actually had to vote on legislation generally, and legislation in this area, and so I bring to this discussion the perspective of the people who have to be persuaded about what the right thing to do is about these difficult questions. And I think it's very important, if you believe in immigration as a central part of the American story, that we need to find a way to have that be something that has credibility and support among Americans.

And everybody is against illegal immigration. The issue isn't whether we should have a system that is not conforming to law, the challenge is how to you actually have a system that operates within legal standards and is not beset by the problem we currently have with so many millions of people here on an unauthorized basis.

Some people want to use this debate about E-Verify to advance the undoing of the mistakes of the past, undoing the fact that there are eleven million people here illegally and that somehow, there's some technological fix that's going to fix that. I think that's wrong-headed. What we can do, however, is create a

16. Jason Arvello, *'Free' E-Verify May Cost Small Businesses \$2.6 billion: Insight*, BLOOMBERG, Jan. 28, 2011.

legally-conforming future, and that's really what this discussion ought to be about—how we do that.

Now there really is no new policy being debated here. Congress, in 1986, set a policy that still appeals to people on an intellectual level of what you have to do if you are interested in preventing people from coming to the United States in substantial numbers and remaining illegally, whether they entered legally or they entered illegally. That is, most people who come here illegally initially or who come legally and overstay either, initially have the intention of coming here to work or, in order to stay here without legal status, have to work; so that employment is at the center of the sustenance of any substantial population of people who are unauthorized.

That's what Congress decided in 1986, that if there was going to be a legal regime—and at that point, we were debating two million, three million, whatever number you wanted to accept—with two or three million people present in the United States on an unauthorized basis. Obviously, measured that way, the 1986 law was a total failure. But the idea at the center of it was that this isn't a border problem—you can only do a certain amount at the border—but this is a workplace problem and, if you're serious about it, you've got to deal with the workplace.

I don't think anything's changed about that policy decision. What we're debating is how to do something at the workplace, and there are no easy and simpleminded solutions because, if there were, even with all our political problems as a country, we would have done them. We've thrown billions of dollars at this problem and I don't know how many trees have been sacrificed in pursuit of the debate, but we are not much closer to a solution than we were in 1986.

So 1986, to me, is the time when we got the policy right and the twenty-five years in between is when we've gotten the implementation wrong. So, it's in that perspective that I think you should think about this and not get too hung up in all the technical arguments without answering this question: how do we solve this problem? Because, if we do not have a way to prevent people from being employed if they're unauthorized, then there will be millions of unauthorized people here. It's a simple economic fact. The border will be breached in many ways. Many of the people who are here unauthorized came legally and then overstayed. It isn't a problem that's going to be solved at the border. It's a problem that is either going to be solved at the workplace or not at all.

And that really is the question that people have to struggle with; how much burden and on whom are we willing to accept at the workplace, in order to prevent the presence of large numbers of unauthorized workers? It is a very simple question to state and a very hard question to resolve. And most of what you hear in the discussion of all the technicalities of E-Verify tend, sometimes, to obscure that fundamental question, because that's the choice.

The other thing I'd say, putting it in context, is there are a lot of people in Congress who will feel themselves politically better off for voting for an expansion of E-Verify or a mandatory E-Verify without regard to all of the niceties that you'll hear discussed on this panel about fixing this or fixing that. The political momentum is in favor of enforcement. Billions on the border, much of it wasted; billions for the workplace, much of it wasted. The politics are pushing away from a rational solution to this problem, a careful solution to this problem. The longer this is a debate and not a kind of problem-solving implementation, the more likely that we'll just get all of the downsides and miss the upsides, as we did in 1986.

So, I have just a few other observations. First, I'd like to talk about the workplace initiative as a prevention strategy. I think when it's talked about as enforcement, it gets confused about what is the objective. In my opinion, the objective is not to use a worksite program to get rid of the eleven million people already here. The question of what to do about the eleven million people is really a separate policy judgment. I have my opinions on that, but that's not the purpose of this discussion.

If you see the worksite prevention being confused with fixing the problem that we created over the last twenty-five years, well you're never going to get any agreement on preventing what might happen in the future. And I actually think the American people are very open to some reasonable resolution of the mistaken eleven million if they can believe that the future is not the creation of a new eleven million. So I think it's very important to think in prevention terms.

If you think in prevention terms, the last thing you would ever do—which is something that the Bush and Obama Administrations did—is to go back and check existing employees. Because once you go back there, you've really changed this from a preventing the incentive to come and get a new job into some kind of prior enforcement regime, and that was done in the contractor regulation. Despite the litigation, which was unsuccessful, the 1986 law forbids the use of the current I-9 E-Verify scheme to get at existing employees, but it's the law now for federal contractors.

So prevention is important. Let's think about how this becomes a disincentive to come in the future. No system screening people at the worksite will be perfect, number one. And any system will make it more attractive to be employed off the books. So there's two parts to this problem. The one part is the compliant employer. Most employers are compliant. They obey laws that they don't agree with everyday. Most employers just follow the law because that's the way to do business. Obviously, publicly-traded corporations are at great risk for violating the law, but most business people obey the law; they withhold the taxes, they send the taxes in, etc. They may or may not agree with it. So there's a compliant community. And then there's a noncompliant community. We can argue about how big the two of them are, but I think the first is much bigger than the second.

But there is now and there will be, during any enforcement regime, any prevention regime, an off-the-books problem. There's an off-the-books problem right now with American citizens, without regard to people who are unauthorized to work. If we're serious about this problem and some other problems, we should have a much increased focus on enforcing labor laws and insisting on on-the-books employment throughout our economy. We don't even enforce the wages and hours laws effectively right now.

So that's a part of this, and anybody who wants any of this to work needs to recognize this. The Joint Tax Committee said it would cost seventeen billion dollars over ten years if you made E-Verify mandatory, and the reason for that number they said was a number of taxpayers would go off the books. Whether that number is right or not, it's directionally correct; that is, you will get more of it. Now finally, just a few things about E-Verify itself.

My colleague Paul Donnelly, who's here, and I have been working on this going back to the Jordan Commission. He was also a staff member of mine when I was in Congress and [assisted with] the 1990 Act. So we're old and gray and rather cranky about the subject. But we found the Westat report in plain sight on the DHS website. Nobody was talking about it and everybody was talking about false negatives; that is, people who are misidentified as unauthorized, which is a number that has been shrinking. But what we found really interesting in the Westat report were false positives. The fact that, essentially, over half the time, a person who is not authorized could be found to be authorized because of impostor documents. And that's like flipping a coin.

So the whole point of this system is not to catch American citizens. The whole point of this is to prevent employment of people who are not authorized. So, if half the time that group is misidentified, then this system is failing. And it won't succeed unless, in some fashion, the identity of people is actually verified, as opposed to numbers that they give or documents they present. I-9 is a document system. E-Verify is a number and document system. It is easy to get impostor documents and an impostor identity and beat this system. When the Swift Meatpacking Company was raided, they had about 6,000 employees; 1,300 of their employees, all of whom had been run through E-Verify, were carted off as unauthorized. This is a serious problem, and hiding from this problem won't get us a solution.

So the impostor problem is very serious and the problems of what it takes to verify identity are full of trade-offs between privacy and prevention. And you can get into a long discussion about all of those, but I think, at the end of the day, we either are going to solve those problems in some way or we're going to give up on it, and then we're going to have lots of people here unauthorized, plain and simple. Some people think if you have enough legal visas, that you'll solve the problem. But the fact is, illegal employment is always cheaper than legal employment, so there'll still be a lot of incentives in the economic system if you don't have any enforcement on the worksite end.

Two final things. One, paper raids—which is the new, humane Obama plan instead of real raids—actually is the biggest breeder of going out and getting impostor documents you could ever imagine. People are being fired for having inadequate documents. Where do you think they go next? To buy impostor documents from the black market that provides them. So, this problem is being made worse, not better, by paper raids, although they're more humane, for sure.

And then, finally, with respect to how we're going to get at this problem, I think that the scariest thing we might do is to spend billions more dollars expanding E-Verify without solving the identity problem and the other trade-offs that have to be met. But the Supreme Court is going to decide this question as to whether the states can go ahead and the states are going ahead, and they will continue to go ahead. Now, Arizona was very smart in what it did in this piece of legislation. And no other state has actually done exactly what it did. Arizona took the 1986 law, which has a very specific exemption to preemption having to do with business licenses, and they took that language and made that the centerpiece of its requirement that E-Verify and other verification be done.

Whether the Supreme Court will find that it is enough to overcome other arguments about preemption or not, I won't try to guess. But the reason that the law passed muster in the Ninth Circuit was because of that very clever drafting. And if that's upheld, then I predict that many states in the country will pursue that, and some people have said, "Well, losing a business license is capital punishment, so that clearly can't be compared to a fine." But Congress may have opened the door to that by the language employed in 1986, so that's a very interesting question to watch. But the people who drafted this were not stupid. They knew exactly the channel they were trying to drive through.

**PETER ASAAD:** Now we turn to Dr. Marc Rosenblum.

**DR. ROSENBLUM:** Well, thank you for coming, everybody and including me on this prestigious panel. It's a tough act to follow and an honor to follow Congressman Morrison. But I'll reiterate a couple of points and maybe expand on a couple of points. I'll also tell you that I brought copies of my recent E-Verify report and it's back on the back table, so please pick that up.

Let me first, to reiterate, tell you that this program has been around since 1997. It's really only been in use since 2005. In 2005, there were still just 5,000 employers using the system. But it's grown exponentially, as in literally exponentially; it's doubled every year since 2005. And currently, there are 200,000 participating employers, which is about four percent of all employers in the country, and about fourteen million verifications were run last year, which is about a quarter of all hires in a typical year.

So that exponential growth means that most of what we know about E-Verify is based on very recent experience, and we don't still know exactly how the system works, partly because most of this growth has occurred during

the recent economic downturn. So, we still have a lot to learn as this program continues to expand in terms of how it affects labor markets and hiring. And certainly, we don't know how it would work in the context of a different immigration system that did a better job with matching supply and demand. Although, certainly there's no perfect way to do that, and you'll always have compliant employers and non-compliant employers.

But, I agree that it's very important as we think about how to make E-Verify work and how to put it in the context of the broader immigration debate, to have in mind these two different populations of employers; the majority of employers who intend to comply and then a subset of employers who knowingly—or at least suspect that they're hiring unauthorized workers. And, there are employers now who do that in the I-9 context, and there are employers in mandatory E-Verify states who knowingly, or more or less knowingly, hire unauthorized workers because they feel unable to find U.S. workers or because they prefer to hire unauthorized workers since they can pay them less for a variety of reasons.

Designing a system that makes it easy for willingly-compliant employers to comply accurately is a different task than designing a system to prevent willfully-noncompliant employers from finding a way around the system. And clever employers, with office workers who are looking for employment, have a lot of resources to look for ways around the system. So it's really different tasks going after those two different problems.

I believe that E-Verify is a very powerful and important tool to build on the I-9 process and to address what we know is the big flaw in the I-9 system, which is that the I-9 system is a document-based system and it is very vulnerable to document fraud. The employer has the responsibility to look and see if identity documents on their face are genuine and prove work eligibility. Anybody can go down to the flea market and buy a fake ID that looks genuine on its face, so E-Verify was designed to prevent a certain type of fake ID by making sure that the name and the number on the ID match data in DHS and Social Security databases.

Looking at the data that DHS has made available, E-Verify probably prevented about 166,000, unauthorized workers from obtaining employment in 2009 by successfully non-confirming fake IDs. But there are two different vulnerabilities. One is that while E-Verify can identify fake IDs that don't have a genuine name and number on them, it's vulnerable to identity fraud when an unauthorized worker uses a borrowed ID or a stolen ID or a fake ID that has a real name and number on it that are available on the black market.

The system has almost no mechanism designed to prevent this. There are a couple of tools that USCIS<sup>17</sup> has been experimenting with to try to cut down on identity fraud, but for the most part, there is no defense against it right now in E-Verify. The one defense that exists on a small scale is that for certain types of IDs, USCIS has a photo-matching tool, which means that if you use a green card or a passport or an employment authorization document as your identity document and you're using E-Verify, then the employer, in addition to getting the confirmation that the name and number are in the database, will also get a copy of the picture that's on the original ID that was issued and the employer can then match that picture to the ID that they're presented with and make sure that it's not a fake ID with a real number on it and somebody else's picture. But only about two percent of hiring uses those documents. Most hiring uses driver's licenses to prove identity. So the identity fraud issue is one vulnerability and the off-the-books employment is the other vulnerability.

With employers who intend to comply, they are vulnerable to being victims of the identity fraud problem. And so what that means is that employers who use E-Verify and are doing their best have no guarantee that they have a legal workforce. And that's a major disincentive to employers to take on the hassle of using E-Verify because, even if you do everything right, you may not have a legal workforce. And so employers really don't get anything out of using E-Verify. They don't get a legal safe harbor and if [Immigrations and Customs Enforcement]<sup>18</sup> does an audit, they may lose their whole workforce. So there's really nothing in it for employers right now.

The off-the-books problem and the identity fraud problem is also an issue for willfully-noncompliant employers because employers can conspire with workers to use identity fraud in a variety of ways and they can just either employ their workers off the books or use E-Verify selectively for some workers and not others or just not use E-Verify even though they're required to do so.

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17. U.S. Citizenship and Immigration Services ("USCIS") is the government agency that oversees lawful immigration to the United States. *See About Us*, USCIS, <http://www.uscis.gov/portal/site/uscis/menuitem.eb1d4c2a3e5b9ac89243c6a7543f6d1a/?vgnextoid=2af29c7755cb9010VgnVCM10000045f3d6a1RCRD&vgnnextchannel=2af29c7755cb9010VgnVCM10000045f3d6a1RCRD>.

18. Immigration and Customs Enforcement ("ICE") is the principal investigative arm of the U.S. Department of Homeland Security. *See ICE Overview*, ICE, <http://www.ice.gov/about/overview/>.

As it has been pointed out, [the Congressional Budget Office]<sup>19</sup> estimates that requiring all employers to use E-Verify without creating an opportunity to legalize their workforce would result in seventeen billion dollars in lost taxes over ten years as a result of existing workers being moved off the books or workers who would be hired on the books being hired off the books instead.

There are limits to E-Verify's ability to do its job. The other point that Peter referred to is that the system also sometimes non-confirms legal workers, and we estimate that happens about one percent of the time; being 0.8 and 2.0 percent of the time—depending on what survey you look at. If all employers were required to screen all new hires, that would be about between 600,000 and 1.2 million workers a year, legal workers who would be wrongly non-confirmed. And between 60,000 and 280,000 workers would lose their jobs or lose some period of employment or somehow face adverse consequences from their employer during that period.

But the other issue with those false non-confirmations is that it creates a lot of uncertainty for employers during the hiring process. In that one to two percent of the time, employers by law have to treat all non-confirmations as tentative non-confirmations and keep workers on the books, treating them as if they were legal workers until workers are given the opportunity to correct those errors. That raises the cost of using the system for employers because most of the time, those workers end up being non-confirmed.

Therefore, to be compliant, employers have to keep workers on their payrolls and train them even though they end up getting non-confirmed. So, it increases the cost of using the system pretty significantly in those cases of non-confirmation. And even though most U.S. workers, most legal workers, are immediately confirmed, about a quarter of the time that people are non-confirmed, those are mistakes. So, it's a significant number and would be a much more significant number in a universal system.

As we think about expanding E-Verify, let me just make a couple of points. One is that all of the problems that exist—identity fraud, identity theft, workers having adverse consequences—all these problems will not only increase absolutely as the system gets bigger but also proportionally, and the reason is that, in a mostly voluntary system like we have now, most E-Verify users are federal contractors and/or large firms.

Nationwide, about ninety percent of employers are small firms with fewer than twenty employees; only about thirty percent of E-Verify users have fewer than twenty employees. So, almost all of the growth that we have ahead of us is among small firms who have less internet access [and] smaller [human resource (“HR”)] departments. Using E-Verify and using it correctly is a much larger

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19. The Congressional Budget Office (“CBO”) is charged with providing nonpartisan analyses to aid in federal budget decision-making and the Congressional budget process. See *About CBO*, CBO, <http://www.cbo.gov/aboutcbo/>.

expense for these small firms than it is for large firms with HR departments who still struggle to use it correctly. So it's quite likely that existing error rates and existing noncompliance rates will increase as a different demographic of employers are required to use the system. That's one point.

A second point I want to make is that the photo-matching tool that USCIS uses and the other major innovation that USCIS has implemented in the last few years, which is its own sort of electronic auditing of employers to look for cases of employer misuse and to look for identity fraud, have limited ability to address these weaknesses in the system and misuse by employers through electronic monitoring and through existing photo-matching tools. And basically, the reason is that most off-the-books employment and most identity fraud don't show up through long-distance electronic auditing. There's no sort of footprint in the electronic record that shows if you're selectively screening your workers. We don't have that sophisticated of an electronic monitoring tool.

It goes very much to the point that [Congressman] Morrison raised of who is going to bear the costs of making this system work. Because, anything that we do to prevent false confirmations, to make sure that the system does a better job of preventing unauthorized employment, must create additional costs for employers, and, especially, must create additional costs for legal workers. And the likeliest tool, or one of the tools that we might think about to do that is to create a biometric system. A biometric system would be much less vulnerable to identity fraud, but the way we would—the steps we'd have to take to create a biometric system—include all U.S. citizens and all legal workers would have to give their biometrics to the government to create a biometric database that could check against and all employers would have to capture biometrics when they hire somebody. So, they'd have to have fingerprint-scanning technology at the worksites or use subcontractors who are going to do that scanning, which raises liability issues.

But, in any event, this is a major expansion beyond what E-Verify does now. But those are the kinds of who bears the costs of fixing the system questions that we have to raise as we think about, especially if we think about using this as an enforcement tool rather than sort of a compliance tool.

So let me just finally mention that having raised this issue of biometrics and the costs associated with biometrics, I also want to put in a pitch for a couple of pilot programs that USCIS is initiating that I think should be explored as alternatives to biometrics and as alternative strategies for strengthening this system. And one of them is further expansion of the photo-matching tool to include state drivers licenses. To do that likely would require congressional action to mandate that states participate, and the debate over the Real ID Act<sup>20</sup> has shown how difficult that is. But that would be a powerful tool to help

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20. REAL ID Act of 2005, Pub. L 109-13, 119 Stat. 302 (2005).

employers who want to comply do so successfully. It's not going to do anything against the intentionally noncompliant employers but a powerful potential tool for employers who intend to comply.

And then the other tool that I think is quite important is a self-check tool which would allow workers to check their own E-Verify records and to confirm themselves in the system before they go to get employment. This is an important tool because it should—for workers who use this—greatly reduce false non-confirmations and employer misuse of the system or the consequences of employer misuse of the system. But it's also potentially a powerful anti-fraud tool because, although this is not how USCIS is piloting it initially, in principle, it creates the opportunity for workers to lock their own social security numbers and to prevent people from using their number without their knowledge. So I think it's potentially a way to substantially reduce fraud without having to resort to biometrics, which may be desirable both from a cost perspective and from privacy and civil liberties perspectives.

**PETERASAAD:** Miss Tulli, your organization has produced several reports highlighting many of the concerns raised in our panel discussion today. And to prevent reiteration of that same discussion, I wanted to ask more about a report that your organization produced, about how errors in E-Verify databases impact U.S. citizens and lawfully-present immigrants. There are cases cited where authorized workers, lawful permanent residents and U.S. citizens, had difficulty clarifying denials of work authorization under E-Verify. Can you discuss with us some of these cases you and others have seen at [the National Immigration Law Center (“NILC”)]<sup>21</sup> and how they were handled? Can you walk us through the path to the resolution where they ultimately resolved? How long did it take? What was the cost to the employers?

**EMILY TULLI:** As Peter mentioned, at NILC we have a policy advocacy wing but we also provide technical assistance to worker advocates and workers who are going through a variety of immigrant and workplace-related issues and specifically with E-Verify.

I think it may be useful to ground our discussion today a little bit in a real worker's saga. So, I'm just going to talk a little bit about Jessica. She was born and raised in Florida, and she took a job at a major telecommunications company in Florida [during the] fall of this year. And as we think through her story, I think it's useful to consider—as the panelists have set up for us—if E-Verify was to become mandatory and all workers were input into this system.

So, as we all do, she began employment there; she filled out typical I-9 paperwork, and her employer ran her through E-Verify. She wasn't aware of what she was being run through. They ran her through the system—that's what

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21. *About Us*, NAT'L IMMIGRATION LAW CTR., <http://www.nilc.org/nilcinfo/index.htm> (last visited July 28, 2011).

they told her. And, after a day of work, they came back to her and said, “You’re showing up as not authorized to work. You need to go and resolve this.” And she was confused—[she was] born and raised in Florida.

So, as a first step, she went home, and she got some more vital documents, identity documents, and brought them back to her employer to try and resolve it. Well, that didn’t work so the employer issued her a tentative nonconfirmation, as they’re supposed to under the program rules, and she went to her local Social Security office to try and resolve the issue.

Now, when she went to her local Social Security office—and remember, she’s taking unpaid time, at this point, so she’s not working; she’s an hourly, low-wage worker. [The Social Security Administration (“SSA”)] is open in her area between 9:00 [a.m.] and 4:00 [p.m.], so she had to go during those hours. And Social Security inputs her information and says, “You’re fine. We can see here that you’re work authorized. Go back to your employer. They’ve made a mistake.” So she’s now excited. She goes back to her employer, being told by the SSA that she’s work authorized, which she knew, and the employer tells her, “Nope, you’re still not coming up in our system;” again, not specifying the system, not giving her any information.

At this point, she’s beside herself. She’s frantic. She had been unemployed before she got this job. So she decides to start Googling and she calls legal services organizations in Florida. After talking to an attorney at a legal services organization, they sent her to the regional [Equal Employment Opportunity Commission (“EEOC”)] office. So everybody here knows that EEOC is most likely not going to have jurisdiction over E-Verify issues in this sense. But she very dutifully goes to the EEOC office to try and resolve the complaint and at this point she’s been issued that [f that people are talking about. So as she’s trying to resolve it, she couldn’t resolve it within the seven days; now she has that final nonconfirmation, she’s been terminated.

At the EEOC, they listened very patiently and told her, “Well, you don’t have a discrimination claim but maybe you should call E-Verify.” This is the first time this worker who has been fired has heard the word E-Verify and knows anything about it. It’s from the EEOC, which doesn’t have jurisdiction over her claim.

So she went online and she called a USCIS hotline number. Again, she called that hotline number between 9:00 [a.m.] and 5:00 [p.m.] because that’s when they’re available and, luckily, she speaks English. At this point, the hotline is only available in English and Spanish, so if she spoke another language it would be difficult to get some help. She waits on the line for over an hour and then finally talks to a representative and what do they tell her? “Well, you’re in our system fine. You’re work authorized. Go back to your employer, who you’ve now been terminated from, and just tell them that you’re work authorized. We can see here that you’re work authorized.”

So she says, “OK, great. This is exciting. USCIS is telling me that they have me in their system. This is going to be fixed. Can you send me a piece of paper

indicating that, that I can then take to my employer?” “No, we can’t do that.” Though USCIS does offer to call the employer. And USCIS calls her employer and tries to work it out.

Now in this interim, it took about a week of USCIS talking to her employer; her following up with the employer and the employer still saying, “We can’t figure out what the problem is. We know USCIS is calling us. We understand. We can’t figure out what the problem is.” In the interim of this period, when she’s not hearing back, she starts job searching. And I probably didn’t do a great job laying out the timeline but she was unemployed from the time she received the FNC and was terminated until she found another position, not at this employer. She was unemployed for three months. She decides that she’s just not going to go back to the employer. Whether they can figure it out with USCIS or not, she doesn’t want to go back because they use E-Verify and she doesn’t want to have to go through that again. So at that point, she’s now taken another position. The USCIS and her original employer, the telecommunications company, have figured out what the problem was and now they’re willing to take her on now that she’s gotten another position which, of course, is for two dollars less an hour. I think that is a really sort of compelling narrative and I think what’s important to underscore is that Jessica, who I’ve talked to numerous times, is actually incredibly capable. She’s young, she’s Internet savvy, she is culturally competent. She’s not a work-authorized immigrant worker; she was born in this country, so she has some understanding of how U.S. government works. She has a family who supported her. So for her, three months without employment didn’t mean an eviction, utilities off, all those other things that come with the reality of working in a low-wage industry; but instead, she had a family that could support her, provide her with a space to live.

**JON FEERE:** What was the error?

**EMILY TULLI:** The error was actually on the employer’s part. [She had] a two-part last name and they were putting two spaces instead of one space between the name, and that caused the non-confirmation.

**JON FEERE:** And that was an employer who tried to do everything right and help the worker, and that’s the other thing that doesn’t always work right.

**EMILY TULLI:** Yes.

**PETER ASAAD:** And this is a story about a non-savvy, if you will, employee who doesn’t understand the ins and outs of the system. But there’s also the story of Traci Hong, who is—who’s been on the House Immigration Subcommittee for several years. And when she was first hired, there was a

requirement of all federal government employees to go through E-Verify. Well, she certainly knows the ins and outs more than just about any of us, but there was a mismatch. I'm sure Marc knows a little bit more about this. There was a mismatch in her case and it took her quite some time and quite some difficulty to go through that system and fix the database error.

But I just want to proceed a little bit to Mr. Feere. Your organization, the Center for Immigration Studies,<sup>22</sup> has produced reports showing the benefits of E-Verify and it's really important to understand those arguments. Would you provide us some of those conclusions; why your organization has reached those conclusions?

**JON FEERE:** Alright. Well, first off, let me just say I might be the only panelist up here who can say that my organization uses E-Verify. I don't know if any of you guys do, but we do. We're a small nonprofit and, like all nonprofits, we're always pinching pennies to make sure that we can maintain our staff. And despite what some opponents of E-Verify say, it hasn't been some sort of financial disaster. We aren't closing up shop because of E-Verify. It's very straightforward, our manager has no problem with it, and it's working to make sure that anyone who's in our office is legally employable.

Couple of things I wanted to mention as far as statistics go. Right now, about a thousand businesses sign up for it every week, some willingly, some because they're in a state that requires it. And from the research we can see, it means that over one out of every four new hires actually is run through E-Verify. Ninety-nine percent of eligible workers are confirmed to work instantaneously; three to five seconds you get a response back. Fewer than one percent of eligible workers need to update their records to be confirmed. Certainly there are still some errors in the system. As you mentioned before, if you had changed your last name or if the employer screwed up, then certainly it has to be corrected. But for the most part, things are correct. We just heard the example of the staffer; she was able to correct it.

Now we do view this as part of the solution to illegal immigration, as did the commissions in the [19]90's. And if we go back to 1986, when we had the first large-scale, comprehensive amnesty bill, the bill was sold as a two-part deal; it was legalization for those were here illegally and it was also the promise of future enforcement of immigration laws. It also, as we heard, criminalized the hiring of illegal immigrants.

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22. *About CIS*, THE CTR. FOR IMMIGRATION STUDIES, <http://www.cis.org/About> (last visited July 28, 2011).

Well it wasn't until a decade or so later that we finally were provided some opportunity to determine whether or not their employees—or their potential employees—were legally authorized to work and that was what eventually became the E-Verify system. And what concerns us is that here we are now, twenty-five years later—a quarter of a century out from the 1986 amnesty—and we're still seeing a lot of effort by those who supported the amnesty to try and stop the growth of any type of workplace verification system.

And I think Americans are concerned about that as well. I think people, by and large, distrust the federal government's willingness to enforce immigration laws and the idea—I've heard it mentioned kind of subtly a couple of times here that we need another pathway to citizenship for employees who are here legally. But what would that do? What would that solve? We already know that if you were to legalize illegal immigrants with promises of future enforcement or promises of some new type of verification program, it's going to be another twenty-five years or so before it ever gets enforced and during that time, there will be lawsuits to try and prevent it. Some of the groups that have filed lawsuits against using E-Verify are groups that, years ago, supposedly were in favor of making sure there was workplace compliance.

So the idea, for us, is that mass legalization, as the Congressman said, was a failure. We tried it in [19]86. If the goal was to reduce illegal immigration, clearly it didn't work. People are suggesting we try it again. It's not going to work without enforcement. The other option that we often hear from advocates of mass legalization is that if we don't do that, the only other option is mass deportation. And of course, no one's calling for mass deportation either.

And that's why we think the middle ground is the policy of attrition, where you slowly shrink the illegal immigrant population over time by sending the message that if you come legally, we'll help you out. In fact, there should be a warmer welcome for those who are admitted legally. But if you are not coming here through proper channels, we're not going to accommodate you as easily. You'll not be able to find a job. And that's really what we're talking about, is the jobs magnet; that's what encourages illegal immigration. And the way you turn off that magnet is by requiring businesses to use programs like E-Verify. Is it 100 percent perfect? Of course not. There aren't any government programs that are 100 percent perfect. Is it ready for prime time? I don't think the government necessarily thinks it is but we're certainly getting there. And as was mentioned, there is the policy of adding photo IDs to E-Verify, which would reduce the fraud rates that much more. You should know that about ninety-eight percent of illegal immigrants use a social security number—a fake ID with their name but a fake number. And E-Verify can catch that very easily because they're going to match the name and the number and realize, “Well, there's no match here,” or the number is not even legitimate. And that's ninety-eight percent of the problem; ninety-eight percent of illegal immigrants do that. The remainder, of course, are using black market IDs which are very expensive and very difficult to come across. And for that, the photo ID process,

if it is attached and if there's support for it, could certainly rule that out.

But as far as the fallout goes from not doing anything, I mean there's a very high cost to cheap labor that I think people tend to forget. We're talking about exploitation here. We're talking about child labor; young kids being worked many hours at a lot of these meatpacking plants, for example, that were the focus of ICE raids that we heard about earlier. You can put an end to this if there's a serious commitment to workplace enforcement. And so far, I just don't think that there is. And I haven't heard much in the way of solutions rather than additional legalization programs.

Let me give you one quick example here and I'm going to close. There's a company that was the focus of an ICE raid in 2006. It was a meatpacking company, Swift & Company. We found—this is well-known—that there were 1,300 illegal immigrants who were found to have been working at six different meat processing plants. I'm not certain if all of them were E-Verify. I know there's some claims that they were. We do know that the business owners were instructing the employees on how to get around the system, where to buy fake IDs. The business wasn't trying to uphold the law.

About twenty-three percent of Swift's production workers were illegal immigrants. Now government data—and this is just so troubling to me—government data shows that the average wages of meatpackers in 2007 were forty-five percent lower than what they were in 1980, and that's adjusting for inflation.<sup>23</sup> That's a significant problem and it's the result of not just porous borders but a lack of enforcement at the workplace.

Well guess what. After the raid occurred, after the illegal immigrants were removed from the jobs, people lined up around the corners to take those jobs. And in fact, we found—or our Pulitzer Prize-winning journalist who works for us found—that wages and bonuses rose, on average, eight percent with the departure of illegal immigrants. I think that's a good thing. I don't know who can say that it's not a good thing.

I'll leave it there.

**PETER ASAAD:** Thank you so much, Jon Feere, for that perspective as well. Now Mr. Hampe, you're a partner of Baker & McKenzie. You represent clients. You've also worked on legislative efforts and you understand the dynamic of how clients such as the Chamber of Commerce represents many clients that are against E-Verify and we were talking a little bit about solutions to the whole problem. How do you see E-Verify? Is it a solution, a solution to what? Can you put that in your perspective as far as representing clients and understanding legislation as well?

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23. Jerry Kammer, *The 2006 Swift Raids: Assessing the Impact of Immigration Enforcement Actions at Six Facilities* (Mar. 2009), <http://www.cis.org/2006SwiftRaids>.

**CARL HAMPE:** Sure. I think the question properly focuses on the point Bruce Morrison made at the start, which is if you're serious about having an immigration system with robust legal immigration numbers that the American public can support—which there's sort of mixed support for at the moment—then you simply do have to address the problem of unauthorized employment. It's just a given. So if one is to conclude, as Congress did in 1986, that employers are the entry point and the incentive, that U.S. employment is the incentive for people to come here without authorization, in most instances, then what should employers do; how much should the burden be on employers? And I think employers have responded by saying, in most instances, they are willing to take reasonable measures, as long as they are effective. And that's kind of the rub.

You will find a diversity of opinion among employers. The Chamber has opposed the Arizona statute. I think they wouldn't oppose it under all circumstances. They're certainly willing, I understand, to discuss a federal statute that preempts a patchwork of state statutes and says "Here is the rule," as long as the system in place was effective. And I think when you talk about the large companies that I counsel, that's really the key. Employers want to minimize risk in all aspects of what they do so they can go about doing what they do, which is providing goods, services, and attempting to make a profit. Immigration is a risk factor to the extent the proposals, such as E-Verify, can reduce the risk involved in the hiring and employment process; then they're positive, as long as the requirements are economically rational.

E-Verify is, to some employers, too much, and to some employers, too little and it kind of depends on where you sit. Small employers who may rely on, shall we say, sketchy pools of labor, would probably be uneasy about having E-Verify required of them. Large employers, particularly those with large numbers of unskilled workers and especially those that are publicly traded, have long ago crossed that threshold. They do E-Verify. That's not going to change. They read the ICE best practices. They do as many of the additional best practices that ICE suggests would be undertaken by a compliant employer. And they are constantly looking for a way to reduce their immigration risk. Obviously, if you're a meatpacker or a chicken processor, you're at very high risk and so you undertake most, if not all, of the ICE best practices and you attempt to do it in a way that is compliant with all laws, including the anti-discrimination laws.

So employers are looking for practical solutions. E-Verify is here to stay without question and, at the same time, it doesn't resolve enough of the risks that employers see on all sides of the aisle. Employers don't want to be raided by ICE, they don't want to unfairly deny employment to someone who's authorized, they don't want to be the subject of anti-discrimination suits; they simply want to go about doing their business. And the immigration system, at the moment, at the new employment transaction point and thereafter, simply isn't sufficient.

And the debate, the healthy diversity of opinion you're seeing on this panel merely indicates how challenging it is for the politicians and policymakers, to come up with the systems that would make the risk that employers face in the employment transaction go down. I think employers would like to see legislation that worked but, of course, that's the question: can it happen.

**PETER ASAAD:** Appreciate the perspective very much of the employer. Now sliding over to Professor Vladeck, you're a professor who understands federal jurisdiction and constitutional law. If you would, what you think will happen in the *Chamber of Commerce v. Whiting* case. Now the District Court sided with the Arizona workers; so did the Ninth Circuit. And there have been oral arguments and there've been some comments based on the oral argument questioning from the justices. Where do you see it going and what do you see the consequences being?

**PROFESSOR VLADECK:** Well, I guess I should preface it by saying I hate guessing how the Supreme Court is going to rule because I'm either wrong or I'm right for the wrong reasons. No one actually knows.

That being said, I think one can read your argument here, I think somewhat reliably, to suggest that the Court's inclined to affirm the Ninth Circuit and to thereby hold that IRCA does not preempt the Legal Arizona Workers Act, but Arizona mandating E-Verify actually is permissible.

What I think is going to be interesting is not what the result is, but how the Court writes that opinion. Because I think there are a couple of different ways they can go and how they do it will have, I think, far greater consequences than [merely just affirming].

So let me just sort of briefly elaborate and then throw it back to some of you. The only legal question is what IRCA means when it exempts state laws related to licensing or other similar laws from its expressed preemption provision. So this is not, for example, like the SB 1070 case<sup>24</sup> where the preemption is based on a sort of more general, and less textual, conflict between state and federal law. Here you actually have a case of expressed preemption or not, depending upon whether the Legal Arizona Workers Act is, or is not, a licensing law. And

indeed, most of the oral argument was about that very question: is it a licensing law.

And what the Justices really struggled with was the notion that they could really tell Arizona that by saying, "We will revoke business licenses if you fail to comply with E-Verify," that that somehow wasn't a licensing law. It may be a sort of troubling licensing law, it may be a licensing law that we might not have enacted, but it's about licenses.

Now the argument that Carter Phillips made on behalf of the Chamber of

24. S.B. 1070, 49th Legis., 2d Sess. (Ariz. 2010).

Commerce is that licensing law means, more specifically, laws that go to the conferral on a license and not just the revocation of a license. I don't think it strains credulity to suggest that that's a thin reed on which to rest this entire case, and I think some of the Justices' questions went in that direction.

So I think one way out is for the Court to just hold narrowly that, because the Arizona law specifically imputes, as the sanction, that a business license is revoked—clearly a licensing law within the meaning of 1324a(h)(2)<sup>25</sup>—we don't have to decide anything else.

What's really interesting, though, is throughout the oral argument, on both sides—well, three sides because the federal government argued, too—Justice Scalia kept coming back to this notion that the rules might be different when you have federal policy that is underenforced by the executive branch. And I have to say, I can't think he means it. And the reason why is because if you guys remember [ ], it was Justice Scalia writing for the Supreme Court who basically said, "Article II of the Constitution protects the executive's discretion to enforce federal law." And so, just as Congress cannot command how the president exercises his discretion, nor can Congress make an end run around that by enlisting the states in requiring the enforcement of certain federal laws.

If that logic makes any sense, then it should also hold for states; that states cannot tie the hands of the federal Executive. In other words, underenforcement, although problematic as a policy matter, has no actual bearing on the constitutional analysis; it has no actual bearing on the preemption analysis. I think that has to be right. And so that's why I think we're likely to see an opinion that sort of ducks the underenforcement question, saves it for SB 1070 and really just sort of construes the statute as narrowly as possible because Arizona did, really, what so few of the states have done, which is—at least in this statute's context—rely specifically on the licensing concept.

If that's what the Court holds, and I think it is, it'll be overnight that I think we'll see more and more states moving toward imposing certain kinds of sanctions on employers in the guise of licensing practices. And I think the question is going to be whether the Supreme Court says the sanction has to be in some way related to the ability of the business to function, which I think would still get you the Arizona law but which would not get you anything about immigration in the guise of business licenses.

So I think that's where we'll see how it cashes out. But if I were a betting man, I think it's likely that the Arizona law is going to be upheld.

**PETER ASAAD:** Thank you so much. So it seems, Congressman Morrison, was onto something when he actually said that it was well-crafted and well-written. And Professor Vladeck, who says, "Let's look at how it's written. Let's look at how the whole thing is going to be written, how narrow will it be." But we could end up then, in fact, with a template, if you will, for other

25. 8 U.S.C. § 1324a(h)(2) (2006) (making employment of unauthorized noncitizens unlawful).

states and localities to pass successful legislation.

**CONGRESSMAN MORRISON:** And indeed, that may in itself provide it if it's just [for Congress to revisit the issue].

**CARL HAMPE:** Yes. Actually, I was just going to say that. Bruce, maybe you'd agree that if the Supreme Court said, "OK, the Arizona statute is fine," ten other states rush to present those bills to their legislatures, that might bring the Chamber and other groups aligned with them back to the Hill to say, "Alright, let's preempt this once and for all," and then the question would be, "OK, under what standards?" Because that kind of opens up the whole basis upon which one has an E-Verify program.

**CONGRESSMAN MORRISON:** That would seem to make sense but I spent four years making that argument on behalf of the Society for Human Resources Management that this—I mean I said then, and it proved out, that the Arizona law was going to be upheld because of the narrow tailoring of the language. Nobody wanted to hear it at the time. Now I guess it's conventional wisdom.

But the fact is that NumbersUSA—to take one organization, for instance—actually has built its grassroots base on advocating state laws and they're going to get a big boost out of this case if it goes the way Professor Vladeck suggests and they're going to do a lot of organizing, they're going to get a lot of members off of it. And it's not entirely clear that the Republican majority in the House will want to fix the problem once the states have the authority to "fix the problem." Because the state solution seems to be much easier to achieve than the federal one and doesn't come with any legalization baggage, for instance. So it might play out quite the other way from what Carl suggests.

**PROFESSOR VLADECK:** It doesn't come with legalization baggage. It does come with litigation baggage. Because I think the real issue is the Arizona law is about as close to a pure licensing requirement as I think you could get without the added piece of actually being necessary to obtain a license versus revoking a license. The question is going to be, when states start going further afield . . .

**PETER ASAAD:** Alright, thank you so much to our panelists for all their time. And thank you.

END TRANSCRIPT