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A VIEW FROM THE FRONT LINES: WHY PROTECTING IMMIGRANT WORKERS IS ESSENTIAL FOR IMMIGRATION REFORM AND VITAL TO THE MAINTENANCE OF A HEALTHY AMERICAN WORKFORCE

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I. INTRODUCTION

In 2009, a group of researchers from University of California, Los Angeles released the findings of a study of low-wage workers in New York, Chicago, and Los Angeles, aimed at assessing the prevalence of workplace violations in the nation's three largest cities.[1] The result was eye-opening for lawmakers: federal and state employment laws are not providing adequate protections to the most critical, and indeed the most vulnerable, members of the United States ("U.S.") workforce—immigrant workers. Among the report's findings, the fact that two-thirds of the workers surveyed suffered pay violations, losing roughly $2,600 in annual wages, which is about fifteen percent of their yearly salaries, is especially alarming.[2] This report, along with others, indicates the need for immigration reform has reached critical levels.

Regrettably, the political discourse over immigration reform is entangled in America's culture wars.[3] Anti-immigrant activists maintain that immigrants come to the United States to take advantage of social welfare programs, health care services, and birthright citizenship. However, this anti-immigrant rhetoric does not adequately explain why people actually pack up and leave their home countries to come to the United States. In reality, immigrants come to America for one overarching reason: work.[4]

Commentators, politicians, judges, members of citizen militias, and others who fear that immigration is threatening our nation's cultural and economic integrity believe that undocumented immigrants must be deported, arrested, or otherwise punished.[5] Notably, the Naturalization Act

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1. *See* ANNETTE BERNHARDT ET AL., BROKEN LAWS, UNPROTECTED WORKERS: VIOLATIONS OF EMPLOYMENT AND LABOR LAWS IN AMERICA'S CITIES 16 (2009), *available at* http://www.nelp.org/page/-/brokenlaws/BrokenLawsReport2009.pdf?nocdn=1 (studying "workplace violation prevalence" among non-managerial and non-professional, "front-line" employees).

2. *Id.* at 50.

3. *See* Eve Conant, *Razing Arizona*, NEWSWEEK, Aug. 16, 2010, at 34, 34–35, *available at* http://www.newsweek.com/2010/08/07/razing-arizona.html (assessing that, similar to the South African culture wars against apartheid, Latino organizations have rallied to punish the state of Arizona by forming a coalition centered around cultural identity).

4. *See The Hub Nation: Immigration Places America at the Centre of a Web of Global Networks. So Why Not Make It Easier?*, ECONOMIST, Apr. 24, 2010, at 32 [hereinafter *The Hub Nation*] (characterizing immigrants as an asset to America because of their hard-working attitude and entrepreneurial spirit).

5. *See, e.g.*, Joseph Lelyveld, *The Border Dividing Arizona*, N.Y. TIMES, Oct. 15, 2006, § 6 (Magazine), at 42 (explaining how Republicans tried to save their majority in Congress by using the issues of immigration and border security as the main focus of the 2006 election). Curiously, some of these critics have actually relied on undocumented workers themselves to their own personal benefit. *See, e.g.*, Michael Calderone, *Report: Lou Dobbs Employed Illegal Immigrants*, YAHOO! NEWS (Oct. 7, 2010, 9:04 AM), http://news.yahoo.com/s/yblog_upshot/20101007cm_yblog_upshot/

of 1790, which restricted citizenship to white persons serves to adequately illustrates the role that fear has historically played in the immigration debate. Yet, despite this long-held fear that the the United States is being overrun by immigrants, which historically manifested the in discrimination of southern European, Chinese, and other immigrant groups—the U.S. is a nation of immigrants.[6]

Immigration is a social and political issue that generates strong emotional feelings. On one side of the debate, we hear calls for sealing the borders and deporting undocumented immigrants. On the other side of the debate, we hear a call for the full inclusion of undocumented immigrants into broader society. No matter which passions are invoked when debating the issues, immigration reform is vital because without large-scale immigration the United States cannot field a competitive workforce.[7] This Article argues that, in the absence of a competitive workforce, the current standard of living in the United States will erode, and the nation's long term economic growth prospects will diminish.[8]

As a matter of economic policy, there is no other option but to undertake the task of reforming our immigration laws. Central to this undertaking is an analysis of the operative nexus connecting the American immigrant demographic to the needs of the economy and to federal and state wage and hour laws.

II. THE ECONOMIC ASPECTS OF IMMIGRATION REFORM

Following the Enron and WorldCom scandals of the 1990's and the more recent mortgage crisis, it is not surprising that the primary concern of the average American in today's society is the restoration of the health and well-being of the U.S. economy. The effects of the Great Recession have been so devastating that leading economists, the U.S. government, and much of the public rightly feared that we just stood at the precipice

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report-lou-dobbs-employed-undocumented-immigrants (reporting that Lou Dobbs, a celebrated anti-immigrant talk show host, relied on undocumented laborers for the upkeep of his multimillion-dollar estate and for tending to his private stable of horses).

6. *See A Better Way: Utah May Offer a Better Model Than Arizona for Dealing with Illegal Immigrants*, ECONOMIST, Aug. 7, 2010, at 25, 26 (observing that while the people of Utah have a strong anti-immigrant sentiment, they still rally around an identity originating from the nineteenth century, when the success of the state was highly dependent on the labor of Irish and Chinese immigrants).

7. *See infra* Part II (comparing Brazil, India, China, Japan and Germany's economies and populations to that of the United States).

8. *See infra* Part II (proposing that because of the decline in the rate of native-born U.S. citizens, the U.S. will struggle to keep up with emerging economies).

of an economic depression.[9]

Upon entering office, President Obama assembled an all-star lineup of economists to tackle the floundering economy.[10] These economists looked to the unprecedented interventionist policies of the U.S. government during the Great Depression.[11] After all, it was the implosion of the American economy in the 1930's that gave license to the Roosevelt Administration to beat back the predatory and rapacious form of capitalism that had come to dominate the market.[12] The Roosevelt Administration, and many members of Congress understood that the country had veered away from a free market balance in which capital and labor were rationally and prudently deployed in the best interest of the nation.[13]

Both the Great Depression and the Great Recession were preceded by an accumulation of wealth in the hands of ever fewer individuals.[14] On both occasions, the drive for immediate, short-term profits created an overheated financial services sector whose meltdown resulted in large-scale destruction of American economic productivity.[15] A fundamental law of economics is that profits cannot increase indefinitely.[16] Specifically, an economy focused on short-term profits generated by the financial

9. *See, e.g.*, *The Great Stabilization: The Recession Was Less Calamitous Than Many Feared. Its Aftermath Will Be More Dangerous Than Many Expect*, ECONOMIST, Dec. 19, 2009, at 15 (stipulating that without the drastic economic intervention of the government, the recession would have turned into a depression).

10. *See Off to Work They Go: Barack Obama Has Stacked His Cabinet with Clever Economists, but Can They Work Together? And What Will They Do?*, ECONOMIST, Nov. 29, 2008, at 31 (crediting Obama's economic team members—Larry Summers, Peter Orszag, Christina Romer, and Paul Volcker—as some of the best economists, with extensive and impressive economic experience).

11. *See How New a Deal?: Comparisons Between Barack Obama and FDR Are Misguided*, ECONOMIST, Nov. 22, 2008, at 46 (indicating that Obama's closest advisors consider the government intervention led by Roosevelt during the Great Depression an important area to study possible remedies to the recent recession).

12. *See* Michael Hirsh & Daniel Gross, *The Wisdom of Crowds: When Populist Rage Leads to Smart Policy*, NEWSWEEK, Feb. 8, 2010, at 26, 28–29 (explaining that during the Great Depression, an enraged general public focused on capitalist institutions—such as Wall Street and banks—and Roosevelt was able to heavily regulate those institutions because intervention was required to quell the public outrage).

13. *See* Irving Howe, *When America Entered the 20th Century*, N.Y. TIMES, Sep. 28, 1986, at 3, 46 (emphasizing that the strong rhetoric Roosevelt used to attack the high concentration of wealth and power also allowed him to persuade Congress to shift from a capitalist focus to a humanitarian one).

14. *See* ROBERT B. REICH, AFTERSHOCK: THE NEXT ECONOMY AND AMERICA'S FUTURE 22–27 (2010) (noting that "[t]he share of total income going to the richest [one] percent of Americans peaked in both 1928 and in 2007, at over [twenty-three percent]. The same pattern held for the richest one-tenth of one percent . . . . And . . . for the richest [ten] percent . . . .").

15. *See id.* at 25–26 (identifying in both eras a working class engaged in performing services that, once credit ran out, reduced spending—ultimately forcing business to reduce spending through mass layoffs).

16. *See id.* at 23 ("[I]t is an iron law of economics, as well as physics, that expanding bubbles eventually burst.").

services sector—at the expense of a production-based economy—is predisposed to predatory investment schemes that destabilize the workforce.

In both economic downturns, the full weight of the economic destruction came crashing down upon the American middle class.[17] The recent financial downturn has left the U.S. economy struggling with high unemployment, rising poverty, and lost opportunity for individual advancement.[18] Meanwhile, at the same time, the productive capacity of emerging economies, like Brazil, India, and China, is expanding.[19] These emerging market countries have young, large populations;[20] China and India, for example, have populations of about 1.2 billion, and Brazil is home to nearly 200 million people.[21] Meanwhile, the populations of Japan and Germany, the developed world's first and second largest economies after to the United States, are aging and shrinking.[22]

Despite the declining birth rates of native-born U.S. citizens, the population of the United States continues to grow because of

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17. *See* John Wheeler, *The Great Recession Has Hit the Middle Class the Hardest*, BIZNETCENTRAL (Dec. 28, 2010), http://biznetcentral.com/2010/12/28/the-great-recession-has-hit-the-middle-class-the-hardest (explaining that the middle class has been hit the hardest by the current recession, in large part as a result of drastic declines in home equity); *cf.* Reich, *supra* note at 14, at 23 (observing that a broad swath of Americans suffered during the Great Depression).

18. *See* BUREAU OF LAB. STAT., CURRENT POPULATION SURVEY 194 (2011), *available at* http://www.bls.gov/cps/cpsaat1.pdf (reporting a rise in unemployment from 5.8% in 2008 to 9.6% in 2010); Erik Eckholm, *Recession Raises Poverty Rate to 15-Year High*, N.Y. TIMES, Sept. 16, 2010, at A1, *available at* http://www.nytimes.com/2010/09/17/us/17poverty.html (reporting the percentage of Americans living in poverty in 2009 at 14.3 percent—the highest since 1994).

19. *Cf. Nipping at Their Heels: Firms from the Developing World are Rapidly Catching Up with Their Old-World Competitors*, ECONOMIST, Jan. 20, 2011, at 80, *available at* http://www.economist.com/node/17957117?story_id=17957117 (tracking the resilience of businesses in Brazil, Russia, India, and China following the financial crisis as compared with the more sluggish multinationals from developed nations).

20. *See, e.g.*, Jeff Schlegel, *Rebuilding with BRICS: The Big Four of Emerging Markets are Back in Favor*, FIN. ADVISOR MAG., July 2009, *available at* http://www.fa-mag.com/component/content/article/4269.html?issue=110&magazineID=1&Itemid=73 (attributing much of India and China's growth to their young population and growing middle classes).

21. Shamim Adam et al., *Evergreen Rises on Lure of $100 Billion China-India Trade: Freight Markets*, BLOOMBERG (Feb. 07, 2011, 11:00 AM) http://www.bloomberg.com/news/2011-02-07/fedex-maersk-add-shipping-routes-for-china-india-prize-freight-markets.html; *Brazil*, CIA WORLD FACTBOOK, https://www.cia.gov/library/publications/the-world-factbook/geos/br.html (last visited Mar. 1, 2011).

22. *See* WARREN SANDERSON, CTR. FOR INTERGENERATIONAL STUDIES, LOW FERTILITY AND POPULATION AGING IN GERMANY AND JAPAN: PROSPECTS AND POLICIES 5 (May 2, 2008), *available at* http://cis.ier.hit-u.ac.jp/Japanese/pdf/shoushika/SandersonWorkshop.pdf.

immigration.[23] For the U.S. to remain economically preeminent, its population must remain one of the largest in the world.[24] Equally important is a balanced demographic ratio between young and old. Population growth is crucial to America's long-term economic security.[25]

In 1930, the U.S. population was 122,775,046,[26] with about forty percent of the population under twenty years of age,[27] and immigrants compring just over eleven percent of the total population.[28] Today, the U.S. population stands at 308,700,000[29] with less than twenty-eight percent under the age of twenty.[30] Immigrants, however, still comprise merely twelve percent of the U.S. population.[31] Population growth is projected to

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23. *See* Sharon Jayson, *CDC: Birthrates Decline Overall*, USA TODAY, Dec. 21, 2010, *available at* http://www.usatoday.com/yourlife/parenting-family/babies/2010-12-22-birthdata22_ST_N.htm (reporting that birthrate levels are at record lows in the United States); Mark W. Nowak, *Immigration and U.S. Population Growth: An Environmental Perspective*, NEGATIVE POPULATION GROWTH, http://www.npg.org/specialreports/imm&uspopgrowth.htm (last visited Apr. 14, 2011) ("[Sixty percent] of the population increase in the United States between 1994 and 2050 will be attributable to immigration and the descendants of immigrants.").

24. *See Population: Growth Is Good*, ECONOMIST: FREE EXCH. (Dec. 23, 2010, 2:11 PM), http://www.economist.com/blogs/freeexchange/2010/12/population (arguing that slow population growth may lead to greater government debt).

25. *See* Adam Ozimek, *A Strange Model of the Economy*, MODELED BEHAVIOR (Dec. 22, 2010), http://modeledbehavior.com/2010/12/22/a-strange-model-of-the-economy/ (observing that an aging population requires governmental support and that it becomes a greater burden without a significant working population to generate that financial support).

26. BUREAU OF THE CENSUS, FIFTEENTH CENSUS OF THE UNITED STATES: 1930, at 9 tbl. 2 (1933).

27. *See* BUREAU OF THE CENSUS, STATISTICAL ABSTRACT OF THE UNITED STATES: 1931, at 5 (1931) (recording that in 1930 about nine percent of the population was younger than five years of age, twenty percent was between five and fourteen years of age, and more than nine percent was between the ages of fifteen and nineteen).

28. *See* U.S. CENSUS BUREAU, PROFILE OF FOREIGN-BORN POPULATION IN THE UNITED STATES: 2000, § 1, at 8 (2001) [hereinafter PROFILE OF FOREIGN-BORN POPULATION] (recounting immigration data from the 1930 census, in regards to immigration, for purposes of comparison to immigration data from the 2000 census).

29. Haya El Nasser, et al., *2010 Census: Slowest Growth Since Great Depression*, USA TODAY, Feb. 3, 2011, *available at* http://content.usatoday.net/dist/custom/gci/InsidePage.aspx?cId=tallahassee&sParam=41887628.story.

30. *United States—Age and Sex*, U.S. CENSUS BUREAU, http://factfinder.census.gov/servlet/STTable?_bm=y&-geo_id=01000US&-qr_name=ACS_2009_1YR_G00_S0101&-ds_name=ACS_2009_1YR_G00_&-_lang=en&-redoLog=false&-state=st&-CONTEXT=st (last visited Mar. 1, 2011) [hereinafter *Age and Sex Statistics*].

31. Jeanne Batalova & Aaron Terrazas, *Frequently Requested Information on Immigrants and Immigration in the United States*, MIGRATION INFO. SOURCE, (Dec. 2010), http://www.migrationinformation.org/feature/display.cfm?ID=818 (reporting immigrants to comprise 12.5 percent of total U.S. population).

continue, reaching 439 million by 2050[32] with eighty-two percent of this growth coming from immigration.[33] While the percentage of foreign-born residents of the United States is no greater today than it was nearly eighty years ago,[34] the national percentage of younger individuals has declined significantly.[35] This portends substantial economic challenges for the economy as the country grows ever older.

Currently, roughly thirty-three percent of immigration into the United States comes from Asia and Europe, with less than fifty-seven percent arriving from Mexico and Latin America.[36] Nearly sixty-six percent of immigrants in the United States are either naturalized citizens or legal, permanent residents, while undocumented immigrants account for thirty percent.[37] The employment rate for male, undocumented workers is ninety-six percent—substantially higher than that of their legal, immigrant counterparts.[38] Not surprisingly, undocumented workers earn considerably less than U.S. citizens.[39]

It is against the backdrop of the Great Recession, with competitive pressures from emerging markets, and an anti-immigrant climate, that the rights of the American laborer must be defended. In hindsight, it is clear that the challenges presented by the Great Depression necessitated the enactment of the Fair Labor Standards Act ("FLSA") as a means to protect the health

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32. *See* Press Release, Robert Bernstein & Tom Edwards, U.S. CENSUS BUREAU, An Older and More Diverse Nation by Midcentury (Aug. 14, 2008), *available at* http://www.uscentralonline.net/uploadedfiles/An%20Older%20and%20More%20Diverse%20Nation%20by%20Midcentury-US%20Census%20Bureau%20article%20v2.pdf (last visited Mar. 1, 2011) (predicting that the United States will be both older and more ethnically diverse by 2050).

33. Adriana Garcia, *Whites to Become Minority in U.S. by 2050*, REUTERS, Feb. 12, 2008, *available at* http://www.reuters.com/article/2008/02/12/us-usa-population-immigration-idUSN1110177520080212. Forecasts also indicate that by 2050, non-Hispanic whites will no longer constitute a majority of the U.S. population. *Id.*

34. *See* PROFILE OF FOREIGN-BORN POPULATION, *supra* note 28, at 8 (providing that according to the 2000 U.S. Census, the percentage of foreign-born individuals living in the U.S. was the highest since 1930).

35. *Compare Age and Sex Statistics*, *supra* note 30, *with* BUREAU OF THE CENSUS, STATISTICAL ABSTRACT OF THE UNITED STATES: 1931, *supra* note 27, at 5 (providing that in 2009, only twenty-seven percent of the population was under twenty years old, as compared to thirty-eight percent in 1930).

36. ROBERT SHAPIRO & JIWON VELLUCCI, NEW POLICY INSTITUTE, THE IMPACT OF IMMIGRATION REFORM ON THE WAGES OF AMERICAN WORKERS 1 (2010), *available at* http://ndn.org/paper/2010/impact-immigration-and-immigration-reform-wages-american-workers.

37. *Id.* (providing that while just one-third of all workers earns less than twice the minimum wage, two-thirds of undocumented workers earn that amount).

38. *See* JEFFREY S. PASSEL, ET. AL., URBAN INST., UNDOCUMENTED IMMIGRANTS: FACTS AND FIGURES 1 (2004), *available at* http://www.urban.org/url.cfm?ID=1000587 (noting that on average, the higher participation in the work force of immigrant workers is due to the younger average age of undocumented men and a reduced likelihood of undocumented workers opting out of work force participation due to disability, retirement, or schooling).

39. *Id.*

and welfare of the U.S. workforce.[40] Likewise, the pressures created by the current economic crisis necessitate legislation to protect the U.S. immigrant workforce.

III. THE FAIR LABOR STANDARDS ACT

A. The FLSA and Undocumented Immigrants

The FLSA is the preeminent civil rights legislation protecting workers' pay. The objective of the FLSA is the elimination of "labor conditions detrimental to the maintenance of the minimum standard[s] of living necessary for health, efficiency, and general well-being of workers . . . . "[41] So, what does the FLSA have to do with immigration reform? In short, the answer is quite a lot.

It is often said that immigrants perform jobs that Americans will not. Without questioning the validity of this assertion, the United States has not shut its doors to immigration because native-born Americans refuse to perform certain jobs. The door to immigration has been open since Colonial America because the U.S. economy relies on the manpower of immigrant laborers to remain competitive.

While immigrants fill all types of jobs in the United States, undocumented immigrants typically perform intensive manual labor in industries like construction, agriculture, and food service.[42] Without the manpower resources of the undocumented immigrants who reside in the United States, many if not all, American business enterprises would suffer substantial and adverse economic consequences.

While most employers comply with the FLSA, many take advantage of the undocumented status of immigrant laborers. One Government Accounting Office study found that non-profit and government agencies across the country reported that "day laborers complained at least once a week about nonpayment of wages."[43] The failure to compensate undocumented immigrants in accordance with the federal and state wage

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40. *See* Fair Labor Standards Act of 1938, 29 U.S.C. § 201–219 (2006 & Supp. IV 2010) (providing that private sector employers shall provide employees, among other protections, a baseline minimum wage and overtime).

41. *See id.* at § 202(a) (providing that the absence of minimum standards for workers obstructs the national economy and "constitutes an unfair method of competition in commerce").

42. *See* JEFFREY S. PASSEL & D'VERA COHN, PEW RESEARCH CENTER, A PORTRAIT OF UNDOCUMENTED IMMIGRANTS IN THE UNITED STATES fig. 5 (2009), *available at* http://pewresearch.org/pubs/1190/portrait-unauthorized-immigrants-states.

43. *See* U.S. GOV'T ACCOUNTABILITY OFFICE, GAO-02-925, WORKER PROTECTION: LABOR'S EFFORTS TO ENFORCE PROTECTIONS FOR DAY LABORERS COULD BENEFIT FROM BETTER DATA AND GUIDANCE 14–15 (2002) (reporting that over half of day laborers do not receive the wages that are due to them under state and federal law).

and hour laws is widespread and frequent, extending well beyond day laborers.[44]

Nowadays, just as during the Great Depression, workers are forced to suffer the twin evils of overwork and underpay. It was amidst the unprecedented economic challenges of the Great Depression that Congress enacted the FLSA "to protect 'the rights of those who toil, of those who sacrifice a full measure of their freedom and talents to the use and profit of others.'"[45]

In enacting the FLSA, Congress intended to eliminate substandard working conditions by establishing a minimum wage and requiring employers to pay an overtime premium of one and one half times an employee's regular hourly rate for work exceeding forty hours per week.[46] President Franklin D. Roosevelt heralded the FLSA as "the most far-reaching, far-sighted program for the benefit of workers ever adopted here or in any other country."[47]

By design, the FLSA's purpose is "remedial and humanitarian."[48] To effectuate its goals, the FLSA requires courts to interpret its application broadly.[49] For instance, the FLSA "defines the verb 'employ' expansively to mean to 'suffer or permit to work.'"[50] This definition of employ is "the broadest definition that has ever been included in any legislation."[51] Moreover, the Supreme Court has directed courts to expansively construe the term "employee;" which, under the FLSA, is defined as "any individual

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44. *See* ANNETTE BERNHARDT ET AL., BROKEN LAWS, UNPROTECTED WORKERS: VIOLATIONS OF EMPLOYMENT AND LABOR LAWS IN AMERICA'S CITIES 5 (2009) (finding that foreign-born workers are victims of the highest incidence of FLSA violations compared to even native-born minority groups within the United States).

45. Benshoff v. City of Va. Beach, 180 F.3d 136, 140 (4th Cir. 1999) (*quoting* Tenn. Coal, Iron & R.R. Co. v. Muscoda Local No. 123, 321 U.S. 590, 597 (1944)).

46. *See* 29 U.S.C. § 202 (declaring that the policy considerations contained in the FLSA including the maintenance of worker well-being required Congressional regulation of industry); § 206 (requiring employers to pay minimum wages to employees covered under the FLSA); § 207(a)(1) (stipulating overtime compensation if a worker's workweek is longer than forty hours).

47. Franklin D. Roosevelt, Fireside Chat on Party Primaries (Jun. 24, 1938), *reprinted in* 1938 THE PUBLIC PAPERS AND ADDRESSES OF FRANKLIN D. ROOSEVELT: THE CONTINUING STRUGGLE FOR LIBERALISM 391, 392 (Samuel I. Rosenman ed., 1941).

48. Tenn. Coal, Iron & R.R. Co. v. Muscoda Local No. 123, 321 U.S. 590, 597 (1944), *superseded by statute*, Portal-to-Portal Act of 1947, Pub. L. No. 80-49, 61 Stat. 84 (1947) (codified as amended at 29 U.S.C. § 254 (2006)).

49. *Id.*

50. Nationwide Mut. Ins. Co. v. Darden, 503 U.S. 318, 326 (1992) (citing 29 U.S.C. § 203(g)).

51. United States v. Rosenwasser, 323 U.S. 360, 363 n.3 (1945) (observing the broad reach of the term "employee" that Congress intended under FLSA is based, in part, on Senator Black's statements on the Senate floor during the congressional debate of the FLSA (citing 81 CONG. REC. 7657 (1937) (statement of Sen. Hugo Black))).

employed by an employer."[52]

There is no enabling language contained in the FLSA that extends its provisions to undocumented immigrants.[53] However, FLSA coverage has been extended to undocumented immigrants by the courts as consistent with congressional intent and U.S. immigration policy.[54] If the protections of the FLSA were not afforded to undocumented immigrants, a perverse economic incentive for employers to seek out and hire undocumented immigrants at rates lower than the minimum wage would emerge. Such a policy would stimulate an inflow of undocumented immigrants and put downward pressure on the wages earned by all Americans. The end result would be the denigration of the health and welfare of the entire American workforce. Thus, enforcing the wage and hour laws on behalf of undocumented immigrants—a substantial portion of the American workforce—is sound economic policy.

It is no accident that courts have interpreted the FLSA's definition of employee to extend "to citizens and aliens alike [irrespective of] whether such aliens are documented or undocumented . . . ."[55]. Some courts have gone so far as to hold employers liable for retaliation if they report an undocumented laborer to immigration authorities for asserting their rights under the FLSA.[56]

Despite the right of undocumented immigrants to avail themselves of the FLSA, studies show that undocumented immigrants are reluctant to report a variety of labor and employment law violations because they feel insecure about their immigration status.[57] As one court explained:

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52. 29 U.S.C.§ 203(e)(1). *See* Rutherford Food Corp. v. McComb, 331 U.S. 722, 728 (1947) (confirming that the FLSA's definition of "employ" is broad and reiterating that this breadth is conferred to the determination of who is an "employee" for purposes of the Act).

53. *See generally* 29 U.S.C. §§ 202–218(c) (providing no jurisdictional bar (or grant) based on an employee's immigration status).

54. *See, e.g.*, Flores v. Amigon, 233 F. Supp. 2d 462, 464 (E.D.N.Y. 2002) (holding that extension of FLSA coverage to undocumented workers actually furthers the goals of the Immigration Reform and Control Act of 1986 because without FLSA coverage for undocumented immigrants, employers would be incentivized to hire undocumented workers in an effort to skirt federal wage and hour regulations).

55. In re Reyes, 814 F.2d 168, 170 (5th Cir. 1987). *See* Patel v. Quality Inn S., 846 F.2d 700, 704 (11th Cir. 1988) ("FLSA's coverage of undocumented aliens is fully consistent with the [Immigration Reform and Control Act of 1986] and the policies behind it.").

56. *See, e.g.*, Contreras v. Corinthian Vigor Ins. Brokerage Inc., 25 F. Supp. 2d 1053, 1059 (N.D. Cal. 1998) (denying the defendant employer's motion to dismiss an undocumented immigrant's claim, alleging retaliation for filing a claimed violation of the FLSA against her employer).

57. *See* Michael J. Wishnie, *Immigrants and the Right to Petition*, 78 N.Y.U. L. REV. 667, 676–79 (2003) (reporting the statistics of a survey that found that about thirty percent of workers did not inform Occupational Safety and Health Administration about their employer's violations because they feared deportation).

> Many of these workers are willing to work for substandard wages in our economy's most undesirable jobs. While documented workers face the possibility of retaliatory discharge for an assertion of their labor and civil rights, undocumented workers confront the harsher reality that, in addition to possible discharge, their employer will likely report them to the [immigration enforcement authorities] and they will be subjected to deportation proceedings or criminal prosecution . . . . As a result, most undocumented workers are reluctant to report abusive or discriminatory employment practices.[58]

Knowing that undocumented immigrants are vulnerable, unscrupulous employers willfully ignore immigration status during hiring and save money assembling a workforce that is unlikely to report violations of employee rights.[59] While these employers choose to circumvent the immigration laws at the time of hiring, they callously threaten their undocumented workers with the same laws if they complain.[60]

These unscrupulous employers are not only "gaming the system," but they are also undermining U.S. labor and immigration policy objectives. To balance the leverage that employers have over undocumented immigrants, it is essential that FLSA enforcement take priority over immigration enforcement. By excluding a worker's immigration status from the FLSA enforcement calculus, undocumented workers are less likely to forgo reporting wage and hour law violations or shy away from joining FLSA litigation.[61]

Experience shows that when an employer fails to properly pay wages to one employee, the employer is likely to operate under a common scheme, practice, or policy of paying all similarly situated employees less than their due wages. At the heart of the FLSA's remedial attributes is the permissive joinder device of 29 U.S.C. § 216(b), which prescribes the issuance of notice to a collective class of similarly situated employees for the joint

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58. Rivera v. NIBCO, Inc., 364 F.3d 1057, 1064–65 (9th Cir. 2004) (internal citations omitted) ("The aliens themselves are vulnerable to exploitation because they cannot complain of substandard working conditions without risking deportation." (quoting United States v. Brignoni-Ponce, 422 U.S. 873, 879 (1975))).

59. *See id*. at 1072.

60. *See* Montoya v. S.C.C.P. Painting Contractors, Inc., 530 F. Supp. 2d 746, 750 (D. Md. 2008) (couching the need for preventing employers from collaterally defending alleged FLSA violations on the grounds of the plaintiffs' immigration status as being necessary to "the effectiveness of the FLSA"); *see also* Rivera, 364 F.3d at 1065 (speculating that allowing an employer to inquire into a worker's immigration status would allow it to threaten the worker that raises a legal claim against the employer with deportation).

61. *See* Zeng Liu v. Donna Karan Int'l, Inc., 207 F. Supp. 2d 191, 192–93 (S.D.N.Y. 2002) (noting that injury that potentially would befall an FLSA claimant-worker far outweighs any need for its disclosure during the litigation of alleged FLSA violations).

prosecution of statutory wage violations.[62] The mandate given to a plaintiff to bring suit on his own behalf or on behalf of similarly situated employees is perhaps the greatest remedial aspect of the FLSA, aimed at preserving the health and welfare of laborers industry-wide for the benefit of the American public.[63]

Marroquin v. Canales,[64] brought by CASA de Maryland[65] on behalf of a group of undocumented day laborers, illustrates the interplay between the needs of the economy, the treatment of undocumented day laborers, and the remedial attributes of the FLSA. In *Marroquin*, the defendant employer hired about 150 Latino immigrant men of limited education, income, and resources as day laborers to perform debris removal work in the aftermath of Hurricane Katrina.[66] The day laborers were hired in Maryland and transported by vans to Mississippi, where they were promised lodging and ten dollars per hour for their work.[67] The day laborers began work immediately upon their arrival at dawn and were housed in tents, trailers, and apartments.[68] Between twelve and sixteen people were lodged in each trailer with four to six people sleeping in each room.[69] In the lawsuit, the laborers claimed that defendants failed to pay them federal minimum wage and overtime wages. They sought collective action certification of the lawsuit pursuant to § 216(b) on their own behalf and on behalf of similarly situated employees.[70] In certifying the collective action and authorizing notice to similarly situated plaintiffs, the court held that the "notification effort is warranted in light of the testimony produced, the importance of adequate notification in an 'opt-in' regime such as this, the nature of this population and the defendants' apparent failure to maintain adequate records."[71]

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62. *See, e.g.*, Hoffman-La Roche, Inc. v. Sperling, 493 U.S. 165, 167, n.1, 170 (1989) (demonstrating that any employee may bring an action on behalf of similarly situated groups of employees as long as she has their written consent implying that they have received accurate and timely notice of the proceedings under § 216(b)).

63. *See Id.* (stating that the FLSA aims to facilitate notice and remedy to all those affected by the claim and to expedite the judicial process).

64. 505 F. Supp. 2d 283 (D. Md. 2007).

65. CASA de Maryland, Inc. is the largest immigrants' rights organization in the state of Maryland. The organization runs five worker centers throughout the state and offers a number of services to the community including education, vocational training, financial literacy, social services, health access and promotion, and legal services. *History*, CASA DE MARYLAND, http://www.casademaryland.org/about-mainmenu-26/history-mainmenu-63 (last visited June 21, 2011).

66. *Marroquin*, 505 F. Supp. 2d at 287–88.

67. *Id.*

68. *Id.* at 288 & n.3.

69. *Id.* at 288, n.3.

70. Second Amended Complaint at 3, Marroquin v. Canales, 505 F. Supp. 2d 283 (D. Md. 2007) (No. CCB-05-3393), 2005 WL 4678916 at *1.

71. Marroquin v. Canales, 236 F.R.D. 257, 262 (D. Md. 2006).

In 2005, a *New York Times* article drew attention to the rampant wage and hour law violations affecting the 2.3 million people who work in the janitorial services industry.[72] The root causes of these statutory violations were attributed to the fact that "cleaning contractors frequently hire immigrants, often without proper papers and at low wages, trying to squeeze out profits as they submit rock-bottom bids to win business. The immigrant workers dare not complain about safety or minimum-wage violations for fear of being fired—and possibly deported."[73] At that time, it was estimated that ninety percent of the janitors in Los Angeles alone were immigrants and, of these, half were undocumented.[74]

The widespread employment of undocumented immigrants in the janitorial services industry at substandard wages resulted in liability for these statutory violations to several well-known companies. For instance, in 2005, Wal-Mart agreed to an $11 million settlement with the Department of Justice after twelve Wal-Mart contractors pleaded guilty to employing 350 undocumented workers as janitors in stores across twenty-one states.[75] Similarly, a Target contractor entered into a $1.9 million settlement after the Department of Labor discovered that 775 immigrant janitors in several states had been refused overtime pay.[76] In addition, the largest supermarket chains in California settled with 2,000 janitors—many of whom where undocumented—for $22.4 million over allegations that many of the affected workers received substantially less than minimum wage while working seven nights a week.[77]

These examples illustrate the realities of many undocumented laborers who work in the shadows of our society, performing the sort of back-breaking physical work that makes the lives of most Americans more comfortable and far more affordable. When walking into our homes, our supermarkets, or our big-box retailers, it is not at the forefront of our minds that the foundations have been laid, the floors have been cleaned, and the food has been processed and packaged by immigrant laborers.

In the examples cited above, employers assembled workforces that relied extensively on undocumented immigrants. These undocumented immigrants uncharacteristically asserted their rights under the FLSA. Yet, for every FLSA wage claim brought, dozens more go unasserted.

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72. *See* Steven Greenhouse, *Among Janitors, Labor Violations Go with the Job*, N.Y. TIMES, July 13, 2005 at A1, *available at* http://www.nytimes.com/2005/07/13/national/13janitor.html?pagewanted=all.

73. *Id.*

74. *Id.*

75. *Id.*

76. *Id.*

77. *Id.* (reporting that the janitors were receiving an hourly rate of just $3.50).

The importance of the FLSA as a tool in promoting the health and welfare of the U.S. economy cannot be overstated. If the courts and the Department of Labor vigorously enforce the wage and hour laws on behalf of undocumented immigrants, the ability of unscrupulous employers to exploit U.S. immigration policy and undermine the health of the U.S. workforce will be dramatically curtailed. Violations of wage and hour laws result in huge costs to public coffers since the full amount of taxes due are not paid to state and federal authorities.

To combat the rampant flouting of the FLSA, plaintiffs' lawyers are empowered to act as "private attorneys general" in the enforcement of wage and hour laws and earn their fees under the FLSA's fee shifting provisions.[78] By empowering the individual laborer to assert claims on behalf of similarly situated employees and by awarding attorneys fees, the FLSA's permissive joinder provisions operate like similar provisions of Title VII.[79] By acknowledging the undeniable reality that immigration is essential to the growth and prosperity of the U.S. economy and by recognizing that the vast majority of undocumented immigrants are gainfully employed, we can accept that zealous enforcement of the FLSA in favor of undocumented immigrants is essential to the health and well-being of the of the U.S. economy.

B. The Role of Legal Service Organizations.

The most important public service provided by legal service organizations like CASA de Maryland is community education.[80] Considering the limited resources available to organizations that focus their efforts on legal advocacy for immigrant workers, the task of defending

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78. *See* 29 U.S.C. § 216(b) (2006) ("Any employer who violates the provisions of [the FLSA] shall be liable to the employee or employees affected in the amount of their unpaid minimum wages, or their unpaid overtime compensation, as the case may be, and in an additional equal amount as liquidated damages . . . [including] a reasonable attorney's fee to be paid by the defendant, and the costs of the action."); *cf.* Rivera v. NIBCO, Inc., 364 F.3d 1057, 1065 (9th Cir. 2004) (holding that a similar provision contained in Title VII of the Civil Rights Act of 1964 allows alleged discriminatees to act as "private attorneys general" in effectuating the purpose of Title VII).

79. *See* 29 U.S.C. § 216(b) ("An action . . . may be maintained against any employer . . . by any one or more employees for and in behalf of himself or themselves and other employees similarly situated."); c*f.* Alexander v. Gardner-Denver Co., 415 U.S. 36, 45 (1974) ("[T]he private right of action remains an essential means of obtaining judicial enforcement of Title VII . . . . In such cases, the private litigant not only redresses his own injury but also vindicates the important congressional policy against discriminatory employment practices." (alterations in original)).

80. CASA de Maryland's legal staff provides "Know Your Rights" presentations to groups of day laborers, domestic workers, and tenants' associations on a range of topics including wage and hour law, workers' compensation, employment discrimination, and general housing issues. *Know Your Rights*, CASA DE MD., http://www.casademaryland.org/index.php?option=com_content&view=article&id=743&Itemid=126 (last visited Mar. 15, 2011).

the rights of those who have been wronged by their employers cannot be accomplished if the worker community is not empowered to advocate on its own behalf. Therefore, enabling workers to recognize when their rights are being infringed upon and to take the necessary steps to preserve their ability to seek legal remedies is a critical component of a grassroots immigrant's rights mission.

Far too often, aggrieved workers come to CASA with stories of employers who acknowledge their unlawful acts with impunity because of the workers' inability to pay for legal representation or current unlawful immigration status.[81] Despite the fact that the right to recover wages does not depend on immigration status or legal representation, the threat of reporting a particular worker or group of workers to law enforcement authorities is commonplace and plays a significant role in deterring low-wage workers from reporting workplace abuse.[82]

At times, the physical and psychological abuse suffered by low-wage workers extends far beyond the failure to pay appropriate wages. In one instance, a female grocery store clerk who initially complained of wage and hour violations later revealed that her employer had also sexually assaulted her. The employer forced her to engage in sexual acts and threatened to have her deported and separated from her young daughter if she refused. Due to a lack of physical force in the assault, her complaint with the police was not investigated and her only recourse was to seek a peace order, temporarily restricting her assailant's ability to contact her. This story illustrates the harsh realities of living in a state of perpetual fear and unchecked vulnerability. Viewed through this lens, it is easy to understand how so many unscrupulous employers formulate "wage chiseling" business models.[83]

IV. CASE STUDY: MARYLAND WAGE AND HOUR LAWS

Maryland boasts two of the strongest employment laws in the country: the Maryland Wage and Hour Law[84] and the Maryland Wage

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81. *See* CASA OF MARYLAND, WAGE THEFT: HOW MARYLAND FAILS TO PROTECT THE RIGHTS OF LOW WAGE WORKERS 5–7 (2007) [hereinafter WAGE THEFT], *available at* http://www.casademaryland.org/storage/documents/wagetheft.pdf (documenting six pervasive practices by employers that deny immigrant workers their employment and labor rights).

82. *Cf. Rivera*, 364 F.3d at 1064-65 (noting the reluctance of undocumented workers to report employers, leaving them vulnerable to exploitation and substandard working conditions).

83. *See* WAGE THEFT, *supra* note 81, at 4 ("Thus while it is incredibly difficult to get by, let alone support a family on the minimum wage, any wage violations that chisel away at already-low take-home pay make survival even harder.").

84. MD. CODE ANN., LAB. & EMPL., §§ 3-401–3-431 (LexisNexis 2008 & Supp. 2010).

Payment and Collection Act.[85] Perhaps the most impressive statutory protection provided by these laws is the provision that allows for an award of treble damages in cases where a defendant is found to be delinquent on wage payments to employees.[86] Maryland's Governor, Martin O'Malley, recently signed into law a bill clarifying the state's definition of "wage" as including overtime pay.[87] In doing so, he expanded the reach of the Maryland Wage Payment and Collection Act by allowing employees to sue for unpaid overtime wages and permitting judges to award treble damages in the absence of a genuine dispute over the payment of wages.[88]

Theoretically, the treble damages provision, which is more severe than the standard double damages provision found in the federal Fair Labor Standards Act, provides a convincing deterrent to unscrupulous employers that seek to exploit low-income workers and rob them of their hard-earned wages. Unfortunately, in this case, theory and practice fail to align. Lack of enforcement mechanisms and extremely limited access to resources make participation in the legal process and self-advocacy virtual impossible for the low-wage worker community.

These barriers are exacerbated when immigrant workers lack sufficient English language skills. In addition, the fact that most of these individuals are unaware of their rights—or of the avenues of relief that may be available to them should those rights be violated—results in millions of workers left exposed and unprotected. Aggressive, predatory employers take advantage of these enforcement shortcomings and turn wage theft and exploitation into a common business practice. Low-income workers often "attest to the devastating effects of wage theft" on their efforts to overcome their marginalized status in society.[89] These workers struggle "to cover basic expenses for rent, food, and medical costs, and [are frequently unable to remit wages] overseas to families who depend on that income for survival."[90] Yet, wage theft largely remains a consequence-free practice for employers.

Assuming that an aggrieved employee is aware of her rights to a minimum wage and overtime and has been refused payment by her employer, what can she do? Many low-wage immigrant workers feel as if there is not much available to them in terms of legal redress. Although a worker may have the right to take a claim for unpaid wages to court, the

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85. LAB. & EMPL., §§ 3-501–3-509.

86. LAB. & EMPL., § 3-507.2(b).

87. 2010 Md. Laws 1158–60.

88. LAB. & EMPL., § 3-507.2(b) (providing employees the ability to recover three times their actual damages for willful employer violations of Maryland Wage and Hour laws).

89. WAGE THEFT, *supra* note 81, at 1.

90. *Id.*

reality is that there is a high likelihood that the employer is judgment proof or will not respond to a court summons. This may be because the employer is truly destitute or, more likely, has put its assets in someone else's name, making collection on a judgment almost impossible.

For these immigrant workers, taking time off to prepare testimony and later attend a court hearing can be a costly proposition as well as discouraging if the employer, cognizant of the legal pitfalls, does not show up to court. The chance in these cases is slim of either collecting back wages or finding available resources to aid the immigrant worker's collection efforts. From the perspective of the unscrupulous employer, there are no incentives to appear before a judge and explain why wages were withheld in the first place.

The resources available at the state level are equally inefficient. The Maryland Department of Labor, Licensing and Regulation ("DLLR") is the state agency tasked with investigating and resolving unpaid wages and other employment disputes in conjunction with the Attorney General's Office.[91] In order to file a claim for wages, an employee must fill out a form, available online in English and Spanish, and submit that form and any supporting documentation to the state agency by mail.[92] Complaints may also be made over the phone, but Spanish-speaking complainants are often discouraged by long, automated messages in English that they cannot understand.[93] Additionally, due to lack of funding from the State, the size of DLLR's investigatory staff is well below what is necessary to address the overwhelming number of complaints received each year.[94] This staffing shortage is further complicated by the very limited number of Spanish-speaking investigators in an area where many of the victims of the most egregious "wage chiseling" practices are only able to communicate in Spanish.[95]

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91. *See* MD. DEP'T OF LAB. LICENSING & REGULATION, THE MARYLAND GUIDE TO WAGE PAYMENT AND EMPLOYMENT STANDARDS 5 (2010) [hereinafter MD. WAGE PAYMENT & EMPLOYMENT STANDARDS], *available at* http://www.dllr.state.md.us/labor/wagepay/mdguidewagepay.doc (describing the Employment Standard Service's investigation process and the possibility of criminal charges brought on behalf of the employee by the Attorney General).

92. MD. DEP'T OF LAB. LICENSING & REGULATION, WAGE CLAIM FORM, *available at* https://www.dllr.state.md.us/forms/essclaimform.doc (last visited Feb. 17, 2011) [hereinafter WAGE CLAIM FORM].

93. MD. WAGE PAYMENT & EMPLOYMENT STANDARDS, *supra* note 91, at 5.

94. WAGE THEFT, *supra* note 81, at 10 (discussing staffing cuts, from a high of twenty investigators to six or fewer in recent years, making it impossible to sufficiently investigate the claims received).

95. *See id.* at 15 (asserting the need for the Employment Standards Division to provide information on rights in various languages to accommodate the large population of non-English speakers in the Maryland workforce).

Once all of these hurdles are overcome by a worker seeking to collect unpaid wages, the process of investigating a particular claim can take as long as, or even longer than, filing a claim in district court. At times, claimants have waited a year or longer to receive a response from state investigators.[96] Even then, many of the same collection problems persist.

When DLLR is unable to resolve a claimant's case during the investigative process, the case will be referred to an Assistant Attorney General ("AAG") for review.[97] If the AAG concludes that the case has merit and is ripe for litigation, an official claim will be filed in court.[98] At this point, months after the initiation of a claim by a worker dependent on his earnings for basic survival, the case heads to court. However, if the employer fails to appear and a default judgment is entered against him, the worker is back to square one with his available resources fading fast.

V. CURRENT PROSPECTS FOR IMMIGRATION REFORM

The 110th and 111th Congress failed to pass substantial immigration reform legislation. While the House passed the Development, Relief and Education for Alien Minors ("DREAM") Act during the lame duck session in the 111th Congress, the Senate failed to pass it.[99] The DREAM Act, if enacted, would provide a pathway to citizenship for "a small child smuggled in [his] mother's arms . . . [to] the United States" who graduates high school with no serious criminal record and either completes two years of college or serves in the military.[100] It is hard to imagine that Congress could undertake any movement toward immigration reform if it could not pass the DREAM Act.

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96. *See id.* at 8–10 (attributing shortcomings in investigations to decreases in funding for wage enforcement agencies, leading to a failure to address large amounts of worker claims).

97. *See* MD. WAGE PAYMENT & EMPLOYMENT STANDARDS, *supra* note 91, at 5 (stating that if the Employment Standards Service of the Maryland Division of Labor and Industry fails to resolve the dispute after an investigation is conducted and efforts to settle the case are attempted, the agency may then pursue a court remedy); *see also* MD. CODE ANN., LAB & EMPL. § 3-507(a) (LexisNexis 2008 & Supp. 2010) (providing that the Commissioner of Labor and Industry may, after finding a violation, refer the case to the Attorney General to bring an action on behalf of the aggrieved employee).

98. *See* WAGE CLAIM FORM, *supra* note 92 (detailing the process followed to establish an unpaid wages claim against an employer by an employee).

99. *See* Michael Winerip, *Dream Act Advocate Turns Failure into Hope*, N.Y. TIMES, Feb. 21, 2011, at A10, *available at* http://www.nytimes.com/2011/02/21/education/21winerip.html (characterizing how a young activist witnessed the success of the bill in the House of Representatives and its demise in the Senate after it failed to receive the sixty votes needed in December 2010).

100. Roger Simon, *Congress Displeases on DREAM*, POLITICO, Dec. 21, 2010, *available at* http://politico.com/news/stories/1210/46633.html (characterizing the intended beneficiary of the DREAM Act).

The longer Congress remains deadlocked over immigration reform, organizing efforts at the grassroots level to continue the fight for social and political equality to empower a community of workers conditioned to tolerate abuse and expect injustice becomes increasingly critical. Changing that mindset of tolerance and inspiring trust and confidence in a system that has consciously turned its back on millions of people in need of help will not be accomplished overnight, nor will it be accomplished by a single individual or organization. Immigrants' rights groups and other grassroots organizations cannot shoulder this responsibility on their own, and it would be unwise to make such an attempt.

Legal protections for immigrant workers will continue to fall short so long as the immigrant workers themselves do not join the national discourse on immigration reform. Hopefully, immigrant workers would then capture the attention and garner the support of community leaders, judges, and Congress.

Yet, more than compassion, hope, and optimism drive the need for immigration reform. Prejudice offers indefensible reasons for opposing immigration reform, and the facts compel the need for reform. The facts are that immigrants are far more likely to contribute to society than to burden its coffers. and studies show immigrants are thirty-percent more likely to start new businesses than native-born Americans.[101] Studies also show that immigrants have a net positive effect on the federal budget.[102] Bringing undocumented workers out from the shadows and the cash economy will increase the state and federal tax base and the public coffers.

Moreover, in the realm of global commerce and innovation, immigration benefits the United States by providing "legions of unofficial ambassadors, deal-brokers, recruiters and boosters. Immigrants not only bring the best ideas from around the world to American shores, but they are also a conduit for spreading American ideas and ideals back to their homelands, thus increasing their adoptive country's soft power."[103] Without question, immigration reform is a matter of economic necessity, and, to the extent that both business interests and immigrant workers demand relief from outdated immigration laws, Congress will be forced to address this intractable

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101. *See, e.g.*, SHAPIRO & VELLUCCI, *supra* note 36, at 1 (expanding upon the benefits of immigrants pointing to the success of even uneducated immigrants as entrepreneurs).

102. *See, e.g.*, *id.* at 3 (distinguishing between the short and long term effects of immigration on government budgets indicating that, while immigration produces a small net cost in the short term, it provides a net profit over the course of an immigrant's lifetime).

103. *The Hub Nation*, *supra* note 4, at 32.

problem.[104] Nonetheless, with the current political climate and the recent refusal by Congress to support passage of the DREAM Act, the much needed overhaul of our immigration laws remains an uphill battle. In the meantime, it is incumbent upon federal and state authorities to support the low-wage worker community—and the public coffers—by expanding their prosecution of "wage chiseling" employers.

104. *See Green-Card Blues: A Backlash Against Foreign Workers Dims Business Hopes for Immigration Reform*, ECONOMIST, Oct. 30, 2010, at 33 (speculating that President Obama might find bipartisan support for one of his legislative proposals in immigration reform because both Republicans and Democrats have an interest, albeit different ones . . . in reform).

THE AGRICULTURAL WORKER PROTECTION ACT & FLORIDA'S MIGRANT WORKER: THE HANDS THAT FEED FLORIDA

FEDLINE FERJUSTE*

ABSTRACT

Since its enactment in 1982, courts have consistently misinterpreted the Migrant and Seasonal Agricultural Worker Protection Act ("AWPA"), and the Eleventh Circuit Courts are no exception to this misconstruction. Migrant workers are among the hardest-working and lowest-paid laborers in America, and they do not receive adequate legal protection. Congress, in enacting the AWPA, intended to make farmers and growers liable for abusing and breaching the AWPA. However, the judicial system has allowed them to create loopholes to escape liability. In order to break the cycle of abuse placed upon migrant workers, Florida must pass new legislation to reform and strengthen the AWPA and its legislatively intended purpose. If new legislation is not enacted, Florida will become a slave labor state because the lack of protection will ultimately turn back time and create an implicit form of slave labor.

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I. INTRODUCTION

It is five thirty in the morning in a parking lot in Immokalee, Florida, where hundreds of laborers wait for a bus to take them to the tomato fields. Sadly, these workers may have to leave without being paid for their time if it rains while they are in the field.[1]

Even though Florida has a $62 billion agricultural industry, migrant workers, like the ones in the tomato fields of Immokalee, earn about forty-five cents for every thirty-two pound bucket of tomatoes they pick.[2] Laborers, including agricultural workers in Florida, earn an average of $200.00 per week, comprising a segment of an unregulated system established to keep the cost of food down, while keeping Americans' plates full.

The Migrant and Seasonal Agricultural Worker Protection Act ("AWPA")[3] is the federal law designed to shield migrant farm workers from exploitative working conditions, and to protect vulnerable migrant and seasonal

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1. Bernie Sanders, *The Harvest of Shame*, HUFFINGTON POST (Apr. 15, 2008, 11:01 AM), http://www.huffingtonpost.com/rep-bernie-sanders/the-harvest-of-shame_b_96759.html.

2. *See* Christine Evans et al., *Modern Day Slavery*, PALM BEACH POST (Dec. 7, 2003), http://www.palmbeachpost.com/moderndayslavery/content/moderndayslavery/reports/day1_main1207.html.

3. The Migrant and Seasonal Agricultural Worker Protection Act ("AWPA"), 29 U.S.C. §§ 1801–1872 (2006), succeeded the Farm Labor Contractor Registration Act of 1963 ("FLCRA"), Pub. L. No. 88-582, 78 Stat. 920 (repealed 1983), which was designed to regulate independent contractors who supplied laborers for farms across the nation. The AWPA's scope is broader than that of the FLCRA. *See* Sherylle Gordon, Note, *Michigan Housing Laws Should Apply To Migrant Farm Workers*, 41 WAYNE L. REV. 1849, 1857 (1995) (arguing that farm labor contractor status is no longer the sole qualification to trigger liability under the AWPA). Gordon asserts that, "instead, the AWPA requires the following categories of persons to adhere to certain worker protection requirements: (1) farm labor contractors, (2) agricultural associations, (3) agricultural employers, and (4) any persons who own or control farm worker housing." *Id.*

agricultural workers from abuse.[4] In Florida, migrant workers' rights have not been adequately protected because Florida courts—specifically in the Eleventh Circuit—have not effectively enforced the AWPA.[5]

This Article addresses the misinterpretation of the AWPA and the failure to enforce basic worker protections. Part II lays out common defenses used by fruit and vegetable growers to avoid liability under the AWPA, based on whether a migrant worker is an "employee" of the grower under the statutory definition.[6] Part III touches on the AWPA's joint employment doctrine, which provides that workers may be considered employees of both a grower and a crewleader—the intermediary—who recruits, transports, and supervises migrant and seasonal workers.[7] Part IV focuses on how the Eleventh Circuit has misinterpreted the AWPA by incorrectly applying the joint employment test and holding that a migrant worker is solely an employee of the crewleader and not of the grower—as exemplified by the decision of *Aimable v. Long & Scott Farms*.[8] This section will also address the consequences of that decision, which has left migrant workers with no recourse because crewleaders are often judgment-proof.[9] Finally, Part V suggests that the Florida legislature should correct this problem by requiring crewleaders to have a surety bond to ensure that migrant workers are compensated when crewleaders violate the AWPA.[10]

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4. *See* Migrant and Seasonal Agricultural Worker Protection Act § 1801 (stating that the purpose of the AWPA is to regulate activities detrimental to migrant and seasonal agricultural workers).

5. *See, e.g.*, Renteria-Marin v. Ag-Mart Produce, Inc., 537 F.3d 1321, 1327 (11th Cir. 2008) (finding that the plain language construction of the terms "controls a facility" does not include supervising crew leaders because the statute, by referring to the person owning or controlling the facility, targeted the persons who "effectuat[ed] the maintenance of, inter alia, plumbing, electricity, sanitation, fire safety equipment and cleanliness in compliance with applicable federal and state standards.").

6. *See* discussion *infra* Part II.B (stating that because the term employ within the AWPA is based on an ambiguous definition in the FLSA, the relationship between a grower and a migrant worker often requires a detailed analysis of caselaw).

7. *See* discussion *infra* Part III (defining agricultural association, employees and farm labor contractors under the AWPA).

8. *See* discussion *infra* Part IV.A–B, Part V (analyzing the courts decision that even though the grower had contracted with a farm labor contractor the farm labor contractor was the sole employer).

9. *See* discussion *infra* Part IV.A (arguing that because the 11th Circuit misapplied the AWPA in *Aimable*, in order to protect immigrant workers, it must require surety bonds for crewleaders .

10. *See id.*

II. THE LEGISLATURE'S ANSWER TO THE MIGRANT WORKERS' QUANDARY

A. Migrant and Seasonal Agricultural Worker Protection Act

In 1982, testimony before the House Committee on Education and Labor described patterns of abuse and exploitation of farmworkers, and led to the enactment of the AWPA.[11] The AWPA was passed in 1983, and repealed the Farm Labor Contractor Registration Act of 1963 ("FLCRA").[12] The FLCRA provided limited protection to agricultural workers from the "low wages, long hours and poor working conditions" that have long plagued the industry.[13] The FLCRA imposed certain requirements, particularly on crewleaders rather than on the growers that own or operate the farm.[14] For example, this Act required crewleaders to register with the Department of Labor ("DOL") by providing information regarding their methods of operation as contractors.[15] Additionally, crewleaders had to provide proof of public liability insurance, or proof of financial responsibility, for all vehicles used in the business.[16]

Similarly, the AWPA provides for wage, employment, and safety protections for migrant and seasonal agricultural workers.[17] Like the FLCRA, the AWPA defines the DOL registration requirements for farm labor contractors and also requires farm labor contractors and their employees to obtain a certificate of registration from the DOL before starting any farm labor contracting activities.[18]

The AWPA, however, was adopted for the broad purpose of protecting migrant and agricultural workers, and it regulates many more aspects of

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11. H.R. Rep. No. 97-885, at 2 (1982), *reprinted in* 1982 U.S.C.C.A.N 4547, at 4548 ("Evidence received by the Committee confirms that many migrant and seasonal agricultural workers remain today, as in the past, the most abused of all workers in the United States . . . . Congress found that the [FLCRA] was largely ignored and not adequately enforced . . . testimony before Congress has shown that the Act of 1963 has failed to achieve its original objectives.").

12. Migrant and Seasonal Agricultural Worker Protection Act, 29 U.S.C. §§ 1801–1872 (2006); Farm Labor Contractor Registration Act ("FLCRA"), 7 U.S.C. § 2041, *repealed by* Migrant and Seasonal Agricultural Worker Protection Act, Pub. L. No. 97-470, § 523, 96 Stat. 2600 (1983).

13. *See* H.R. Rep. No. 97-885, at 1; *accord* 7 U.S.C. § 2041. The Committee on Education and Labor concluded, "as a result of direct evidence, that the Farm Labor Contractor Registration Act, as amended, has failed to reverse the historical pattern of abuse and exploitation of migrant and seasonal farm workers and that a completely new approach must be advanced." H.R. Rep. No. 97-885, at 3.

14. H.R. Rep. No. 97-885, at 2 (finding that ten years after its passage, evidence shows that the same abuses the FLCRA addressed continued unabated).

15. 78 Stat. at 921.

16. *Id*.

17. *See* 29 U.S.C. §§ 1802, 1822, 1841 (2006). Under the AWPA, a *migrant* agricultural worker is "an individual who is employed in agricultural employment of a seasonal or other temporary nature, and who is required to be absent overnight from his permanent place of residence." § 1802(8)(A). A *seasonal* agricultural worker is a person who is "employed in agricultural employment of a seasonal or other temporary nature and is *not* required to be absent overnight from his permanent place of residence." § 1802(10)(A).

18. § 1811.

the employment relationship, by establishing employment standards related to wages, transportation, disclosures, and record keeping.[19] Furthermore, it provides that if housing is furnished, it must meet specific safety and health standards.[20] Workers must be provided with written statements of earnings and deductions.[21] If transportation is provided, vehicles used must be safe and properly insured.[22] And most importantly, the AWPA provides enforcement provisions, including a provision granting aggrieved migrant workers a private right of action to sue for violations.[23]

B. Growers' Defenses to Avoid Liability under AWPA

A grower is responsible to a migrant worker under the AWPA only if the grower employs the migrant worker under the statutory definition of "employ."[24] Because the definition of "employ" is based on an unclear definition from the Fair Labor Standards Act ("FLSA"), determining whether a grower employs a migrant worker requires a detailed analysis of case law.[25] In enacting the AWPA, Congress acknowledged that agricultural-type labor often creates distinctive employment relationships.[26] The most common of these types of relationships is a triangle between the grower, the crewleader, and the worker.[27] Congress predicted that growers would deny responsibility for AWPA violations by categorizing crewleaders as independent contractors, not as employees of the agricultural employer or association, and categorizing farmworkers as employees solely of the crewleaders.[28] Indeed, growers have

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19. §§ 1811, 1821, 1822, 1831, 1832, 1841.

20. § 1823.

21. § 1821.

22. § 1841.

23. *See* § 1854.

24. § 1802(2), (5).

25. § 1802(5); Fair Labor Standards Act of 1938, 29 U.S.C. § 203(g) (2006 & Supp. IV 2010) (defining employ as "to suffer or permit to work").

26. H.R. Rep. No. 97-885, at 7 (1982), *reprinted in* 1982 U.S.C.C.A.N. 4547, 4553 (giving examples of many types of possible employment relationships between employees, employers, and contractors).

27. *Id*. at 6, 7 (explaining that this issue often arises where an "employer/association asserts that the worker in question was not an employee but an independent contractor or in the alternative that such worker was solely an employee of an independent contractor/crewleader").

28. *Id*.

often been successful in using those two defenses to escape liability under AWPA.[29]

When a court holds that a crewleader or worker is an independent contractor, the crewleader is directly liable to the migrant worker, but the grower is not.[30] In other words, the crewleader can be found to be the sole employer of the farmworker.[31] Yet, crewleaders typically do not have the financial resources to pay farmworkers' judgments in a lawsuit, frequently making it impossible for the farmworker to recover damages against the crewleader.[32] This lack of legal recourse places an economic burden on migrant farmworkers, "who are underpaid in the first instance and who cannot realistically recover unpaid wages from a crewleader who is undercapitalized and nowhere to be found."[33]

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29. *See, e.g.*, Aimable v. Long & Scott Farms, Inc., 20 F.3d 434, 445 (11th Cir. 1994) (finding that absent a clear showing of both the regulatory and non-regulatory factors that the migrant workers were economically dependent on the grower, the crewleader remains the sole employer of migrant workers), cert. denied, 115 S. Ct. 351 (1994); Howard v. Malcolm, 852 F.2d 101, 105 (4th Cir. 1988) (concluding that the crewleader was the sole employer of migrant corn pickers because he hired them, arranged for their housing and transportation, bargained for corn price with grower, and set their wages); Donovan v. Brandel, 736 F.2d 1114, 1120 (6th Cir. 1984) (noting that migrant pickle harvesters were not employees but independent contractors because of their ability to perform a similar task throughout Michigan); Charles v. Burton, 857 F. Supp. 1574, 1581–82 (M.D. Ga. 1994) (invoking the AWPA's legislative history to show there will always be situations where a farmer is not held to be a joint employer of a crewleader's employees, especially where the farmer exercised only cursory supervision, did not determine the wages, did not have the authority to hire or fire, and could not modify the individual conditions of employment, and was not responsible for the preparation of the payroll).

30. A crewleader is also known as farm labor contractor ("FLC"). *See* AWPA, 29 U.S.C. § 1802(7) (defining the term "farm labor contractor" as "any person, other than an agricultural employer, an agricultural association, or an employee of an agricultural employer or agricultural association, who, for any money or other valuable consideration paid or promised to be paid, performs any farm labor contracting activity"); *see also* Bertrand v. Jorden, 672 F. Supp. 1417, 1419 (M.D. Fla. 1987) (establishing that the defendant employer "ha[d] worked as a farm labor contractor, or 'crewleader.'").

31. *See, e.g.*, *Aimable*, 20 F.3d at 445 (conducting a multi-factor regulatory and non-regulatory analysis and concluding that the crewleader was the sole employer because the employee was found to be economically dependent on the crewleader).

32. Telephone interview with Gregory Schell, Managing Attorney, Fla. Rural Legal Svcs. (Sept 19, 2008) (on file with author). *See* Antenor v. D & S Farms, 88 F.3d 925, 930 (11th Cir. 1996) (attributing agricultural workers' inability to reverse patterns of abuse to crewleaders' tendency to be insolvent and transient).

33. Jeanne M. Glader, Note, *A Harvest of Shame: The Imposition of Independent Contractor Status on Migrant Farmworkers and its Ramifications for Migrant Children*, 42 HASTINGS L.J. 1455, 1472 (1991) (internal citations omitted) (quoting Maldonado v. Lucca, 629 F. Supp. 483, 489 (D.N.J. 1986)).

III. THE JOINT EMPLOYMENT DOCTRINE

There are three principal classes of regulated persons under the AWPA: agricultural associations, agricultural employers, and farm labor contractors.[34] Growers have limited obligations under AWPA, and are liable under the Act only if their relationship to the agricultural workers meets the statutory definition of "employ."[35] If the grower is not found to be a joint employer of the migrant or the seasonal worker, she avoids liability under the AWPA.[36]

Under the AWPA, the term "agricultural employer" means "any person who owns or operates a farm, ranch, processing establishment, cannery, gin, packing shed or nursery, or who produces or conditions seed, and who either recruits, solicits, hires, *employs*, furnishes, or transports any migrant or seasonal agricultural worker."[37] The term "employ" under the AWPA has the same meaning as under the FLSA: "to suffer or permit to work."[38] Congress's deliberate adoption of the broad definition of employ from the FLSA was the "central foundation" of the AWPA and "the best means by which to insure that the purposes of [the AWPA] would be fulfilled."[39]

Despite claims by growers that crewleaders are the farmworkers' sole employer, and thus are solely responsible for compliance with the AWPA, courts sometimes look beyond this label and hold growers and crewleaders liable as joint employers of farmworkers.[40] The term joint employment means

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34. "The term 'agricultural association' means any nonprofit or cooperative association of farmers, growers, or ranchers, incorporated or qualified under applicable State law, which recruits, solicits, hires, employs, furnishes, or transports any migrant or seasonal agricultural worker." AWPA, 29 U.S.C. § 1802(1).

35. § 1802(2). Growers only have to take reasonable steps to determine that the farm labor contractor possesses a certificate of registration. *See* § 1842. *See also Antenor*, 88 F.3d at 929 ("The grower's liability under the FLSA and the AWPA depends on whether they 'employed' the farmworkers furnished by [the independent labor contractor].").

36. § 1802(2). *See* 29 C.F.R. § 500.20(h)(5) (2011) (incorporating into the AWPA the definition of joint employment relationship contained in the FLSA); *see also Antenor*, 88 F.3d at 929-30 (discussing the liability of a grower if involved in joint employment relationship).

37. § 1802(2) (emphasis added).

38. Fair Labor Standards Act of 1938, 29 U.S.C. § 203(g) (2006 & Supp. IV 2010);AWPA, 19 U.S.C. § 1802(5). *See* S. Rep. No. 89-1487 (1966), *reprinted in* 1966 U.S.C.C.A.N. 3002 (1982) (discussing how the 1966 amendment would extend minimum wage protection to 390,000 agricultural workers). Congress passed the FLSA in 1938 to correct and eliminate those "conditions detrimental to the maintenance of the minimum standard of living necessary for health, efficiency, and general well-being of workers." The FLSA establishes minimum wage; regulations concerning maximum hours; record-keeping and reporting requirements; child labor provisions; and a system of civil and criminal penalties for violations of the FLSA. Although the original version of the FLSA excluded agricultural workers from its minimum wage protection, Congress amended the FLSA in 1966 to extend minimum wage protection to some agricultural workers. *Id. See generally*, 29 U.S.C. §§ 201–219.

39. H. Rep. No. 97-885 at 7.

40. *See, e.g.*, Real v. Driscoll Strawberry Assocs., Inc., 603 F.2d 748, 756 (9th Cir. 1979) (holding that the farmer and independent contractor jointly employed the worker in light of the level of control the farmer exercised over the workers).

"a condition in which a single individual stands in the relation of an employee to two or more persons at the same time."[41] A finding of joint employment requires a case-by-case fact-based analysis.[42] "If the facts establish that two or more alleged employers are completely disassociated with respect to the employment of a particular employee, a joint employment situation does not exist."[43]

Whether an employment relationship exists between the agricultural employer or association and the agricultural worker, depends on whether the worker is economically dependent upon the agricultural employer or association.[44] This economic dependency test used by courts to determine whether a migrant or seasonal farmworker is jointly employed does not appear in the AWPA.[45] In the legislative history of the AWPA, Congress expressly stated that, for joint employment purposes, the factors used in case law interpreting FLSA violation claims should be the controlling approach used by courts interpreting AWPA violations.[46] Congress specifically endorsed several factors used by courts construing FLSA claims in determining joint employment. These elements include but are not limited to:

(1) Whether the work was a "specialty job on the production line,"[47]
(2) Whether responsibility under the contracts between a labor contractor and an employer pass from one labor contractor to another without "material changes,"[48]

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41. 29 C.F.R. § 500.20(h)(5) (2002).

42. *Id.*

43. *Id*.

44. *Id*. § 500.20(h)(5)(iii).

45. Rather, the economic dependency doctrine is a judicially constructed device developed by several courts in finding whether a worker is jointly employed by an entity under FLSA claims. *See, e.g.*, Rutherford Food Corp. v. McComb, 331 U.S. 722, 729 (1947) (finding that the workers were employees of the slaughterhouse since they were economically dependent upon the factory because the workers used the factory's premises and equipment, because the workers had no independent business organization, and because the workers' contracts were not individually tailored and never materially altered); *Real*, 603 F.2d at 756 (concluding that the strawberry farmer's supervision, control over fertilization of plants, and provision of strawberry plants rendered the workers economically dependent upon the farmer and therefore finding an employer-employee relationship between the farmer and workers); Sec'y of Labor v. Lauritzen, 835 F.2d 1529, 1538 (7th Cir. 1987), *cert. denied*, 488 U.S. 898 (1988) (asserting that the migrant workers were economically dependent on the farmer's land, agricultural expertise, equipment and marketing and accordingly were employees for the purposes of the AWPA); Beliz v. McLeod, 765 F.2d 1317 (5th Cir. 1985) (determining that an employer-employee relationship existed between the crewmembers and the agricultural producer because the agricultural producer controlled and supervised how the work was to be performed and set the piecework rates); Castillo v. Givens, 704 F.2d 181 (5th Cir. 1983), *cert. denied*, 464 U.S. 850 (1983).

46. H. R. Rep. No. 97-885 at 7.

47. *See, e.g.*, *Rutherford Food Corp.*, 331 U.S. at 730; Hodgson v. Griffin & Brand of McAllen, Inc., 471 F.2d 235, 238 (5th Cir. 1973).

48. *Rutherford Food Corp.*, 331 U.S. at 730.

(3) Whether the "premises and equipment" of the employer are used for the work,[49]

(4) Whether the employees had a "business organization that could or did shift as a unit from one worksite to another,"[50]

(5) Whether the work was "piecework" and not work that required "initiative, judgment or foresight,"[51]

(6) Whether the employer exercised control over the employees' work.[52]

In analyzing the existence of a joint employment relationship, the Supreme Court in *Rutherford Food Corp. v. McComb* utilized the economic reality test in the context of a FLSA claim.[53] In *Rutherford*, the DOL sought to enjoin a slaughterhouse and meat packing company from violating FLSA wage and hour provisions.[54] The Court looked at the economic reality of the relationship between meat deboners, the slaughterhouse operator, and slaughterhouse owner.[55] The Court sought to determine whether workers who deboned meat in the slaughterhouse were independent contractors or employees of either Rutherford Food Corporation (the slaughterhouse operator) or Kaiser Packing Company (the slaughterhouse owner).[56] The Court proceeded to look at the broader circumstances of the deboners as they related to all the activities in the slaughterhouse, and concluded that the workers were employees of the owner,

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49. *Id*.; *accord Griffin & Brand*, 471 F.2d at 237; *Real*, 603 F.2d at 754 (considering the alleged employees' "investment in equipment or materials required for his task, or his employment of helpers").

50. *Rutherford Food Corp.*, 331 U.S. at 730.

51. *See id*. (noting that providing a financial incentive to encourage greater output from the workers by lining payment to output does not result in any independent initiative on the part of the workers, but is more similar to piecework thereby resulting in the worker remaining economically dependent upon the deboning factory); *see also Real*, 603 F.2d at 754 (considering "whether the service rendered requires a special skill"); *Griffin & Brand*, 471 F.2d at 236 (defining piece rate as the amount paid per basket picked and stating that the piece rate varies with the size of the particular vegetable or fruit being harvested).

52. *Rutherford Food Corp.*, 331 U.S. at 730; *see also Griffin & Brand*, 471 F.2d at 237 (indicating that the farmer exercised control over the crew leaders and harvest workers when the farmer assigned what row or patches to harvest each day and the rate at which crew leaders should pay the harvest workers, including whether an hourly or piece rate is appropriate).

53. *Rutherford Food Corp.*, 331 U.S. at 727 (finding that because the FLSA sought to improve labor conditions for workers, the standard it uses to define an "employee" should also be used in AWPA cases).

54. *See id*. at 723 (examining whether there was a violation of the FLSA because the factory failed to keep proper records and pay appropriate overtime).

55. *See id*. at 726 (following the Circuit Court of Appeals' departure from the common law test of determining the definition of an "employee" and looking at the "underlying economic realities").

56. *Id*. at 724, 727. Rutherford owned 51% of Kaiser stock. Because Kaiser was operating at a loss, Rutherford advanced money for Kaiser's operation. In 1943, Rutherford leased the Kaiser slaughterhouse and took over its operations. This arrangement lasted until 1944. *Id*.

Kaiser, as they were performing a specialty job on the production line.[57] The Court considered Kaiser's ownership of the plant and most of the equipment as well as Kasier management's close supervision of the workers's performance.[58] The job was essentially piecework because the deboners' compensation did not actually depend on their own initiative, judgment, or foresight, as it would for a typical independent contractor.[59] Therefore, the Court concluded that the employer could not label the deboners independent contractors in order to escape compliance with the FLSA.[60]

AWPA's legislative history indicates that the absence of any one or more of the six factors listed above does not preclude a finding that an agricultural association or agricultural employer is a joint employer along with a farm labor contractor.[61] Additionally, Congress recognized that the agricultural economy contains varied employment relationships.[62] These relationships often involve a combination of employers, contractors and employees. In the enactment of the AWPA, Congress wanted to make clear that, under the construction of the joint employer concept, it envisioned situations in which a single employee may have the required employment relationship with not just one employer, but simultaneously with an employer and an independent contractor, or with several employers, with or without the inclusion of an independent contractor.[63] The focus of each inquiry, therefore, must be each employment relationship as it exists between the parties.[64]

Whether a worker is an employee does not depend on technical or "isolated factors but rather on the circumstances of the whole activity."[65] It depends not on the form of the relationship but on the economic reality, and whether the employee is dependent upon that person for his livelihood.[66]

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57. *See id*. at 730 (determining that assessment of the relationship between the deboners and the slaughterhouse does not hinge on isolated factors, but rather on the entirety of the circumstances).

58. *See id*. (considering the ownership of the premises and the equipment factory a when finding an employer-employee relationship and proving that the de-boners were dependent on the managers and were therefore employees).

59. *See id*. (holding that linking pay to worker output can constitute piecework which does entail initiative or judgment by the worker).

60. *See id*. (reasoning that the deboners could not constitute independent contractors since they did not work as a unit, they did piecework, and they relied on the slaughterhouse management equipment).

61. H. R. Rep. No. 97-885 at 7.

62. *Id*.

63. *Id*.

64. *Id*. at 8.

65. *Rutherford Food Corp*., 331 U.S. at 730.

66. *Id*. (looking at the entire work relationship including the extent of employee organization, payment structure, and managerial oversight).

IV. THE ELEVENTH CIRCUIT'S MISINTERPRETATION OF THE AWPA

A. How the Eleventh Circuit has Interpreted the AWPA

The joint employment doctrine is a judicial mechanism used by courts to determine whether a farm labor contractor and agricultural association or employer jointly employ a migrant or agricultural worker for purposes of AWPA violations.[67] In assessing the existence this relationship, the Eleventh Circuit has used the economic reality test promulgated in Title 29 of the Code of Federal Regulations (C.F.R.) and interpreted by several judicial decisions.[68] AWPA violations have also been found using the factors outlined in decisions construing FLSA violation claims in determining the existence of joint employment.[69]

Aimable v. Long & Scott Farms is the seminal case in the Eleventh Circuit interpreting the joint employment doctrine under the AWPA.[70] In *Aimable*, a grower had contracted with a farm labor contractor that would provide laborers to harvest its crops. The Eleventh Circuit had to decide whether the grower was the joint employer of those laborers for purposes of the FLSA and AWPA.[71] The plaintiffs, 206 migrant and seasonal farm workers, were

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67. *Id.*

68. 29 C.F.R. 500.20(h)(5)(iii). *See, e.g.*, Torres-Lopez v. May, 111 F.3d 633 (9th Cir. 1997) (assessing whether a joint employment relationship exists by examining the "economic reality"—looking at the nature and degree of control of the workers, the degree of supervision, the power to determine methods of payment of the workers, the right to fire or modify employment conditions and the preparation of payroll and the payment of wages); Howard v. Malcolm, 852 F.2d 101 (4th Cir. 1988) (finding joint employment because the farmer arranged the housing, transportation, the piecework rate, tax and maintained work records); Dep't of Labor v. Lauritzen, 835 F.2d 1529, 1536-38 (7th Cir. 1987) (looking at the control of supervisors, profit and loss, capital investment and degree of skill required to perform the work to assess the economic reality); Beliz v. W.H. McLeod & Sons Packing Co., 765 F.2d 1317, 1327 (5th Cir. 1985) (finding that control of the farmer over the workers is key in assessing the economic reality and the "critically significant" factors are how specialized the nature of the work and whether the individual is "in business for himself"); Castillo v. Givens, 704 F.2d 181, 185–93 (5th Cir. 1983); Real v. Driscoll Strawberry Assocs., 603 F.2d 748, 754 (9th Cir. 1979) (distinguishing employees from independent contractors by examining the employer's control of the workers, the worker's opportunity for profit or loss, the worker's investment in the equipment or materials, whether the service requires a special skill, the degree of permanence of the working relationship, and whether the service rendered is an integral part of the employer's business).

69. *See, e.g.*, Charles v. Burton, 169 F.3d 1322 (11th Cir. 1999) (stating that the concept of "employ" used in the AWPA includes the joint employment principles applicable under the FLSA); Antenor v. D&S Farms, 88 F.3d 925 (11th Cir. 1996) (viewing the AWPA definition of "employ" as the same as the FLSA definition); Aimable v. Long & Scott Farms, 20 F.3d 434, 438 (11th Cir. 1994) (referring to the FLSA principles to define concept of "joint employment" in the context of the Migrant and Seasonal Agricultural Worker Protection); *accord* Luna v. Del Monte Fresh Produce, 2008 U.S. Dist. LEXIS 21636 (N.D. Ga., March 18, 2008) (construing that both the AWPA and the FLSA define "employer" as any entity that "suffers or permits" an individual to work).

70. *See Aimable*, 20 F.3d at 436 (examining the district court's summary judgment that the farm was not the laborers' joint employer).

71. *Id.*

alleged to have been employed by John Miller, Jr., the farm labor contractor, to harvest crops grown by Long & Scott Farms—the owner and operator (grower) of a vegetable farm in Florida.[72] One of the grower owners, Frank Scott, managed the day-to-day activities of the farm.[73] Miller, the farm labor contractor, had been recruiting and supplying Scott with migrant workers for his farm for twenty-five years.[74] Throughout their relationship, Scott never used any contractor other than Miller.[75] Scott would pay Miller a flat rate for each quantity of produce picked and Miller compensated the workers on a piece-rate basis.[76] The farmworkers sued both the grower and farm labor contractor to recover unpaid wages—alleging that the defendants were liable as joint employers for violations of the FLSA and the AWPA for not paying them minimum wage and keeping proper records of their pay.[77]

At the trial court, the United States District Court for the Middle District of Florida held that the farm labor contractor was the sole employer of the farmworkers for purposes of the FLSA and the AWPA.[78] On appeal, the Eleventh Circuit upheld these findings.[79] The Eleventh Circuit used factors formulated by other courts to determine whether a joint employment relation exists under the FLSA, including:[80]

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72. *Id*. at 437.

73. Frank Scott owned one-half shares in the Long & Scott farm.

74. *Id*. at 437.

75. *Id*.

76. Piece rate is a payment system where employees are paid according to how much they produce. For example, farmworkers are paid a predetermined amount per bucket of vegetables or fruits picked.

77. *Aimable*, 20 F.3d at 437

78. *Id*. at 436.

79. *Id*.

80. Congress recognized that in each case interpreting joint employment under the FLSA, courts give a slightly different description of the five or six factors used in making the determination of whether joint employment exist. Additionally, Congress suggested that the factors are not exhaustive. *Id*. at 438. *See* Hodgson v. Griffin & Brand of McAllen, Inc., 471 F.2d 235, 237 (5th Cir. 1973) (using a five-part test to examine the employer-employee relationship under the FLSA); Rutherford Food Corp. v. McComb, 331 U.S. 722 (1947); Real v. Driscoll Strawberry Assoc., Inc., 603 F.2d 748, 754 (9th Cir. 1979) (adopting FLSA factors to determine whether a joint relationship exists by looking at the degree of the employer's control, the employees' opportunity for profit or loss, the employees' investment in equipment, the special skills required, the permanence of the working relationship, and whether the service is an integral part of the employer's business).

> (1) The nature and degree of control of the workers;
> (2) The degree of supervision, direct or indirect, of the work;
> (3) The power to determine the pay rates or the methods of payment of the workers;
> (4) The right, directly or indirectly, to hire, fire, or modify the employment conditions of the workers; and
> (5) Preparation of payroll and the payment of wages.[81]

In interpreting the five factors, the court concluded that Long & Scott were not the joint employers of the farmworkers based on five key findings.[82] First, the court found that the farm labor contractor, not Long & Scott, controlled the number of workers employed to work on the farm; the farm labor contractor hired and fired specific individuals, and selected specific workers to do specific jobs.[83] Second, supervision by Long & Scott was *de minimis*, although Long & Scott employees came out to the field on a regular basis and occasionally gave Miller commands that were, in turn, relayed to the workers.[84] Third, Long & Scott had no direct or indirect power to set or increase the workers' wages, although plaintiffs argued that Long & Scott controlled the amount Miller received and Miller controlled the amount the workers received and therefore, Long & Scott controlled the amount the workers ultimately received.[85] Fourth, Long & Scott never commanded that a particular individual be hired or fired and never decided whether the workers would be paid hourly or piece-rate wages.[86] Lastly, Miller, not Long & Scott, was responsible for calculating and paying each farmworker his wages.[87]

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81. *Aimable*, 20 F.3d at 438 (finding that none of the first three factors—the three in dispute—supported a finding of joint employment).

82. *See id*. at 443-44. However, the court continued its analysis by addressing six additional factors proposed by the plaintiff farmworkers. In its examination, the court determined two issues: "whether the factors were relevant to this particular case; and if so, whether the factor supported a finding of joint employment." The court held that, in this case, only two of the six factors were relevant. Thus, the court created its own unique six-factor test for joint employment as follows: (1) Investment in equipment and facilities; (2) The opportunity for profit and loss; (3) Permanency and exclusivity of employment; (4) The degree of skill required to perform the job; (5) Ownership of property or facilities where work occurred; and (6) Performance of a specialty job within the production line integral to the business. *Id.*

83. *Id*. at 441 (making such a determination even though the court also recognized that Long & Scott made all planting decisions, including which crops to plant, how much to plant, and how to grow the crop (e.g., decisions regarding tilling, fertilization, and irrigation)).

84. *Cf. Hodgson*, 471 F.2d at 238 (holding that supervision is present whether orders are communicated directly to the laborer or indirectly through the contractor).

85. *See Aimable*, 20 F.3d at 442 (explaining the indirect control Long & Scott possessed over the appellants).

86. *See id*. (illustrating how the fourth regulatory factor favors a finding that no joint employment existed).

87. *See id*. at 442-43 (showing how the fifth regulatory factor does not support a finding of joint employment).

The court concluded by stating that the farmworkers were economically dependent upon Miller, not upon Long & Scott.[88] Moreover, taking the five factors in isolation, "the result is inescapable: Miller alone was appellants' employer; no joint employment existed."[89]

B. Why the AWPA does not Protect Migrants in Florida

The legislative history of the AWPA demonstrates that Congress intended to have growers ensure compliance with the AWPA.[90] During the debate, Rep. Miller noted that: "Agricultural employers . . . will for the first time be sure of their duties to migrant workers. Agricultural employees will, in turn, know who is responsible for their protections, by fixing responsibility on those who ultimately benefit from their labors—the agricultural employer."[91] Section 1842 of the AWPA provides that "[n]o person shall utilize the services of any farm labor contractor . . . unless the person first takes reasonable steps to determine that the farm labor contractor possesses a certificate of registration which is valid and which authorizes the activity for which the contractor is utilized."[92]

Additionally, the legislative history of the AWPA states that Congress's purpose in enacting the AWPA was to reverse the historical pattern of abuse and exploitation of migrant and seasonal farm workers.[93] According to Gregory Schell, a leading AWPA attorney who has represented many migrant workers in AWPA violation cases, "the courts simply are not enforcing AWPA against the growers."[94] He went on to say that "when Congress enacted AWPA, it meant to regulate the crewleaders."[95] But, he further stated, "The law is doing what it is supposed to do, protecting migrant workers from crewleaders' violations."[96] The crewleaders, however, do not usually have very much money.[97] Even when a migrant worker wins a lawsuit against a crewleader under the AWPA,

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88. *See id*. at 445 (holding that when the court examines all of the non-regulatory factors in light of the five regulatory factors, each of which demonstrates that the farmworkers were economically dependent upon Miller).

89. *See id*. at 443 (establishing that *Aimable* is still the law in the Eleventh Circuit); *accord* Luna v. Del Monte Fresh Produce, 2008 U.S. Dist. LEXIS 21636, at *29 (finding no joint employment where the wholly-owned subsidiary hired and fired workers and the parent company purchased and sold the produce).

90. *See* 29 U.S.C. § 1802(2) (2006) ("The term 'agricultural employer' means any person who owns or operates a farm . . . and who either recruits, solicits, hires, employs, furnishes, or transports any migrant or seasonal agricultural worker.").

91. 128 CONG. REC. 26,008 (1982) (statement of Rep. Miller).

92. 29 U.S.C. § 1842 (2006).

93. H.R. REP. NO. 97-885, at 3 (1982), *reprinted in* 1982 U.S.C.C.A.N. 4547, at 4549.

94. Telephone interview with Gregory Schell, Managing Attorney, Fla. Rural Legal Servs. (Sept. 19, 2008) (on file with author).

95. *Id.*

96. *Id.*

97. *Id.*

the migrant usually cannot collect the damages.[98] Thus, "when a person is riding on the back of a crewleader's truck that is not insured, the person is just out of luck if he is injured [because] he has to pay his own hospital bills."[99] Furthermore, Schell also stated that the crewleaders deduct social security insurance from the workers' paychecks, but the Internal Revenue Service will never see a dime, as many of the workers do not have valid social security numbers with which to collect social security payments.[100] The same is true for alleged worker's compensation payments collected by the growers.[101]

In another Eleventh Circuit AWPA decision, *Charles v. Burton*,[102] the court had to decide whether the growers were liable for actual damages to the farmworkers for the growers' failure to verify the farm labor contractor's registration and insurance.[103] In *Burton*, the farm labor contractor's uninsured truck overturned on the highway while driving the workers to the growers' farm, killing and seriously injuring several farmworkers aboard the truck.[104] The Eleventh Circuit reversed the district court's holding that the growers' failure to check the farm labor contractor's certificate of registration precluded the workers from having access to insurance coverage.[105] In reversing, the court reasoned that if the growers had utilized a farm labor contractor with a valid certificate of registration, there would have been insurance coverage for the workers' physical injuries.[106] Thus, the court concluded that the growers violated the AWPA and therefore were liable for the workers' lost wages and medical care.[107]

The district court's ruling in *Burton* shows some courts' refusal to hold growers liable under the AWPA, even where the grower blatantly violated the act by not checking the farm labor contractor's certificate of registration.[108] The decision had to be reversed on appeal in order to hold the grower liable. During a phone interview, Gregory Schell explained why such decisions are so common:

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98. *Id.*

99. *Id.*

100. *Id.*

101. *Id.*; *see also* Charles v. Burton, 169 F.3d 1322, 1335-36 (11th Cir. 1999) (failing to check worker's certificate of registration).

102. *Burton*, 169 F.3d at 1322.

103. 29 U.S.C. § 1842 (2006) (requiring farm labor contractor to possess the certificate of registration); § 1841(b) (requiring vehicles used for transporting migrants to carry insurance or a liability bond).

104. *Burton*, 169 F.3d at 1326.

105. *Id.* at 1335 (explaining that the trial court found that checking the farm labor contractor's license was too far removed from the type of harm the workers suffered).

106. *Id.*

107. *Id.* at 1336.

108. *Id*.

> [N]obody cares about these people. The fact is the majority of these workers are undocumented which saves the company that hires them a lot of money because the labor is cheap. The government does not care about them either, because they are minorities. They don't pay taxes; they don't pay campaign contributions, and therefore [they], are not [a] priority on anyone's list. [This is why] so many bills intended to protect them fail—the migrants are powerless.[109]

V. FLORIDA SHOULD REQUIRE CONTRACTORS TO HAVE SURETY BONDS

In enacting AWPA, Congress adopted the joint employment doctrine to aid courts in enforcing AWPA violations.[110] At the same time, when a worker is found not to be an employee of the agricultural association or the employer, the farmworker is often left without recourse for his injuries.[111] Still, enacting stricter penalties will likely not remedy the problem of judgment-proof farm labor contractors. Congress has already attempted this by repealing the AWPA's predecessor, the FLCRA, and adopting standards that are more stringent for growers and farm labor contractors.[112]

The author of a Note entitled, *Picking Produce and Employees: Recent Developments in Farmworker Injustice*, suggests that Congress should amend the AWPA and create a per se rule that migrant farmworkers are employees of agricultural businesses.[113] The article reasoned that adopting a per se rule would make it impossible for large growers to avoid liability under the AWPA.[114] The author further noted, "this per se rule should begin in the courts as a signal to growers that judges will no longer be fooled by the veil of a mere contractual agreement with a crewleader."[115] However, as with the joint employment doctrine, a per se rule would still be subject to judicial construction. Notably, inconsistent judicial construction is one of the weaknesses of the AWPA, as

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109. Telephone interview with Gregory Schell, Managing Attorney, Fla. Rural Legal Servs. (Sept. 19, 2008) (on file with author).

110. *See* H.R. REP. NO. 97-885, at 8 (1982).

111. 8 U.S.C. § 1101(a)(15)(H)(ii)(a) (2006 & Supp. 2008). Overwhelmingly, migrant and seasonal farmworkers do not have social security numbers and are not employees of the grower. Therefore, they cannot collect worker's compensation and unemployment benefits when they are out of work. Many migrant farmworkers come to the United States under the H-2A program, authorized by the Immigration and Nationality Act ("INA"), which permits U.S. employers to bring temporary foreign workers into the United States to perform seasonal agricultural work. *Id.*

112. H.R. REP. NO. 97-885, at 13. Farm labor contractors, agricultural employers, and agricultural associations that recruit workers must provide the workers with a written disclosure statement informing them of the wage rates, the period of employment, where the employment will take place, and what it will involve, as well as whether housing, transportation or other benefits are provided.

113. Jeanne E. Varner, Note, *Picking Produce and Employees: Recent Developments in Farmworker Injustice*, 38 ARIZ. L. REV. 433, 469-71 (1996).

114. *Id.* at 435.

115. *Id.* at 470.

courts do not apply the factors of the joint employment doctrine uniformly, and each court may develop its own factors where applicable.[116] Thus, the per se rule is a dilemma with no end.

A. California and Oregon: Additional Protection for Migrant Workers

In order to remedy the problems created by the joint employment loophole, Florida should require that crewleaders obtain a surety bond upon registering as a farm labor contractor.[117] Such regulation already exists in at least two states—California and Oregon—both of which require that farm labor contractors be bonded before employing migrant workers. [118]

Both California and Oregon statutes provide agricultural workers added protections in addition to the ones already offered by AWPA.[119] Whenever federal statutes confer certain rights and benefits to individuals, states can always provide even greater benefits to their citizens.[120] Typically, where a person brings a cause of action under the federal statute, that person may sue under the state statute as well.[121] This is because state statutes often replicate federal statutes pertaining to particular rights.[122] In addition to the protections offered by the AWPA, California and Oregon agricultural workers enjoy added benefits.

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116. *See*, *e.g.*, Aimable v. Long & Scott Farms, 20 F.3d 434, 436 (11th Cir. 1994) (affirming that the grower had no control over workers where the farmer gave the farm labor contractor general instructions as to which crops to harvest at a particular time); *see also* Charles v. Burton, 169 F.3d 1322, 1325-26 (11th Cir. 1999) (ruling the the grower had control where growers determined the particular fields that they wanted the workers to cultivate, determined when workers would begin picking each field, and supplied workers with boxes); Antenor v. D&S Farms, 88 F.3d 925, 937-38 (11th Cir. 1996) (finding the the growers did have control over workers where growers told FLC how many farmworkers to bring each day, the growers' foremen determined the precise moment when picking would commence each day, and the growers were free to directly delay or stop the workers from continuing their work).

117. A surety bond is an insurance policy that pays injured parties for losses suffered from the bondholder's failure to perform under a contract. 30 FLA. JUR. 2D *Insurance* § 27 (2011).

118. CAL. LAB. CODE § 1684(a)(3) (West 2003 & Supp. 2011); OR. REV. STAT. § 658.415(3) (2009).

119. 29 U.S.C.A § (1)(H) (1983). For example, AWPA does require that farm labor contractors carry an insurance policy or liability bond. However, the grower has to verify coverage. Insurance is not a requisite to be a licensed farm labor contractor.

120. *Cf.* William J. Brennan, *State Constitutions and the Protection of Individual Rights*, 90 HARV. L. REV. 489 (1977) (discussing the capacity for state constitutions to help protect individual liberties in a manner separate from the role of federal law and the United States Constitution).

121. *Cf. id*. at 503 (stating that the "very premise of the cases that foreclose federal remedies constitutes a clear call to state courts to step into the breach.").

122. *See*, *e.g.*, People v. Disbrow, 545 P.2d 272, 280 (Cal. 1976) ("We pause . . . to reaffirm the independent nature of the California Constitution and our responsibility to separately define and protect the rights of California citizens despite conflicting decisions of the United States Supreme Court . . . .")

The California Labor Code provides that a person shall not act as a farm labor contractor until the California Labor Commissioner licenses that person.[123] The California Labor Commission must investigate an individual's character, competency, and responsibility before it issues or renews his license as a farm labor contractor.[124] The statute also requires that a person deposit with the Labor Commissioner a surety bond in an amount based on the size of the person's annual payroll for all employees.[125] For payrolls up to $500,000.00, a $25,000.00 bond is required.[126] In addition, a $50,000.00 bond is required for payrolls of $500,000.00 to $2,000,000.00.[127] For payrolls greater than $2,000,000.00, a $75,000.00 bond is mandated.[128] Furthermore, the law requires that where a farm labor contractor is subject to a final judgment in an amount equal to the bond requirement, he must deposit an additional bond within sixty days.[129]

Additionally, farm labor contractors in California must take a written examination to measure their knowledge of the current laws and administrative regulations concerning farm labor contractors.[130] A farm labor contractor needs a score of at least eighty-five percent on the examination to pass and be licensed.[131] Moreover, a person may take the examination no more than three times in a calendar year.[132] The statute also mandates that a person who wishes to become a farm labor contractor enroll and participate in at least eight hours of relevant educational classes each year, chosen from a list of approved classes prepared by the California Labor Commissioner.[133]

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123. Under the California Labor Code, a farm labor contractor is any person who, for a fee, employs workers to render personal services in connection with the production of any farm products to, for, or under the direction of a third person, or who recruits, solicits, supplies, or hires workers on behalf of an employer engaged in the growing or producing of farm products, and who, for a fee, provides in connection therewith one or more of the following services: furnishes board, lodging, or transportation for those workers; supervises, times, checks, counts, weighs, or otherwise directs or measures their work; or disburses wage payments to these persons. *See* § 1682 (2011). *See* § 1684(a)(6) ("[a] person has registered as a farm labor contractor pursuant to the federal Migrant and Seasonal Agricultural Worker Protection Act (29 U.S.C. 1801 et seq.), when registration is required pursuant to federal law.").

124. § 1684(a)(1)(A).

125. § 1684 (a)(3) (2006).

126. § 1684 (a)(3)(A).

127. § 1684 (a)(3)(B).

128. § 1684 (a)(3)(C).

129. *Id.*

130. § 1684 (a)(5). The exam taker is assessed on his knowledge of the current laws and regulations regarding wages, hours, and working conditions, penalties, employee housing and transportation, collective bargaining, field sanitation, and safe work practices related to pesticide use in agricultural employment setting.

131. *Id.*

132. *Id.*

133. § 1684 (b)(2).

Similarly, under Oregon's Revised Statute, a person may not act as a farm labor contractor unless first licensed by the Commissioner of the Bureau of Labor and Industries.[134] Oregon requires that farm labor contractors carry surety bonds for the protection of its migrant workers.[135] In contrast, Oregon provides farm labor contractors the option of making a cash deposit if they are unable to obtain the surety bond.[136] While, the bond in California is based upon the amount of one's payroll, in Oregon it is based on the number of employees a farm labor contractor has.[137]

Any person may file an application for a license to act as a farm labor contractor at any office of the Bureau of Labor and Industries.[138] However, every person who acts as a farm labor contractor must furnish proof of insurance for any vehicles that will be utilized to transport agricultural workers.[139] In addition, each farm labor contractor applicant has to provide and maintain proof of financial ability to pay the wages of employees and other obligations that may arise under this statute.[140] Proof of financial ability to obtain and carry a corporate surety bond of a company licensed to do such business in Oregon is necessary.[141] Where a farm labor contractor cannot purchase the requisite surety bond, that person may establish a cash deposit or deposit the cash equivalent through a savings account at a bank in the name of the Commissioner.[142]

The Commissioner acts as trustee for the employees of the farm labor contractor and others as their interests may appear. The farm labor contractor, in turn, has to deliver proof of the account and the ability to withdraw the funds for the Commissioner under the terms of a bond approved by the Commissioner.[143] The amount of the bond a farm labor contractor is required to carry depends on the number of workers the contractor employs.[144] For example, a $10,000 bond is required if the contractor employs up to twenty employees, and a $30,000 bond is required if the contractor employs over twenty workers.[145] The statute further provides that any person who suffers lost wages or any other loss because of an agricultural association or the private nonprofit corporation as a farm labor contractor shall have a right of action against the surety bond or against the bank deposit.[146] In addition, any person

134. OR. REV. STAT. § 658.415(1) (2007).
135. OR. REV. STAT. § 658.415(8) (2007).
136. § 658.415(3) (2007).
137. *Id.*
138. *Id.*
139. § 658.415(2)(a) (2007).
140. § 658.415(3) (2007).
141. *Id.*
142. *Id.*
143. *Id.*
144. *Id.*
145. § 658.415(3)(b) (2007).
146. § 658.415(8) (2007).

who knowingly uses the services of an unlicensed farm labor contractor shall be personally, jointly, and severally liable along with the person acting as a farm labor contractor.[147]

In addition, Oregon makes any person jointly and severally liable with a farm labor contractor if that person knowingly uses the services of an unlicensed farm labor contractor.[148] Consequently, this provision seems to indicate that even if a court finds that an agricultural association or owner is not a joint employer of a migrant worker for AWPA violations, the owner or association could still be liable under the this statute.[149] For instance, in *Burton*, the growers violated AWPA by not verifying that the farm labor contractor had a valid certificate of registration. So long as the owner or association knowingly uses the services of an unlicensed farm, they are liable for the workers' claims.[150] Under this approach, a court does not even need to define joint employment in order to hold a grower liable under Oregon law for AWPA violations. The grower would be jointly and severally liable if it fails to verify the farm labor contractor's certificate of registration.

Requiring farm labor contractors to take an exam holds the individuals to a greater standard, as contractors should know the laws that can potentially affect their status as farm labor contractors.[151] The exam ensures that before someone even applies to be a licensed farm labor contractor, that person already knows the standard to which he must conform.[152] Requiring farm labor contractors to carry surety bonds ensures that workers are compensated for injuries suffered from farm labor contractors' non-compliance with AWPA and the California Code.[153]

B. Florida Should Follow Oregon's Surety Bond Law

Often, migrant workers cannot collect on civil judgments won under AWPA. This is because farm labor contractors usually do not have the financial ability to pay the judgments, and the growers who have the economic ability to pay are found not to be the employer of the migrant worker. In order to further AWPA's statutory purpose, the Florida legislature should enact a law similar to Oregon's—requiring crewleaders to carry surety bond. The statute should require proof of surety bond before a person can become a farm labor contractor. And in the event a grower fails to verify that the farm labor contractor meets this requirement, the grower would be jointly and severally liable to the migrant workers for any injuries sustained. The Oregon law

147. *See* § 658.419.
148. § 658.415(7)(a) (2007).
149. *Id.*
150. *Id.*
151. *Id.*
152. *Id.*
153. § 1684(a)(3)(C) (2006).

provides more protection and flexibility than the California law. For instance, in Oregon the farm labor contractor can have a bond or a cash deposit.[154] Furthermore, Oregon makes any person jointly liable under the act for known violations.[155] Moreover, just like Oregon, Florida should make the amount of bond based on the number of personnel a farm labor contractor employs. In addition, Florida should establish a commission that would oversee and act as trustee for any bonds paid and maintained. By enacting this legislation, Florida migrant workers would finally have the much-needed protection they lack in the event of incidents like the one in *Burton*.[156] For example, under current law, if a migrant worker incurs bodily injury or death while being transported by a farm labor contractor and the contractor does not have liability insurance, the migrant worker does not get compensation for medical expenses or lost wages.[157] Under this new recommended law, whether a farm labor contractor is underinsured or uninsured, the surety bond would help pay for the medical expenses and lost wages of the migrant worker.

While the AWPA states that a farm labor contractor should not transport workers in its vehicle unless insured, contractors often break this rule.[158] The AWPA does not require that farm labor contractors first obtain insurance in order to obtain their farm labor contractor status. The Oregon law deals precisely with this issue, requiring a person who wants to apply to be a farm labor contractor to first have a surety bond approved by the Commissioner of Labor.[159]

This mandatory policy would aid migrants like the ones in *Burton*.[160] In *Burton*, since the farm labor contractor's truck was uninsured and the migrants could not get medical care or compensation for lost wages.[161] Burton would have ended differently had Florida required the crewleader to have a surety bond, which would have compensated the migrant workers for the injuries sustained in that crash. Additionally, the grower would be jointly and severally liable for its failure to validate the farm labor contractor's valid certificate of

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154. § 658.415(3) (2007).

155. § 658.415(7)(a) (2007).

156. Charles v. Burton, 169 F.3d 1322, 1335 (11th Cir. 1999) (finding that farmworkers were unable to obtain medical care and compensation for lost wages because the farm labor contractor did not have a valid certificate of registration and therefore no insurance coverage on the vehicle).

157. *See generally* Aimable v. Long & Scott Farms, 20 F.3d 434 (11th Cir. 1994) (discussing the factors used to determine joint employer status, as well as related responsibilities).

158. *Burton*, 169 F.3d at 1326.

159. OR. REV. STAT. § 658.415(3) (2007).

160. *Burton*, 169 F.3d at 1322, 1326.

161. *See Burton*, 169 F.3d at 1325-26. Although beyond the scope of this paper, a number of migrant workers may be eligible for workers compensation, insurance paid for by an employer, which provides cash benefits and medical care if an employee sustains job-related injury or illness. On the other hand, a person has to be an employee in order to file a worker's compensation claim, which brings back to the table the joint employment doctrine discussion.

registration. The uncompensated damages suffered by the migrants were the result of the farm labor contractor's truck's lack of insurance.

By mandating that crewleaders carry a surety bond, migrant and agricultural workers will be less likely to suffer from the grave economic hardship like that suffered by the workers in *Burton*. The surety bond would provide some relief so that the migrant workers can be compensated if they win a claim against the farm labor contractor. Moreover, this statute would eliminate the need for the joint employment doctrine because migrant workers would have some expectation of compensation for injuries suffered.

VI. CONCLUSION

The AWPA provides many necessary protections for migrant workers. However, these protections are only available if the farmworkers are found to be employees under the statutory definition.[162] When courts, like the Eleventh Circuit in *Aimable*, misapply the joint employment doctrine and find that migrant farmworkers are not employees of the growers on whose land they work—it is as if the AWPA does not exist. If courts do not hold growers liable for AWPA violations, the migrant workers have almost no hope of recovering the damages to which they are entitled if their farm labor contractor does not have the funds to pay. Courts and Congress must provide an incentive for growers to comply with the AWPA by implementing a surety bond requirement and finding them jointly and severally liable with the farm labor contractor where the grower knowingly uses the services of an unlicensed, non-bonded farm labor contractor. Growers would therefore not try to dodge the joint employment doctrine. *Aimable* and *Burton* demonstrate that without this type of monetary incentive, unprincipled crewleaders will continue to abuse workers and laws while growers look the other way.[163]

Migrant workers have no political voice and little power to organize for their own protection. They are part of an eager yet oppressed work force that enables Americans to purchase a half-gallon of fresh orange juice for just $3.39 and a pound of tomatoes for only $1.29 while they earn as little as $200.00 a week. As major contributors to Florida's $62 billion agricultural industry, these workers should get more in return.

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162. *Compare Burton*, 169 F.3d at 1336 (finding that appellants were employees under weighing factors, leading to a determination that employer appellees were liable for violating AWPA) *with Aimable*, 20 F.3d at 436 (finding that the weighing factors to determine employee status of farmworkers was insufficient to determine their employer).

163. *Compare Aimable*, 20 F.3d at 436 (determining joint employment doctrine did not apply because appellants could not establish sufficient economic dependency on appellees), *with Burton*, 169 F.3d at 1336 (contending Burtons' use of appellants' services established joint employer relationship).

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.*

PANELIST BIOGRAPHIES

Peter Asaad is an Adjunct Professor of Law at American University Washington College of Law and is the Managing Member of Immigration Solutions Group, PLLC. Mr. Asaad specializes in complex issues in U.S. immigration law. He is the Co-Chair of the American Bar Association Immigration Litigation Committee and currently serves as the Vice-Chair of the American Immigration Lawyers Association (http://www.immigrationsolutions.com/about/managing-member-profile).

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*.[1] 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.[2] 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

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[3] as the keystone of IRCA in 1986.[4]

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.[5] 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,[6] 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*.[7]

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]."[8]

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,[9] 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.[10] Both major pieces of proposed legislation on comprehensive immigration reform in 2006[11] and 2007[12] 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,[13] 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[14] 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[15] 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%20 Report%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.[16] 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-h~~eaded. 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[17] 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][18] 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=2af29c7755cb90 10VgnVCM10000045f3d6a1RCRD&vgnextchannel=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][19] 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[20] has shown how difficult that is. But that would be a powerful tool to help

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.

PETER ASAAD: 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")][21] 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

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,[22] 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.

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.[23] 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[24] 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)[25]—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

PANEL

IMMIGRANT WORKERS' RIGHTS: BEYOND THE SCOPE OF TRADITIONAL LABOR & EMPLOYMENT LAW

This Article is an annotated transcript of a panel that took place on October 25, 2010 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/immigrant-workers-rights/. The event was co-sponsored by the Immigrants' Rights Coalition Labor & Trafficking Committee as part of Immigrants' Rights Week.*

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IMMIGRANT WORKERS' RIGHTS: BEYOND THE SCOPE OF TRADITIONAL LABOR & EMPLOYMENT LAW

ANNOTATED TRANSCRIPT

ELIZABETH KEYES: This is a wonderful panel of folks representing different aspects of very challenging issues; namely, the set of issues facing immigrant workers in 2010 . . . . And, I'm just going to throw a few questions at them. Knowing them, that will be more than enough to get something lively started, but I would like you all to feel free to ask a question as we go. So, I'm going to start with Dan and Sebastian, who both work locally on this issue: Dan in Virginia [and] Sebastian in Maryland. And, I'd like it if each of you . . . could talk a little bit about the people that you're working with at your team organization, the characteristics of the immigrant workers that you are representing, and what it is that you do with them. If you could describe, for the folks here, the work that you're doing and services [that accompany your work].

DANIEL CHOI: [S]o I work at the Legal Aid Justice Center,[1] which [provides] . . . non-traditional legal aid [to individuals in Virginia]. Most of my clients are people [who are] not citizen[s] or legal permanent residents, [but are] undocumented people on various asylum, refugee, or temporary protective status.

So, [these are] folks who normally can't get help. And, the reason that we [provide them with assistance] is because we're the only non-LSC funded

1. LEGAL AID JUSTICE CENTER, *About Us*,http://www.justice4all.org/about_us (last visited July 26, 2011) ("The Legal Aid Justice Center provides legal representation for low-income individuals in Virginia. Our mission is to serve those in our communities who have the least access to legal resources. The Legal Aid Justice Center is committed to providing a full range of services to our clients, including services our federal and state governments choose not to fund.").

organization in Northern Virginia that handles civil litigation. [T]he federal government has a funding procedure called Legal Services Corporation,[2] [which stipulates that] if you [take] federal money, you will have a nicer office, but it also comes with restrictions like you can't help people with certain statuses, you can't ask for attorney's fees—although that's recently changed—you can't do class actions and other restrictions. My organization, a while ago, said, 'screw that!' And we started representing people of different statuses, and that includes mostly, for me, restaurant workers, day laborers, people in cleaning services—low-wage working folks. A large percent[age] of our clients are mostly Latino and monolingual Spanish speaking, but that's changing as we increase our outreach into different sectors like Asian and Middle Eastern, etc.

SEBASTIAN AMAR: [W]e do a lot of what they do at the Legal Aid Justice Center at CASA [de Maryland],[3] [but] just for Maryland residents. So, a lot of what Dan mentioned [is true for CASA too]. [M]ost of my work focuses on the representation of day laborers and domestic workers. As for our day laborers, we have maybe twenty percent [that] are in the . . . cleaning industry. A lot of hotels have gone up, especially in National Harbor and in Prince George's County [Maryland], so you've got a lot of casinos and hotels there looking for cleaning staff. But, beyond that, it's mostly general construction-based labor. So, [we're talking about] folks that go out to do anything from sheetrock and drywall to [the] more sophisticated laying of fiber optic cables for Verizon . . . and things like that.

One of the big misconceptions about CASA, in particular, is that folks come to us under the impression that we represent folks in immigration cases. Obviously, because we work with 100 percent immigrants, [people think] we must do asylum and other types of deportation defense. The answer is that we do not, and the reason for that is because CASA, twenty-five years ago, realized that there are some areas of law that the private bar and other non-profits have specialized in—asylum and deportation defense being twoof those [specializations]. Asylum cases are very sexy for law firms to put on their annual prospectus and so a lot of their pro bono hours go towards those types of cases. The not so sexy case is that of the undocumented worker who

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2. *About LSC*, LEGAL SERVS. CORP., http://www.lsc.gov/about/lsc.php (last visited July 16, 2011).

3. *About*, CASA DE MARYLAND, http://www.casademaryland.org/about-mainmenu-26 (last visited July 16, 2011) ("CASA's primary mission is to work with the community to improve the quality of life and fight for equal treatment and full access to resources and opportunities for low-income Latinos and their families. CASA also works with other low-income immigrant communities and organizations, makes its programs and activities available to them, and advocates for social, political, and economic justice for all low-income communities.").

is owed $150.00. It's not a huge amount and doesn't really mean a lot to a lot of people, but it means a great deal to the person who needs [it] to make rent. So, that's why we focus on the employment side, on issues that are just tangentially related to immigration issues that these folks may face.

ELIZABETH KEYES: Joseph, could you take us now to the national level, and talk about how Change to Win[4] is working?

JOSEPH GEEVARGHESE: Sure. Just by way of a little bit of history: I think people probably [have] heard about the [American Federation of Labor and the Congress of International Organizations ("AFL-CIO")],[5] which is a coalition of unions that was . . . formed in the 1920's and [19]30's at the moment [when] the industrial revolution really kicked into gear [and] our economy moved into [a] factory-based economy. [W]hen you think about steel workers and auto workers, you think about high-paid workers. [At least] that's what you hear [about] in the news. At the turn of the century and into the [19]20's and [19]30's, those were pretty desperate jobs. Those would be akin to Wal-Mart jobs today. And a lot of those jobs were filled by Eastern European immigrants, and what happened was workers rose up and organized—to make sure that they had a fair share of the profits they were generating for the steel barons and the auto barons, like Henry Ford.

Change to Win unions are actually . . . a set of service employee unions—[Service Employees International Union ("SEIU")],[6] [United] Farm Workers,[7] United Food and Commercial Workers,[8] [and the] [International Brotherhood of] Teamsters[9]—who broke off from the AFL about five years ago[10] . . . because

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4. *About Us*, CHANGE TO WIN, http://www.changetowin.org/about (last visited July 16, 2011).

5. *About Us*, AFL-CIO, http://www.aflcio.org/aboutus/ (last visited July 16, 2011).

6. *About SEIU*, SEIU, http://www.seiu.org/our-union/ (last visited July 16, 2011) ("We are the Service Employees International Union, an organization of 2.1 million members united by the belief in the dignity and worth of workers and the services they provide and dedicated to improving the lives of workers and their families and creating a more just and humane society.").

7. *About Us*, UNITED FARM WORKERS, http://www.ufw.org/_page.php?menu=about&inc=about_vision.html (last visited July 16, 2011) ("Founded in 1962 by Cesar Chavez, the United Farm Workers of America is the nation's first successful and largest farm workers union currently active in 10 states.")

8. *About UFCW*, UNITED FOOD AND COMMERCIAL WORKERS, http://www.ufcw.org/about_ufcw/ (last visited July 16, 2011).

9. *About Us*, INT'L BROTHERHOOD OF TEAMSTERS, http://www.teamster.org/content (last visited July 16, 2011).

10. *See* Thomas E. Edsall, *Two Top Unions Split from AFL-CIO*, WASHINGTON POST (July 25, 2005), http://www.washingtonpost.com/wp-dyn/content/article/2005/07/25/AR2005072500251.html (reporting on the resignation of the Service Employees International Union and International Brotherhood of the Teamsters from the AFL-CIO on July 25, 2005).

we're now in a service economy. [W]here the factory workers of seventy or eighty years ago are the hotel workers, the restaurant workers, the janitors, and the security guards [of today]. By and large, a lot of those workers are immigrants, and these are workers who are struggling to make it into the middle class. And right now, because large groups of these workers are all unorganized, there isn't a path for these folks. And what our unions are trying to do is create a pathway, [to] give these workers, whether it's farm workers or truck drivers, a right to have a voice in the workplace, so they can bargain over their working conditions.

And that's really . . . the primary goal of [Change to Win]. And, in a larger context, [the reason] why . . . it's significant right now is [because] . . . the labor movement has been in decline for about thirty to forty years . . . [and] [a] smaller and smaller percentage of workers are organized. Why is that important? It's important for . . . one fundamental reason, which is we're in danger of not having a middle class. We're in danger of [losing] the American dream. [W]e're in the moment of [one of the] greatest economic inequality[ies] [in] our nation's history—[where the] greatest concentration of wealth is squeezed from the top and there's less for everybody else . . . and that has wide-ranging consequences. It has consequences right now for education, for crime, for healthcare outcomes, [and] for kids making it to college. And, fundamentally, that's what we're trying to figure out: how do we organize workers, the least of these, the poorest of the poor in this new economic moment?

ELIZABETH KEYES: Dan, I'm wondering if you could give us a picture of a typical case that you [get]. A restaurant worker comes to you, what [harm] has been done? Give us a picture of . . . [what has] been done and what you're able to do about it.

DAN CHOI: Oh, Sebastian and I probably have the same answer to this. We work on the same thing. But what usually happens is [that] it comes to us [at the] second stage— [where a] worker [hasn't been] paid. It could be a restaurant worker [or] someone in construction, but they don't get paid, and they'll try [futilely] for maybe weeks, sometimes even months, trying to get their wages. Basically, calling their employer, visiting their worksite, doing everything [they can] to get a couple hundred or a couple thousand dollars back. When they come to us [their efforts didn't] work out, and they somehow were fortunate enough to learn that there could be additional things that could be done. [W]e actually don't take most of the cases that come to our office, because . . . [the] need for unpaid wage services is actually much greater than the number of lawyers that are available. Just to put it into perspective . . . after our other attorney left, I could safely say that if you want free legal help after you didn't get paid, I'm the only lawyer in northern Virginia who will take your case . . . for free.

ELIZABETH KEYES: [Sebastian,] I was thinking about how both you and Mr. Choi said you represent a lot of people that work in the restaurant industry and then construction. In these industries, many people are . . . being paid in cash. How is there a way that you can verify how much cash they're actually owed?

SEBASTIAN AMAR: Sure, so this is one of my favorite types of cases for the reason that it's the employer's responsibility under the law to keep records of all the workers and how many hours they've worked. And so, in cases—especially with big construction [companies], and a restaurant that has more than one employee—you've got witnesses that can attest to the fact that somebody has come to work, and he's worked "x" number of days and weeks and months, and if you paid this guy under the table, your defense in court is, 'Your Honor, I'm in violation of my responsibilities under the law as an employer because I'm not reporting this guy on my taxes. I'm not withholding anything, but I don't have any receipts for that, either, but I promise that I paid.'

DAN CHOI: [W]hat it actually comes down to is [that] places like Virginia don't really have good labor laws. But the Fair Labor Standards Act [FLSA],[11] which is a federal law that deals with wage[s] and hour[s], [has] a recordkeeping requirement—so if you actually bring a lawsuit and if it survives . . . [in] the initial stages the burden shifts, so that the employer actually has to show that [it] kept records . . . so it's not as difficult [of a case].

ELIZABETH KEYES: You both have talked about the need [for representation] far outstripping the supply. So, Sebastian, could you talk a little bit about something that makes CASA fairly special, which is the organizing component. [Can you speak about some] of the wage and hour work and how that amplifies what you individually do?

SEBASTIAN AMAR: [S]o, I think one of the good things about working at CASA is that every CASA attorney is outnumbered now . . . [approximately] forty to one by organizers. And so, you've got this army of people whose entire job it is to go out into the community, to educate folks about what their rights are, to get a feel for what the cost to the community is, what the issues that they're facing are, and then bring them back to us, and say, 'Hey, listen, this is a problem, what can we do from a legal perspective, as far as trying to address it and provide some relief?' And I think that that helps us, because we are outnumbered greatly, as far as the need—it gives you an added tool—another weapon as an attorney. [This is] because the reality is [that] if you are an employer and you care about your license to work, if you care about the

11. Fair Labor Standards Act of 1938, 29 U.S.C. §§ 201–219 (2006).

reputation of your company—which, in a lot of these industries your reputation is everything—what you don't want is for me to call a bunch of organizers, and say, 'Hey, listen, we need to rally the troops. Get 500 people over to your headquarters. I'll call every news ally that I have and we'll have cameras and 500 people in front of your office talking about how you're cheating workers out of their wages.'

[S]o, in certain instances, that's prove[n] to be infinitely more useful than any litigation that we could have undertaken in those cases, especially for folks who don't have the luxury of waiting six, eight, ten months, two years, three years on appeal for something to go through. And then the collections process. And so . . . the ability to lean on organizers is what makes the job as fulfilling as it is, because—without the organizer component to it—[we] would just be running into a brick wall over and over again.

ELIZABETH KEYES: [This segues] nicely to Joseph. I wonder if you could talk about . . . how [organzing] has helped, in particular, industries where immigrants are dominant and what some of the challenges have been [in] organizing those groups?

JOSEPH GEEVARGHESE: Well, to talk specifically about the farm work . . . United Farm Workers is a union in California. Some of you may be familiar with Cesar Chavez, who marched in the fields in the [19]60's, organized tens of thousands of farm workers,[12] [and] gave them a path to self-organize. The fundamental challenge, for example, with this group of workers, is that they are excluded from federal labor law, and what that means is, you've got an entire group that's excluded from having the right to organize under federal law. [S]o, in 1935, when Congress passed the Wagner Act, or the National Labor Relations Act,[13] it excluded domestic workers, farm workers, [and] a few other categories. Does anyone want to venture a guess why?

AUDIENCE MEMBER: Because everybody is an immigrant in those industries.

JOSEPH GEEVARGHESE: Okay, immigrant. Other guesses? Who were the work[ers] . . . what was the work force in 1935?

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12. *See* Mara Elena Durazo, *Making Movement: Communities of Color and New Models of Organizing Labor*, 27 BERKELEY J. EMP. & LAB. L. 235, 242 (2006) (discussing the role that Cesar Chavez, among others, has played in the labor movement).

13. National Labor Relations (Wagner) Act, Pub. L. No. 198, 49 Stat. 449, 453 (1935) (codified at 29 U.S.C. §§ 151-53, 157, 159–61, 163, 165-67 (2006)).

AUDIENCE MEMBER: Well, they didn't want to apply federal laws to family farms.

JOSEPH GEEVARGHESE: So, when Congress considered the law, there was incredible opposition, but when President Roosevelt moved it through Congress, in order to get the southern senators to vote for the law, he had to remove all of the protections for farm workers, or domestics, who were largely African-Americans.[14] And so, they wrote them out of the law, and for seventy years we've been laboring under that set of restrictions. And so what we're trying to figure out is . . . how do you lift [up] this group of workers? Stephen Colbert testified in front of Congress[15] a month ago, some of you may have seen the testimony. He was there with Arty Rodriguez, the President of the United Farm Workers, and Colbert, he said it better than anyone else. [Colbert was asked] 'Why are you interested in this group of workers? Why are you interested in not only the immigration issue, but the organizing issue? Why are you sitting here with Arty Rodriguez?' And Colbert said, 'Well, it's about power. This is a group of people who are the least of these, they come here and do our work, and they have no rights whatsoever.'

So, the challenge we've got in this moment is . . . what do you do if federal law doesn't give folks the right to organize? [W]hat do you do? So, seventy years ago . . . Congress said, 'Farm workers are not protected under federal law to organize.' And you're an activist, you've got a law degree, you're an organizer, [y]ou're going to get creative. Come hell or high water, you're going to figure out how to lift farm workers out of poverty. What do you do? Think big.

AUDIENCE MEMBER: Organize anyway.

JOSEPH GEEVARGHESE: You organize anyway. Absolutely. What else?

AUDIENCE MEMBER: You lobby to change the law.

JOSEPH GEEVARGHESE: Okay, you do. And at which level?

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14. *See* Michael H. LeRoy & Wallace Hendricks, *Should "Agricultural Laborers" Continue to Be Excluded from the National Labor Relations Act?*, 48 EMORY L.J. 489, 506 (1999) (explaining that the exclusion of domestic workers and farmworkers was the result of harsh criticisms of the original drafting of the bill, which broadly covered all private-sector employees).

15. *See Protecting America's Harvest: Hearing Before the Subcomm. on Immigration, Citizenship, Refugees, Border Sec., & Int'l Law, of the House Comm. on the Judiciary*, 111th Cong. 32 (2010) (statement of Stephen Colbert, Host, *The Colbert Report*, Comedy Central Studios), *available at* http://frwebgate.access.gpo.gov/cgi-bin/getdoc.cgi?dbname=111_house_hearings&docid=f:58410.pdf (text); *Stephen Colbert Testifies in Front of Congress* (NECN broadcast Sept. 24, 2010), http://www.necn.com/09/24/10/Stephen-Colbert-testifies-in-front-of-co/landing_arts.html?BlockID=317523&feedID=4214 (video).

AUDIENCE MEMBER: At the state level.

JOSEPH GEEVARGHESE: [S]o . . . there's a couple of different things . . . that have been out there. [F]or the last seventy years, farm worker advocates [and] civil rights advocates have been trying to get Congress to write farm workers [into the NLRA and] it hasn't worked.[16]

And then there's been a concerted effort in several states, and really, after seventy years, it's really California, that one state, [that has] enshrined the right to organize. Let me tell you a little bit about what we're doing just very briefly. So, recognizing the difficulty of moving legislation either at the federal level or the state level—before the election of Barack Obama, we decided what are the things that President Obama can do to help this group of workers. [W]e realized [that] the federal government purchases over a billion dollars worth of fruits and vegetables . . . that feed our troops [and] that are on school lunch plates. And the federal government, specifically the President—had the procurement authority right to say, 'Well, the federal government is going to only do business with those vendors who say no to child labor, say no to slavery, provide overtime, provide rest breaks, provide minimum wage protections, and the right to organize.'

Actually, the same day that Stephen Colbert testified [before] Congress and really elevated the issue of migrant farm workers, Arty and I met with the Secretary of Agriculture, and told him that 'We think you should use your federal procurement power to extend the law, to give workers the rights they've been denied for almost seventy years.' We fundamentally believe there's no better way to organize or no better thing that you can do for workers than to give them a path to self-organize, to self-police their own workplaces. And so, that's some of the creative type stuff that we're trying to figure out how to do.

ELIZABETH KEYES: It's creative. Can you talk about the special challenges of organizing immigrant women? What industries they're found in and how they make their . . . what kinds of cases make their way to your attention.

SEBASTIAN AMAR: Sure, like I mentioned before, we do a significant amount of representation of domestic workers, so that can mean pretty much anything, but, most specifically, it means folks hired to do cleaning of homes, preparing dinners, child care, elder care, and things like that. And actually, I'd say that our women's group at CASA is, without a doubt, the best organized and most effective of all the groups of workers that we organize. I'm not exactly sure why that is except that they seem to be the most upset. They do a

16. *See, e.g.*, *Hearing Before the S. Comm. On Labor and Public Welfare*, 91st Cong. (1969) (statement of Cesar E. Chavez) (lobbying for the removal of the agricultural labor exclusion from § 2(3) of the NLRA).

tremendous job of not only supporting each other, but a lot of the work on the ground to get people out of really dangerous situations. A lot of the domestic workers that we are present[ed with] . . . because of our proximity to the District, come over to us through diplomats. Somebody brings them through some country in Africa, they don't speak the language, they don't have family, they have no phone, no Internet. They have no idea what to do once [their situation] turns sour, and somehow, they get word out to CASA and we'll . . . send folks out to the site to confront the employer and to extract the worker. And so the women organize . . . for whatever period of time is necessary, to provide housing and help the worker(s) get back on their feet, contact family or friends back home and do whatever we can do to recover wages. And so, the majority of the women that we organize are domestic workers. I'm not sure, beyond our proximity to the District, why that is.

But I'd say the other side of that coin is that we have a significant number of women who work in the cleaning industry. [I believe] that the reason that they organize so well is because when there's a violation, there seems to be a wholesale violation of everybody that's working on that particular site—and when you and all of your colleagues that are similarly [situated and] suffer the same harm, it's a lot easier to find your voice—it's not just you. It's not just you having to convince an attorney at CASA de Maryland, or an organizer who[m] you've never met. You're coming with, literally, ten, fifteen, twenty people who have suffered the same harm, to seek help. And so, I think that that's empowering. And I think that they're just very much outspoken. They're a very effective group before the media. They're not afraid to tell their story, which is a common problem that we find among immigrant workers, [who usually say] "It's fine if you want to file my case, but I don't want to talk to the press, I don't want my picture in the newspaper, I don't want anybody to know who I am." These ladies are the exact opposite. You almost have to fight off their demands that we go to the press immediately every time there's an issue. It's great to have to tell someone, "Listen, just take a second, step back for a minute," and, "we'll call you as soon as we have a plan of action." But they're always there and they're always ready. That's been a very effective tool for us, particularly with the folks who work for diplomats because of the issue of diplomatic immunity that, in many cases, keeps us out of court, and so you got to find another way. And I'll tell you, they really don't like people showing up [at an embassy] to [tell them] that [they are] violating human rights.

DAN CHOI: We actually also organize, but we don't have a women's group, so I'll talk about the challenge side of things. [First,] I think immigrant women still fulfill traditional roles. So, I mean, if you think of traditional roles, men go to work, and women stay at home. When they come to the United States, man goes to work, woman goes to work, but she still takes care of the children, so a lot of times after work, women are taking care of children, which puts less time for them to actually come out and be organized. Second[,] is that

they tend to work in a lot of sectors that are much more hidden, like domestic work. If you are at a house serving a family or if you're in a dry cleaners . . . it's harder for someone to go out there and do outreach as opposed to, at [a construction site where] there are 500 guys [at] any time. So that's been our challenge—working with immigrant women, or organizing them.

ELIZABETH KEYES: Dan, can you talk about how Virginia has its [own] special challenges? [Y]ou mentioned the absence of a good labor law, but politically it's an even trickier environment than most to work with immigrant clients. [C]an you talk about how you connect to advocacy or coalition work to try to handle some of the state problems that are making your job of litigating difficult?

DAN CHOI: So, northern Virginia is a separate creature from the rest of Virginia. The rest of Virginia is still very conservative, and when you think Tea Party, you think [of] Virginia. [It was the] capitol of the Confedera[cy], and a lot of things that go on are not very pro-immigrant, so we are always on a defensive posture. Our General Assembly is usually in January and February, and [two years ago] we had 150 or so . . . what we would consider anti-immigrant measures presented. It went down slightly last year when they found out the economy was bad and all that immigrant stuff [wasn't] going to work. [B]ut we expect it to rise again because of all the successes [in other states]—and I use that term success in a cynical manner. For example, [in] Arizona, where politicians have now found out that you can profit by making life harder for immigrants.

Some of the things that have recently gone on [in the] General Assembly are simply that you can't have anything [except] in English. You can't have any government literature [except] in English. Imagine if you're a tourist from Finland or Argentina, coming through Virginia, and trying to look at a tourist brochure, and you can't print that in some of the other language, because it's required that it will only be in English.

You have things like arrest[ing] folks . . . the big thing is [that] you can't get your driver's license or renew your driver's license using your employment card. So basically, a lot of people in the D.C. metro area, especially Salvadorans, came here on what was previously mentioned, temporary protected status. That means that you're here legally, but you don't have a green card. To get a driver's license in Virginia, you practically need a green card or a U.S. passport. This immigration—employment verification card—the IEP, you can't use it to do [it].

Basically . . . you're here legally, and the federal government said, "You can work here legally, but you can't drive to get to your work or pick up your children." So that's the situation that we have right now and that was spurred on by one immigrant—one immigrant on that kind of status—who got drunk and killed a nun somewhere else. So the government made this a big

deal, and even though the monastery said, "We don't want this to become a political issue," it became a political issue and now you have literally hundreds of people [in this situation]. We've been getting hundreds of phone calls of people saying, "I've been here for years. I haven't committed any crime. I just want to get to my work, but they won't let me renew my driver's license."

ELIZABETH KEYES: Our time is winding down . . . but I'd like to leave time for questions.

AUDIENCE MEMBER: With the acknowledgement that there tens of millions of immigrant workers in this country, why do you think the laws are so slow to change, to be modernized. You talk about the issue being like this for seventy years. So, what's the hold-up, basically?

JOSEPH GEEVARGHESE: I think, in my experience, at least the last two years, working at the federal [level]—even with the Administration, even when you have a President of goodwill, who in his heart of hearts wants to do the right thing—there's an incredible amount of inertia and opposition. And, just as an example, when we met with the Secretary of Agriculture, and we said, "Well, farm workers should have a bill of rights. They've been excluded from legal protections for seventy years." I can't think of a more sympathetic group of workers to be a champion for. We had done polling that said, "This will make you look good with Latino voters, etc." He's open to it, but he said, "Well, I'm concerned about, Republican opposition. I am concerned that the existing bureaucracy in the Department of Agriculture isn't going to adapt quickly enough." So, it's frustrating for folks like us who want change to come very quickly.

[O]ther examples over the last two years . . . we're working on a campaign in the Inland Empire in California, where [ ] the goods come in on ships. They get out at the Port of Long Beach, near Los Angeles, California—this is stuff that goes on the shelves of Wal-Mart or Home Depot. They're then trucked from the coast, about 100 miles [to] the Inland Empire, which is just a sea of warehouses. It's a third world country, [in] Riverside County. Walking around, there's no running water. Streets are unpaved. And, [there] are low-wage Latino workers or temp workers. We've done multiple meetings with the Department of Labor to say, "Look, you should do concentrated enforcement. You actually have power of the FLSA to invoke hot cargo."[17] Which means, that if Wal-Mart is violating

17 *See, e.g.*, DEP'T OF LABOR, *Improving Workplace Conditions Through Strategic Enforcement: A Report to the Wage and Hour Division* 29–30 (David Weil ed., May 2010), *available* at http://www.dol.gov/whd/resources/strategicEnforcement.pdf (explaining that the Wage and Hour Division of the Department of Labor has the power, under section 15(a) of the FLSA, to embargo goods that have been manufactured in violation of any provision of the FLSA—including non-payment of wages).

the law the Department of Labor could say, "alright, we are going to hold these goods, Wal-Mart. We're not going to let you put them on the shelves, until you clean up your act, until the hundreds of thousands of workers in your supply chain get the rights they deserve."

But again, it's two years into it. We're still negotiating with the Administration, so there's inertia. And I think people have to rise up and get a little bit angrier for more radical change to happen.

DAN CHOI: It's definitely politics. It's polarized. They say the country is getting very polarized, and whenever you make any move ahead, it kind of means working together and when you say "comprehensive immigration," it encompasses all. And so, for example, pass legalization as well as strengthening the borders. Unfortunately, whenever those words come up, there's a large faction on both sides [of people] who will not work together. Hearing, pass legalization, you call it "amnesty," and people don't want to [allow amnesty] . . . and the same thing on our side, too. But I mean, the reason it doesn't happen is it's a very political issue and people really aren't willing to work together. And it's just politics. It's not common sense. It's just politics, and that's what we've seen over and over.

AUDIENCE MEMBER: How do you feel about strikes and walkouts, specifically, restaurants having walkouts on a Friday night? Do you think those modes of organizing are outdated?

DAN CHOI: Oh, it works. It still works. So, I'm actually on the Advisory Board for the Restaurant Opportunities [Center][18] . . . I'm on the board, but [on the] D.C. side. [T]hey've been around the country and what they've done is, whenever there are problems, they've organized . . . [they've] had people strike, and they brought attention to the fact that workers at these—even [at] the fanciest, and we're talking about the $100.00 [a] plate places, are still getting exploited in so many ways. So it still works. It's not the only answer, but it definitely works.

ELIZABETH KEYES: I agree on that. More questions?

AUDIENCE MEMBER: So, the threats, when someone threatens that they're going to report someone to Immigration . . . is that [an empty threat]?

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18. *See generally* REST. OPPORTUNITIES CTRS. UNITED, *What We Do*, http://www.rocunited.org/what-we-do (last visited July 16, 2011) (explaining that the Restaurant Opportunities Center model builds power for restaurant workers by organizing the workers to "demonstrate public consquences for employers who take the 'low-road' to profitablity.").

DAN CHOI: Yes and no. I mean, they could call Immigration and Customs Enforcement [ICE][19] and, potentially, I don't know what ICE would do with that information. So, they might actually go after somebody. That said, a lot of times, ICE has better things to do than go after workers who didn't get paid and [who are] trying to get their rights. Also, depending on their jurisdiction, there [are] protections. Unfortunately, the circuit courts are somewhat conservative, so it's actually after you file a lawsuit, but it might be considered retaliation, and illegal, if you make any threats after a lawsuit is filed.

ELIZABETH KEYES: Going on that . . . will there often be sanctions for the employer, so it's kind of like if they make that threat, it's more of an empty threat because they could get in trouble? Couldn't they get in trouble, too, if they're hiring undocumented [immigrants]?

DAN CHOI: Yes, and I remind them that every time they call and say, "That guy is illegal, right?" And then I ask them, "Well, if he is, you hired him." That usually shuts it up.

SEBASTIAN AMAR: [A]nd I'll just add onto that, [that] the Department of Labor is . . . making a push now to revamp their wage theft, wage recovery, and bad employer . . . practices. And so, we've had some meetings with them where they stress, to a very high degree, that "Listen, whoever you send to us, we're absolutely not entering into any memorandum of understanding with ICE or anything like that to pass them over, [or] to give any type of information to folks." And, I think that probably part of your question was spurred because of my comment, saying "I can't really guarantee to anybody that I represent that if we go to court that that's not going to come up," and we can object to it all we want, but if there's somebody in the courtroom that we didn't anticipate being there, and you get on the stand and you've said it anyway . . .

The reason that I say that, although I haven't seen that, personally, [is that] I have heard, particularly in the District of Columbia, folks who have objected [un]til their face turned blue, and the judge still allowed that information—which you can appeal—but throughout that process, folks that have actually caught the attention of [ICE]. So, a lot of those instances haven't been resolved yet, and I'm sure that there [are] significant constitutional and other arguments that folks should be able to make to get that quashed. But it's nonetheless a concern. So, I don't think that we can ever say it's a totally empty threat. Just like Dan said—also—we never know who's going to answer the phone at ICE. And, if it's somebody that just didn't have a lot to do that day, or felt like going to [a] favorite Chinese restaurant, maybe they'll show up. But it is a very

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19. *ICE Overview*, U.S. IMMIGRATIONS AND CUSTOMS ENFORCEMENT, http://www.ice.gov/about/overview/ (last visited July 26, 2011).

useful response to say, 'Well, that's fine—if you call ICE, you're calling ICE on yourself, too, basically because somebody is going to have to investigate that you're hiring all these undocumented workers." So, at the end of the day, that's the big problem. There's just not enough accountability for employers.

ELIZABETH KEYES: I'm going to take moderator's privilege for the last question. I think it's striking that all three speakers have talked about lawyering far beyond litigation. There's nobody up here who said that this case, those cases are in the context, the context and we've heard about local advocacy, state advocacy, federal advocacy, legislation, agency work, [and] organization in general. And any of you are welcome to talk about this. I'm going to ask Joseph if he could talk about it. Joseph was an organizer before law school and then obviously, has continued with his motivation to be very heavily involved in organization. Can you talk about what the law adds to organizing . . . ?

JOSEPH GEEVARGHESE: [T]he truth is the law as it is, isn't [how] the law as it should be. And . . . we organize in a context where there are perimeters set down and I think the worst thing you can do is go through law school and then operate within those perimeters. I went to law school. I was an organizer with the Steelworker's Union in the South, and a defining experience [was when] I had organized a small steel finishing plant in rural Tennessee, and I was young—I was excited—I was a young organizer, [and I had] one of my first wins. [A]nd after you organize, you then give it to a union negotiator to work on the first contract. I called up the negotiator a month later and I said, 'How's the bargaining going?'

And he said, 'Well, they've shut down the place and moved it.' [A]nd all those men and women that stood up and decided to act in concert . . . it just kind of hit me in the gut, and at that moment, I realized, well, I do need to organize, but I also need to know what the law is more effective[ly], [in order] to try to move both in a more effective direction. So, a lot of the work that I've done, especially at Change to Win, has been trying to figure out what is the intersection of existing law and how can you kind of operate in the gray spaces. How can you bring creativity, to try to do things that have never been done, or that get stalled in Congress? But, I think there's a mixture of both. Being a good lawyer, by itself, isn't enough. I think you got to be a strategic organizer, if you want to really facilitate social change. And, I passed out . . . the latest issue of *The American Prospect Magazine*.[20] This is actually . . . an

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20 *See generally About The American Prospect*, AM. PROSPECT, http://www.prospect.org/cs/about_tap/our_mission ("The magazine's founding purpose was to demonstrate that progressive ideas could animate a majority politics; to restore to intellectual and political respectability the case for social investment; to energize civic democracy and give voice to the disenfranchised; and to counteract the growing influence of conservative media.") (last visited July 16, 2011).

example of the intersection of law and advocacy. So, there's a lot of projects here where workers are organizing in California, in the fields, in warehouses, and, at the same time, we're trying to use creative [tactics], like to get the biggest bang for the buck at the federal level, whether it's DOL, Agriculture, or the White House.

ELIZABETH KEYES: Great . . . Big round of applause for our panel.

END TRANSCRIPT

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STRENGTH IN NUMBERS: THE QUESTION OF DECERTIFICATION OF SPORTS UNIONS IN 2011 AND THE BENEFIT OF ADMINISTRATIVE OVERSIGHT

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I. INTRODUCTION

In 1998, National Basketball Association ("NBA") commissioner David Stern grew a "lockout beard" for nearly half a year, declaring that it would remain intact until the league and union came to an agreement and resumed the basketball season.[1] Currently, the threat of yet another beard, in addition to another truncated or cancelled season, looms over the NBA and up until very recently, lingered over the National Football League ("NFL").[2]

Within the last several months, the NBA and NFL's collective bargaining agreements ("CBA") have expired, leaving both leagues with serious doubt regarding the cancellation or delay of their 2011 seasons due to disagreements about several mandatory subjects of collective bargaining between their front offices and unions.[3]

As of the date of this article, the NBA has instituted a lockout of its players, and the NFL ratified a new ten-year CBA with the National Football League Players Association ("NFLPA") on July 25, 2011 following a five-month long lockout.[4]

Decertification, or dissolution, of a labor union, is one option available to labor organizations—including players' associations—during collective bargaining negotiations.[5] With the owners seemingly holding so much power and with the longstanding history of lockouts present in both leagues, the possibility of decertifying the union with the National Labor Relations Board

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1. *See* Steve Aschburner, *Lockout Revisited, 10 Years Later*, SPORTS ILLUSTRATED (July 8, 2008), http://sportsillustrated.cnn.com/2008/writers/steve_aschburner/07/08/lockout.revisited/ ("But the way most people remember it, the league's angry and newly vulnerable chief executive let his retro whiskers grow symbolically from bitter start to exhausting finish . . . .").

2. *See* Laura Clawson, *NFL Lockout Ends*, DAILY KOS (July 25, 2011, 11:36 A.M.), http://www.dailykos.com/story/2011/07/25/998457/-NFL-lockout-ends (allowing for current players to remain in the NFL's medical plan for life a provision which was hotly debated in prior negotiations).

3. *See* Larry Coon, *Lockout Looms Over 2010-11 Season*, ESPN.COM (Sept. 22, 2010), http://sports.espn.go.com/nba/columns/story?columnist=coon_larry&page=lockout-100922 (explaining that if a new CBA is not agreed upon by the NBA and players' union prior to the expiration of the current CBA a league-imposed lockout will likely ensue, threatening cancellation of 2011–12 season); *Union Head Says Owners Set for Lockout*, ESPN.COM (Oct. 5, 2010), http://sports.espn.go.com/nfl/news/story?id=5652700 (explaining that a stumbling block for negotiation of a new CBA is that the NFL, although claiming financial difficulties, will not share its books with the union).

4 *See generally*, *CBA Expires, NBA Locks Out Its Players*, ESPN.COM (July 1, 2011), http://sports.espn.go.com/nba/news/story?id=6723645 (detailing both sides of the labor dispute which erupted on Friday, July 1, 2011, when its CBA expired); Judy Battista, *As the Lockout Ends, the Scrambling Begins*, N.Y. TIMES, July 25, 2011), at B10, *available at* http://www.nytimes.com/2011/07/26/sports/football/NFL-Union-Labor-Deal.html?pagewanted=all ("After nearly five months of inactivity by all but a handful of negotiators, the NFL sprang to life again Monday when [thirty-two] player representatives voted unanimously to recommend approval of a [ten]-year labor deal that owners largely approved last Thursday.").

5. *See* GLENN M. WONG, ESSENTIALS OF SPORTS LAW 528–29 (4th ed. 2010) (explaining that if a union votes to decertify, players would no longer have any "affiliation with the union and no collective bargaining agreement would be in place").

("NLRB" or "Board") may appear to be the best option for players.[6] Based on the likelihood of the owners instituting a lockout following the expiration of the CBA, a decertification of the NBA Players Association ("NBPA") is arguably the only tool left to ensure a 2011 season.[7] Recent decertification efforts in both leagues reveal, however, that such a move can result in a negative economic impact on players' salaries and free agency status.[8] Thus, the legal options available to a players' union via the NLRB and provide a more stable and successful alternative in dealing with the current labor situations in the NBA and the NFL.

This Article will examine, analyze, and propose a solution for the NBPA by considering the interplay between the National Labor Relations Act ("NLRA" or "Act"), the NLRB, and the history of labor disputes in the NBA and the recently revived NFL. Part II will provide a background on collective bargaining under the Act, the jurisdiction of the NLRB, and how it applies to the unique circumstances of the sports industry.[9] Part III will outline the labor histories of the NBPA and the NFLPA, including important legal challenges to collective bargaining and antitrust restraint claims, and will discuss the current situation facing the NBA and NBPA.[10] Part IV will analyze the likely negative results of decertification in comparison to the strength of a certified players' association, as well as illustrate the disadvantaged position that a union inhabits in today's economy after decertification.[11]

II. BACKGROUND

To safeguard both employers and employees, and to "promote[ ] the flow of commerce," the NLRA regulates collective bargaining relationships between employers and designated employee unions.[12] The history of labor

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6. *See generally* Eric R. McDonough, *Escaping Antitrust Immunity—Decertification of the National Basketball Players Association*, 37 SANTA CLARA L. REV. 821 (1997) (proposing, in the context of the late 1990s dispute between the NBA and NBPA, that decertification of the NBPA, following the expiration of the then-current CBA, would allow players to compete in a more free market and receive fair market value wages).

7. *Cf.* Nat'l Basketball Ass'n v. Williams, 857 F. Supp. 1069, 1078 (S.D.N.Y. 1994) (explaining that decertification allows players to pursue new strategies, such as challenging league practices through a strikes or through antitrust claims).

8. *See Decertification: The NFLPA and NBPA's Nuclear Option*, LAW360 (January 18, 2011), www.constantinecannon.com/pdf_etc/complaw360art011811.pdf (explaining that decertification would eliminate guaranteed salaries and pensions for the players and the ability to negotiate and control their marketing and licensing rights).

9. *See infra* Part II (discussing the application of the NLRA to professional sports labor disputes).

10. *See infra* Part III (analyzing the effects of the most recent NFL decertification and the future of the NBA lockout).

11. *See infra* Part IV (providing an accounting of the labor history and current labor relations disputes present in the NBA and the NFL).

12. *See generally* National Labor Relations Act, 29 U.S.C. §§ 151–169 (2006) (attempting to rectify the unequal bargaining power between employers and employees through provision for collective bargaining).

law, stemming from the Wagner Act,[13] is based around the policy of bringing employers and employees together to encourage negotiation and agreement.[14]

A. Collective Bargaining and the NLRA

In 1935, Congress passed the NLRA to protect the rights of employees and employers, to encourage collective bargaining, and to curtail certain labor and management practices deemed harmful to the workforce and economy of the United States.[15] In order to carry-out this process, Congress charged the NLRB with administering the provisions of the Act.[16] The Board has two main functions: (1) to determine, through elections, whether a group of employees wish to be represented by a union in dealing with their employers and if so, by which union; and (2) to prevent "unfair labor practices by private sector employers and unions."[17]

The Board's authority includes oversight of union representative elections by employees,[18] as well as the governing of elections when employees seek to dissolve their labor organization as their exclusive bargaining representative.[19] The Board is also empowered to regulate unfair labor practices by conducting investigations, issuing complaints, and petitioning courts for relief.[20] One of the key aspects of labor practices between labor organizations and employers is the mandatory obligation to bargain collectively when a labor unit has elected an exclusive bargaining agent.[21] This obligation exists "with respect to wages, hours, and other terms and conditions of employment," and requires that both sides negotiate in "good faith."[22]

The process of collective bargaining begins with the selection of an

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13. National Labor Relations (Wagner) Act, Pub. L. No. 74-198, 49 Stat. 449 (1935) (codified as amended 29 U.S.C. §§ 151–169 (2006)).

14. *See* 1 PATRICK HARDIN ET AL., THE DEVELOPING LABOR LAW 26–27 (4th ed. 2001) (providing Senator Wagner's belief that, in an industrial era dominated by large corporations, employees needed the ability to bargain together in order to assure their rights, with regard to the need for the passage of the Wagner Act).

15. *See id*. (explaining that the "cornerstone" of the Wagner Act was Section 7, which gave employees "the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in concerted activities for . . . mutual aid and protection").

16. *See* § 153 (creating the NLRB to adjudicate, investigate, and enforce the NLRA to remedy historically lax enforcement that plagued previous labor laws).

17. *What We Do*, NAT'L LAB. RELATIONS BD., http://www.nlrb.gov/what-we-do (last visited Apr. 23, 2011).

18. § 159(c).

19. *See* § 159(e) (requiring that thirty percent of eligible employees must petition the Board, no sooner than one year after a union had previously been certified, for an election to decertify a previously-certified bargaining representative).

20. *See* § 160(e) (permitting the NLRB to seek relief in federal district court to enjoin ongoing unfair labor practices).

21. *See* § 158(d) (specifying that the duty to bargain in good faith is aimed at the consummation of a written collective bargaining agreement between the employer and the bargaining representative).

22. *See id.* (explaining, however, that such an "obligation does not compel either party to agree to a proposal or require the making of a concession").

appropriate unit for the purpose of bargaining with the employer.[23] The unit representative is selected by a majority of all employees within an appropriate unit at the employer's facility or plant; after the representative collectively bargains with an employer over several mandated conditions of employment.[24] The Board's statutorily-mandated determination of an "appropriate unit for collective bargaining" is adjudicated before, and decided by the Board, and cannot be overruled or interfered with by a court, unless the Board's decision is arbitrary or capricious.[25] Additionally, the Board has the authority to decline to exercise jurisdiction over an employment organization if the labor dispute does not have a sufficiently substantial impact on interstate commerce.[26]

Once the selection of an exclusive bargaining unit is complete, the collective bargaining process ensues. There is a duty for both the employer and the unit representative to bargain in good faith, failure to do so is an unfair labor practice.[27] The language in the Act creates two subject matter categories for collective bargaining—mandatory and permissive subjects.[28] To be a mandatory subject of collective bargaining, a term must "settle an aspect of the relationship between the employer and employees."[29]

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23. For instance, when an employer has two plants that manufacture different product lines, the employer may ask the Board to segregate the two into two different bargaining units. If the employer is successful, each plant would then have to separately select a certified exclusive bargaining representative (union) and each representative would have to bargain with the employer separately. *See* § 159(a)–(b); Ethan Lock, *The Scope of the Labor Exemption in Professional Sports*, 1989 DUKE L.J. 339, 382 (1989) ("When a majority of employees designate a union to represent them, an employer must . . . bargain in good faith with the employees' representatives . . . .").

24. *See* § 159(a) ("Representatives designated or selected for the purposes of collective bargaining . . . shall be the exclusive representatives of all the employees in such a unit" regarding mandatory subjects of bargaining, including "rates of pay, wages, hours of employment, or other conditions of employment.").

25. *See* NLRB v. Lettie Lee, Inc., 140 F.2d 243, 247–50 (9th Cir. 1944) (upholding the Board's determination that sloper and trimmer employees were also qualified cutters and that all three could join in an appropriate bargaining unit together). A federal court usually defers to an "administrative agency [like the NLRB] because of its own lack of experience with issues or the need to protect the authority of the agency." HARDIN ET AL., *supra* note 14, at 2282.

26. *See* § 164(c)(1); *see also* Sec. Guards & Watchmen Local No. 803 (Yonkers Raceway, Inc.), 196 N.L.R.B. 373, 373 (1972) (declining jurisdiction over the horse racing industry, even though racing had "some effect" on interstate commerce).

27. *See* § 158(a)(5) (prohibiting an employer from refusing to bargain collectively with his employees' chose representative); § 158(d) ("[T]o bargain collectively is the performance of the mutual obligation of the employer and the representative of the employees to meet at reasonable times and confer in good faith . . . .").

28. *See* NLRB v. Wooster Div. of Borg-Warner Corp., 356 U.S. 342, 348–49 (1958) (holding that an employer cannot insist on acceptance of non-mandatory terms as a precondition to reaching an agreement, even when the employer otherwise agrees to bargain over mandatory terms).

29. *See* Allied Chem. & Alkali Workers of Am., Local Union No. 1 v. Pittsburgh Plate Glass Co., 404 U.S. 157, 178 (1971) (explaining that there is no penalty or repercussion if parties refuse to negotiate with regard to permissive subjects).

An unfair labor charge can be brought when one party refuses to bargain in good faith over a mandatory subject.[30] The good faith requirement to bargain collectively, however, does not indicate a necessity for parties to reach an agreement.[31] The "good faith" requirement in collective bargaining is focused on the standards of behavior in the bargaining process, not on results.[32]

A theory of judicial non-intervention supports the purpose of the NLRB refereeing the collective bargaining process.[33] While the Act establishes the right of employees to join labor organizations and engage in collective action, it also guarantees the right of employees to abstain from forming or joining a labor union.[34] Additionally, the Act provides a strict procedure for decertifying a labor organization by a vote of the union's members.[35] Following a petition to the NLRB for decertification signed by at least thirty percent of the employees, the Board takes a secret ballot poll of the entire bargaining unit to determine whether or not to decertify the unit.[36] If the majority of employees vote against the continuation of the union as the exclusive representative of the bargaining unit, the Board then decertifies the union.[37]

B. The Labor Exemption

Because the union-employer relationship can often lead to accusations of antitrust violations, courts have recognized a "non-statutory labor exemption" from antitrust law in certain agreements reached in the course of collective

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30. *See* § 158(a)(5) ("It shall be an unfair labor practice for an employer . . . to refuse to bargain collectively with the representatives of his employees [over mandatory subjects of bargaining].").

31. *See* NLRB v. Truitt Mfg. Co., 351 U.S. 149, 152 (1956) ("While Congress did not compel agreement between employers and bargaining representatives, it did require collective bargaining in the hope that agreements would result."); H.J. Heinz Co. v. NLRB, 311 U.S. 514, 525 (1941) ("It is true that the National Labor Relations Act, while requiring the employer to bargain collectively, does not compel him to enter into an agreement.").

32. *Cf.* NLRB v. Acme Indus. Co., 385 U.S. 432, 435–36 (1967) (stressing that the employer has an obligation to supply all relevant information necessary for the employees' bargaining representative to perform its duties); NLRB v. Katz, 369 U.S. 736, 743 (1962) (holding that the duty "may be violated without a general failure of subjective good faith").

33. *See generally* Lock, *supra* note 23, at 381–83 (explaining the theory behind restraint in judicial intervention during the bargaining process as being consistent with congressional intent manifested in the text of the Act).

34. *See* § 157 ("Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing . . . and shall also have the right to refrain from any or all such activities except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment . . . .").

35. *See* § 159(c)(1) (requiring an initial petition by employees); *see also* 29 C.F.R. §§ 102.83–102.84 (2010) (regulating the form, content, and procedure for presentation to the NLRB of decertification petitions).

36. § 159(e)(1).

37. *Id.*

bargaining under the NLRA.[38] The primary purpose of the labor exemption is to protect labor organizations and their bargaining activities.[39] Typically, antitrust actions are brought under the Sherman Act, which condemns "[e]very contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce."[40] The Supreme Court has held, however, that parties engaged in labor agreements can be immune from antitrust laws.[41] The Court cited a "strong labor policy" favoring labor agreements, even in the face of antitrust restraints.[42] The labor exemption and antitrust immunity apply when agreements at issue relate to mandatory subjects of bargaining such as wages, hours, and terms and conditions of employment.[43]

C. The NLRA and Collective Bargaining as Applied to the Sports Industry

In 1969 the Board established its jurisdiction over professional sports leagues, holding in *American League of Professional Baseball Clubs*[44] that Congress

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38. *See* Connell Const. Co. v. Plumbers & Steamfitters Local No. 100, 421 U.S. 616, 622 (1975) (recognizing "the nonstatutory exemption" to federal antitrust law protects the unions ability to "eliminate competition over wages and working competitions" and to inevitably "affect price competition among employers"); Local No. 189, Amalgamated Meat Cutters, Butcher Workmen of N. Am. v. Jewel Tea Co., 381 U.S. 676, 691 (1965) ("[T]he national labor policy expressed in the National Labor Relations Act places beyond the reach of the Sherman Act union-employer agreements on when, as well as how long, employees must work."); *see also* 15 U.S.C. § 17 (2006) ("The labor of a human being is not a commodity or article of commerce. Nothing contained in the antitrust laws shall be construed to forbid the existence and operation of labor, agricultural, or horticultural organizations, instituted for the purposes of mutual help, and not having capital stock or conducted for profit, or to forbid or restrain individual members of such organizations from lawfully carrying out the legitimate objects thereof; nor shall such organizations, or the members thereof, be held or construed to be illegal combinations or conspiracies in restraint of trade, under the antitrust laws."); *cf.* 29 U.S.C. § 105 (2006) (preventing federal courts from enjoining activity that would otherwise be considered "an unlawful combination or conspiracy because of the doing in concert of [certain] acts" in the context of a labor dispute).

39. *See, e.g.*, United States v. Hutcheson, 312 U.S. 219, 229–33 (1941) (holding that labor actions directed at an employer but due to "internecine" conflict between two competing labor organizations did not violate the antitrust law); *but cf.* Allen Bradley Co. v. Local Union No. 3, Int'l Bhd. of Elec. Workers, 325 U.S. 797, 807–11 (1945) (noting, however, that the exemption does not permit unions to combine with non-labor groups in order "to create business monopolies and to control the marketing of goods and services").

40. 15 U.S.C. § 1.

41. *See* 312 U.S. at 229–33 (explaining that "whether trade union conduct constitutes a violation of the Sherman Law is to be determined only by reading the Sherman Law and [Section] 20 of the Clayton Act and the Norris-LaGuardia Act as a harmonizing text of outlawry of labor conduct").

42. *See* 421 U.S. at 622 ("[T]he goals of federal labor law never could be achieved if this effect on business competition were held a violation of the antitrust laws.").

43. *See id.* ("The nonstatutory exemption has its source in the strong labor policy favoring the association of employees to eliminate competition over wages and working conditions.").

44. Am. League of Prof'l Baseball Clubs & Ass'n of Nat'l Baseball League Umpires, 180 N.L.R.B. 190 (1969).

intended for the Act to apply to Major League Baseball.[45] And reasoned that, based on its policy of encouraging collective bargaining, it should assert its jurisdiction and subject any professional team sports labor dispute to the Act.[46] For the first time, the Board accepted the idea that professional baseball affects interstate commerce, and thus ruled that professional baseball is subject to the Act.[47] The Supreme Court applied the Board's holding in *Radovich v. Nat'l Football League* to determine that both football[48] and basketball[49] affect interstate commerce under the Commerce Clause and are, by extension, subject to the NLRA.

Then, in 1980 the Fifth Circuit established that when facing a joint employer relationship, such as a professional sports league, a league-wide, multi-employer bargaining unit was appropriate because the unit had "common labor problems and a high degree of centralized control over labor relations."[50] And rationalized that only a bargaining unit comprised of every league player can wield enough bargaining power to challenge professional sports leagues.[51]

For multi–employer certification, the NLRB requires either such a joint agreement between the parties or a controlling history of bargaining on a

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45. *See id.* at 192 ("We can find, neither in the statute nor in its legislative history, any expression of a Congressional intent that disputes between employers and employees in [the] industry [of professional sports] should be removed from the scheme of the National Labor Relations Act.").

46. *See* JOHN C. WEISTART & CYM H. LOWELL, THE LAW OF SPORT § 6.03, at 788 (1979) (explaining that the Act is broad enough to permit the Board to exercise jurisdiction over "all the employees" in professional team sports, "from bat boys to maintenance men").

47. *See id*. at 190–91 ("Congressional deliberations regarding the relationship of baseball and other professional team sports to the antitrust laws likewise reflect a Congressional assumption that such sports are subject to regulation under the commerce clause . . . [and] legal scholars have agreed . . . that professional sports are in or affect interstate commerce, and as such are subject to the Board's jurisdiction." (footnotes omitted)). *See generally* NLRB v. Fainblatt, 306 U.S. 601 (1939) (establishing that that the Board had authority under the NLRA to exert jurisdiction over an employer even when a manufacturer was not directly involved in interstate commerce but instead, received and shipped a small volume of manufactured goods through interstate commerce).

48. *Cf.* Radovich v. Nat'l Football League, 352 U.S. 445, 452 (1957) ("[T]he volume of interstate business involved in organized professional football places it within the provisions of the [Sherman] Act.").

49. *Cf.* Denver Rockets v. All-Pro Mgmt., Inc., 325 F. Supp. 1049, 1055 (C.D. Cal. 1971) ("The business of professional basketball as conducted by NBA and the NBA teams on a multi-state basis, coupled with the sale of rights to televise and broadcast the games for interstate transmission, is trade or commerce among the several States within the meaning of the Sherman Act."), *stay granted*, 1971 WL3015 (9th Cir. Feb. 16, 1971), *reinstated sub nom.* Haywood v. Nat'l Basketball Ass'n, 401 U.S. 1204.

50. 613 F.2d 1379, 1383 (5th Cir. 1980) (explaining that once a player is hired by a team, his working conditions are controlled not only by that team, but by the league as well).

51. *Cf.* PAUL C. WEILER & GARY ROBERTS, SPORTS AND THE LAW 302–03 (3d ed. 2004) (explaining that multi-employer bargaining is now a common feature, because "[b] oth employers and unions in these industries find they have a complimentary long-term interest in putting their relationship on that broader footing"); WEISTART & LOWELL, *supra* note 46, at 794 ("Multi-employer bargaining is presently used in professional sports . . . ."); *see also* WONG, *supra* note 5, at 530 (describing that today "players associations have become a powerful tool" in collective bargaining).

multi-employer basis.[52] In the sports industry, the inclusion of all teams within a league, along with the league commissioner's office, constitutes a multi-employer unit for collective bargaining.[53]

In the context of a multi–employer unit, challenges often arise over the issues of individual bargaining and the union's right to fair representation.[54] Professional sports contracts have historically been made between a player and a single team or organization. Meanwhile, the relevant collective bargaining agreement does not set salaries for contracts, but rather contains constraints concerning wages and conditions of employment within which players and teams are free to negotiate.[55] Each league sets forth in its CBA the limitations or parameters in which a player and team can negotiate a salary, but no matter the system, any employer that individually bargains with a player outside of those parameters is committing an unfair labor practice.[56]

The Supreme Court's standard for such action comes from *J.I. Case Co. v. NLRB*,[57] when the Court conceded that in some situations, allowing for individual employees to bargain may be beneficial for the purpose of collective bargaining.[58] The Southern District of New York's decision in *Morio v. North American Soccer League*[59] best illustrates the issue of individual bargaining in sports.[60] The *Morio* court granted a temporary injunction on all individual contracts due to a violation of the employers' duty to bargain exclusively with the bargaining representatives of the players.[61] Thus, in sports there is more individual freedom of contract for employees under typical league collective bargaining agreements, so long as the employees and the individual teams act

52. *Id.*

53. *See, e.g.*, N. Am. Soccer League v. NLRB, 613 F.2d 1379, 1383 (5th Cir. 1980) (explaining that there is a joint employer relationship between the North American Soccer League and the various clubs that have a "proportionate role in League management").

54. *See generally* NLRB v. Truck Drivers Local 499, 353 U.S. 87, 94–97 (1957) (establishing the constitutionality of multi-employer bargaining).

55. *See* WONG, *supra* note 5 at 529–30 (explaining the difference between typical sports contracts and those of other unions such as butchers, teachers, or grocery workers who will negotiate specific salaries in collective bargaining).

56. *Compare* WEILER & ROBERTS, *supra* note 51, at 305 (quoting Morio v. N. Am. Soccer League, 501 F. Supp. 633, 638–39 (S.D.N.Y. 1980), *aff'd*, 632 F.2d 217 (2d Cir. 1980) (explaining that any individual bargaining outside of a CBA can be a violation under the Act, because a union is entitled to conduct all bargaining with an employer), *with* WEISTART & LOWELL, *supra* note 46, at 808 (describing how it has "been common for collective bargaining agreements in professional sports to cover only the minimum terms . . . and to *specifically provide* that individual athletes may negotiate individually for better terms" (emphasis added)).

57. 321 U.S. 332 (1944).

58. *See id*. at 338 (noting that it may be wise for a CBA to set basic terms but to allow further individualized bargaining, particularly when individual employees face different work or personal circumstances).

59. 501 F. Supp. 633 (S.D.N.Y. 1980), *aff'd*, 632 F.2d 217 (2d Cir. 1980).

60. *See id*. at 635, 637 (finding that the soccer league's clubs continued to negotiate with individual players after the NLRB named the league as a multi-employer unit).

61. *See id*. at 638–39, 640 ("The duty to bargain carries with it the obligation on the part of the employer not to undercut the Union by entering into individual contracts with the employees.").

in good faith and within the parameters of the CBA.[62]

The duty to bargain in good faith is best seen through the behaviors and actions of parties involved in collective bargaining.[63] In sports, bad faith bargaining accusations are usually the result of one party refusing to start or continue negotiations with the other party.[64] Both players associations and leagues have been found guilty of unfair labor practices for a bad faith refusal to negotiate over mandatory subjects of bargaining.[65]

While the Act vaguely mandates that all negotiations must be in good faith "with respect to wages, hours, and other terms and conditions of employment,"[66] several cases have explicitly held certain types of restraints and parameters within collective bargaining to be mandatory subjects of bargaining in good faith.[67] Some of the most important bargaining issues are included in mandatory subjects of collective bargaining, such as free agency,[68]

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62. *See* WEILER & ROBERTS, *supra* note 51, at 307 (discussing the free market orientation of CBAs in sports and how such an orientation is different "than what one finds in most unionized sectors.").

63. *See supra* notes 17-37 and accompanying text.

64. *See* WEISTART & LOWELL, *supra* note 46, at 805 (explaining that bad faith has een found when there was a refusal to negotiate or an attempt to bypass the other party with a unilateral change in a mandatory subject matter of collective bargaining).

65. *Compare* Nat'l Football League Players Ass'n v. NLRB, 503 F.2d 12, 17 (8th Cir. 1974) ("[B]y unilaterally promulgating and implementing a rule providing for an automatic fine to be levied against any player who leaves the bench area while a fight or an altercation is in progress on the football field, [employers] have engaged in unfair labor practices."), *with* WEISTART & LOWELL, *supra* note 46, at 805 & n.217.1 (explaining that in 1976 the NBPA was found to have bargained in bad faith when it refused to bargain over player restraint mechanisms that were mandatory subjects of bargaining, but which the NBPA contended were violations of antitrust law).

66. 29 U.S.C. § 158(d) (2006).

67. *Accord* Mackey v. Nat'l Football League, 543 F.2d 606 (8th Cir. 1976); Powell v. Nat'l Football League ("*Powell II"*), 930 F.2d 1293 (8th Cir. 1989); Wood v. Nat'l Basketball Ass'n, 809 F.2d 954 (2d Cir. 1987); Silverman v. Major League Baseball Player Relations Comm., Inc. ("*Silverman II"*), 880 F. Supp. 246 (S.D.N.Y. 1995), *aff'd*, 67 F.3d 1054 (2d Cir. 1995).

68. *See Mackey*, 543 F.2d at 615 (holding that the "Rozelle Rule," which provides guidelines on free agency for NFL players, constitutes a mandatory subject of collective bargaining).

player mobility restraints[69] (including compensation systems),[70] salary caps, player drafts,[71] and salary arbitration.[72]

Challenges to mandatory subjects of bargaining in sports have often been presented as antitrust claims under Sherman Act.[73] These challenges are typically defended by the non-statutory labor exemption that allows for a league to engage in behavior that would otherwise be an antitrust violation, so long as the action or restriction relates to mandatory subjects of collective bargaining.[74] *Mackey v. National Football League* provides the accepted requirements with which a subject of collective bargaining in sports may be exempt from trade restraints claims.[75] The Eighth Circuit designated a three-part test to determine whether the restraint receives the labor exemption.[76] For the labor exemption to apply, (1) the restraint on trade must primarily affect only the parties to the collective bargaining agreement; (2) the agreement must concern a mandatory subject of collective bargaining; and (3) the agreement must be the product of bona fide arm's-length bargaining.[77]

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69. *See id*. (noting that the Rozelle Rule "operates to restrict a player's ability to move from one team to another and depresses player salaries").

70. *See Powell II*, 930 F.2d at 1303 ("The First Refusal/Compensation system, a mandatory subject of collective bargaining, was twice set forth in collective bargaining agreements negotiated in good faith . . . .").

71. *See*, *e.g.*, *Wood*, 809 F.2d at 961–62 (holding that the salary cap, entry draft, minimum individual salaries, fringe benefits, minimum aggregate team salaries, guaranteed revenue sharing, and first refusal provisions, "are mandatory subjects of bargaining . . . [because] [e]ach of them clearly is intimately related to 'wages, hours, and other terms and conditions of employment'").

72. *See*, *e.g.*, Silverman v. Major League Baseball Player Relations Comm., Inc., 880 F. Supp. 246, 257 (S.D.N.Y. 1995), *aff'd*, 67 F.3d 1054 (2d Cir. 1995) (finding that the "salary arbitration for reserve players is also a mandatory part of the collective bargaining process between the Players and the Owners.").

73. *See Mackey*, 543 F.2d 606, 609, 610 (challenging an NFL rule that allowed the league commissioner to force a club receiving a free agent to compensate the player's former club); Wood v. Nat'l Basketball Ass'n, 809 F.2d 954 (2d Cir. 1987) (reciting contentions by a national basketball player that "[a] 'salary cap,' college draft, and prohibition of player corporations violated Sherman Act").

74. *See supra* Part II.B; *see also* Local Union No. 189 v. Amalgamated Meat Cutters, Butcher Workmen of N. Am. v. Jewel Tea Co., 381 U.S. 676, 689–90 (1965) (holding that a marketing-hours restriction was related to wages and hours, and obtained through collective bargaining, and thus fell within the "protection of the national labor policy and [was] therefore exempt from the Sherman Act").

75. *Mackey*, 543 F.2d at 614.

76. *Id.*

77. *Id*.

III. HISTORY OF LABOR RELATIONS IN THE NFL AND THE NBA

Both the NBA and the NFL have exclusive bargaining agents that were first recognized in the 1960's—the NFLPA and the NBPA.[78] During their tenure, both labor organizations have negotiated numerous collective bargaining agreements with their respective leagues, yet both the NFL and the NBA have had their share of strikes, work stoppages and even cancelled seasons.[79] Currently after a four-and-half month lockout, the 2011 NFL season is back on track, after a new ten-year CBA was executed on July 21, 2011.[80] But, the NBA's 2011 season appears to be in jeopardy after the league and the NBPA's negotiations failed on July 1, 2011 the NBA filed an unfair labor practice complaint with the NLRB and a suit against the NBPA in Federal District Court of New York.[81]

A. Labor History of the National Football League

The NFLPA was formed in 1956 and became the exclusive bargaining unit to NFL players in 1968.[82] While there were small work stoppages in 1968, 1970, and 1974[83] the NFLPA encountered its first serious issue in the case of *Mackey v. National Football League*.[84]

In *Mackey*, a group of present and former players sued the NFL, arguing that the "Rozelle Rule," was an unfair restraint on trade under the Sherman Act.[85] This rule provided that, upon the expiration of a player's original team contract, if a player switched teams and the two teams could not reach a satisfactory

78. *Compare About the NBPA*, NAT'L BASKETBALL PLAYERS ASS'N, http://www.nbpa.org/about-us (last visited Oct. 8, 2010) (explaining that the National Basketball Players Association was founded in 1954), *and* WONG, *supra* note 5, at 531 (stating that the National Football League Players Association was founded in 1956), *with* Mackey v. Nat'l Football League, 543 F.2d 606, 610 (8th Cir. 1976) (pointing out that the NLRB recognized the NFLPA in 1968 as the exclusive bargaining representative of all NFL players), *and* Nat'l Basketball Ass'n v. Williams ("*Williams II*"), 45 F.3d 684, 686 (2d Cir. 1995) (referencing how the NBA and NBPA entered into their first collective bargaining agreement in 1967).

79. *See* April Weiner, *NFL and the CBA: Ranking the Worst Work Stoppages in Pro Sports' History*, BLEACHER REPORT (March 10, 2011), http://bleacherreport.com/articles/631338-nfl-and-the-cba-ranking-the-worst-work-stoppages-in-pro-sports-history (noting that the NFL has had five work stoppages since its inception—four strikes and one lockout—and the NBA has had three work stoppages, all of which were lockouts).

80. *See* DeMaurice Smith, Interview with Michel Martin host of NPR's Tell Me More (July 27, 2011) (transcript *available at* http://www.npr.org/2011/07/27/138738431/nfls-longest-work-stoppage-ends).

81. *See* Nathan Koppel, *NBA Takes Players Association to Court*, WALL STREET JOURNAL LAW BLOG (August 2, 2011, 12:35 PM), http://blogs.wsj.com/law/2011/08/02/nba-takes-players-association-to-court/?mod=WSJBlog; Nat'l Basketball League, *NBA Files Unfair Labor Practice Charge, Lawsuit Against NBPA* (August 2, 2011 10:38 AM), http://www.nba.com/2011/news/08/02/nba-labor-lawsuit/.

82. Kapp v. Nat'l Football League, 390 F. Supp. 73, 83 (N.D. Cal. 1974), *vacated in part*, No. 72-537, 1975 WL 959 (N.D. Cal. Apr. 11, 1975), *aff'd*, 586 F.2d 644 (9th Cir. 1978).

83. WONG, *supra* note 5, at 544 tbl.11.3.

84. 543 F.2d 606 (8th Cir. 1976).

85. *Id.* at 609.

arrangement on compensation, the league commissioner could transfer substitute players from the player's new team to the old team.[86] League players complained that the rule limited their free agency and argued that they could not freely contract out their services.[87] The NFL argued that it was shielded from antitrust liability under the nonstatutory labor exemption within the Sherman Act, due to its participation in a CBA.[88] The District Court of Minnesota held that "[the NFL's] enforcement of the Rozelle Rule constituted a concerted refusal to deal . . . and therefore was a per se violation of the Sherman Act."[89]

The Eighth Circuit upheld the District Court's ruling that because the Rozelle Rule was not the product of "bona-fide arms length bargaining," the labor exemption did not apply and the Rozelle Rule was subject to antitrust scrutiny under the Sherman Act.[90] In a victory for the players, the court held that the Rozelle Rule was a violation of antitrust law because it was an unreasonable restraint on trade, but the court also encouraged the two sides to resolve the issue of player mobility restraints through a collective bargaining agreement.[91] The two sides came to an agreement in March of 1977 that contained league concessions on "union security" and the league's pension plans, in return for new and different restrictions on free agency.[92]

Then, in 1982 following the expiration of the CBA, the NFL players went on strike; this strike lasted fifty-seven days and ended with a new agreement.[93] Later, in 1987, the NFL experienced its most significant labor dispute after the expiration of the 1982 CBA when the NFL owners found replacements for the striking players and the NBPA was forced to call off the strike after many players were close to crossing the picket line to receive a paycheck.[94] After twenty–four days the strike ended, and the players returned to work under similar pre-strike conditions.[95]

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86. *Id.* at 610–11.

87. *Id.* at 609.

88. *Id* at 620–21.

89. *Id.* at 609 (citing Mackey v. Nat'l Football League, 407 F. Supp. 1000 (D. Minn. .1975)).

90. *See id.* at 616 (observing that the clubs had unilaterally imposed the rule since 1963). *See generally* John Croke, *An Examination of the Antitrust Issues Surrounding the NBA Decertification Crisis*, 5 SPORTS LAW. J. 163, 177-79 (1998) (discussing the "per se" and "rule of reason" antitrust analyses in the decertification context).

91. *See Mackey*, 543 F.2d at 623 ("The parties are far better situated to agreeably resolve what rules governing player transfers are best suited for their mutual interests than are the courts.").

92. *See* WEILER & ROBERTS, *supra* note 51, at 231 (observing that the new rules "proved even more restrictive than the old Rozelle Rule" and that only one player "actually changed teams for compensation" from 1977 to 1987).

93. *See* WONG, *supra* note 5, at 531 (noting that the union conceded on the issue of player mobility in return for better player salaries and benefits).

94. *See generally* Paul D. Staudohar, *The Football Strike of 1987: The Question of Free Agency*, 111 MONTHLY LAB. REV. 26 (1988) (explaining the disputes over free agency and player mobility in the 1987 strike). *See id*. at 29 (describing how two-thirds of the league teams found replacement players, while the striking players, on the other hand, had limited financial reserves and the union had no "strike fund" prepared).

95. *See id*. at 30 (stating that the strike ended October 15th).

The fight was not over, and a group of players brought suit against the NFL in the District Court of Minnesota for several restrictions contained in the CBA and in the standard player contract—claiming that they were violations of the Sherman Act.[96] The court refused to order a preliminary injunction on the issues and held that the labor exemption protected the NFL—as the parties had not come yet to an impasse.[97]

The players appealed the district court's decision that there was not yet an impasse, but the Eighth Circuit reversed the District Court's decision and held that the labor exemption applies for "as long as there is a possibility that proceedings may be commenced before the Board, or until final resolution of Board proceedings and appeals."[98] Noting, in the decision, that antitrust claims were not appropriate because labor policy favors "negotiated settlements rather than intervention by courts."[99]

Following this ruling, and having played two seasons without a CBA in place, the NFLPA elected to decertify itself as the exclusive bargaining unit through a league-wide player vote.[100] Following decertification, another lawsuit was filed against the NFL in *Powell v. National Football League* & *McNeil v. National Football League* (*Powell III*).[101] The District Court of Minnesota held that because of the decertification of the NFLPA, the labor exemption no longer protected the NFL and the player restraints challenged in the suit were

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96. *See* Powell v. Nat'l Football League ("*Powell I"*), 678 F. Supp. 777, 778–79 (D. Minn. 1988) (stating that plaintiffs "[sought] to enjoin defendants from implementing or continuing a system of alleged player restraints [set up to restrict player mobility]"), *rev'd*, 930 F.2d 1293 (8th Cir. 1989).

97. *See id*. at 788 ("[P]roper accommodation of labor and antitrust interests requires that a labor exemption relating to a mandatory bargaining subject survive expiration of the collective bargaining agreement until the parties reach impasse *as to that issue;* thereafter, the term or condition is no longer immune from scrutiny . . . ."). The NLRB has ruled an "impasse" to be a "matter of judgment" in which the Board considers: [the] bargaining history, the good faith of the parties in negotiations, the length of the negotiations, the importance of the issue or issues as to to [sic] which there is disagreement, the contemporaneous understanding of the parties as to the state of negotiations . . . . *See* Taft Broad. Co. & Am. Fed'n of Television & Radio Artists, 163 N.L.R.B. 475, 478 (1967); *see also* Wong, *supra* note 5, at 544 (listing seven factors to consider).

98. *See* Powell v. Nat'l Football League (*Powell II*), 930 F.2d 1293, 1303–04 (8th Cir. 1989) ("[T]he nonstatutory labor exemption protects agreements conceived in an ongoing collective bargaining relationship . . . beyond impasse. . . . ")

99. *Id.* at 1303.

100. *See* WONG, *supra* note 6, at 531. Without a CBA, the league was able to institute unilateral changes so long as the bargaining relationship existed, and these changes could not be challenged as unfair labor practices through NLRB jurisdiction.

101. 764 F. Supp. 1351 (D. Minn. 1991).

now vulnerable to antitrust violation claims.[102] This time, a jury found that the NFL's compensation rule was a violation of the Sherman Act.[103]

Another suit was filed less than two weeks after *Powell*: *White v. National Football League*.[104] In *White* a group of players brought a class action suit seeking total or modified free agency.[105] *White* eventually settled out of court, and the NFL paid $195 million to the class of players and granted greater free agency to the NFL players.[106] Not long after the *Powell* verdict, the players once again elected the NFLPA as their exclusive bargaining representative and the NFLPA successfully executed a new CBA in 1993.[107]

The most recent CBA, signed in 2006, included a provision allowing owners to opt out of the agreement in March, 2011—instead of its expiration in 2012.[108] Months before the CBA actually expired, NFLPA executive director DeMaurice Smith expressed concerns about the NFL making plans for a lockout,[109] and stated that every team had taken individual votes to determine whether the NFLPA should once again decertify as the exclusive bargaining unit.[110]

On March 11, 2011, the owners opted out of the agreement and the league locked out its players.[111] The same day, the NFLPA officially decertified and a group of individual players filed a lawsuit in

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102. *See id*. at 1358–59 (reasoning that, without a certified collective bargaining representative, no further remedy or action before the Board remained, and thus there was no longer the "ongoing collective bargaining relationship").

103. *See* McDonough, *supra* note 6, at 840 (describing how the jury found that Plan B had "a substantially harmful effect on competition" and caused economic injury to the players (quoting Jackson v. Nat'l Football League, 802 F. Supp. 226, 229 n.2 (D. Minn. 1992))).

104. White v. Nat'l Football League, 822 F. Supp. 1389, 1394 (D. Minn. 1993), *motion for final approval of settlement granted*, 836 F. Supp. 1458 (D. Minn. 1993), *aff'd*, 41 F.3d 402 (8th Cir. 1994).

105. *Id*. at 1394–95.

106. McDonough, *supra* note 6, at 842 ("But of greater importance is that the White settlement, gained only after decertification of the players own union and subsequent court victories, provided the most significant amount of free agency in the history of the NFL.").

107. WONG, *supra* note 5, at 531.

108. *See* NFL Collective Bargaining Agreement 2006–2012 (Mar. 8, 2006) (unpublished contract) (on file with author); *see also* WONG, *supra* note 5, at 546 (explaining that the "[o] wners unanimously vote[d] to opt out of [the] collective bargaining agreement" on May 20, 2008, an act that resulted in the expiration date of the collective bargaining agreement moving to May 1, 2011).

109. *See* Associated Press, *Union Head Says Owners Set for Lockout*, ESPN (Oct. 5, 2010), http://sports.espn.go.com/nfl/news/story?id=5652700 (explaining that Smith has pointed to the NFL's recently asking banks to extend loan periods for league teams in the event of a lockout).

110. *See* Doug Farrar, *Players, NFL Dig In For Pending Labor Fight*, YAHOO! SPORTS (Nov. 18, 2010) http://sports.yahoo.com/nfl/news?slug=ys-nfllabor111810/ (describing the actions of the league and the NFLPA in preparing for a possible lockout at the end of the current season).

111. *See* Nate Davis, *NFLPA Decertifies, Pursues Lockout Injunction Against NFL*, USA TODAY, http://content.usatoday.com/communities/thehuddle/post/2011/03/report-nfl-players-association-applies-for-decertification/1 (Mar. 12, 2011).

U.S. District Court, alleging antitrust violations and seeking an injunction regarding the lockout.[112] In the months since then, the NFLPA has engaged in a series of court hearings, court-mandated mediation and numerous negotiation meetings.[113] Then, on July 25, 2011 NFL Commissioners Roger Goodell and DeMaurice Smith announced that the league and the NFLPA had reached a new ten-year CBA which would end the lockout and that "[f]ootball [was] back."[114]

B. Labor History of the National Basketball Association

The exclusive bargaining unit of the NBA is the NBPA, which was founded in 1954.[115] The NBA entered into its first CBA in 1967.[116] Following the 1971 decision in *Denver Rockets v. All-Pro Management, Inc.*,[117] which provided that the NBA participated in interstate commerce,[118] and thus, by extension, would fall within the jurisdiction of the NLRB.[119]

Wood v. Nat'l Basketball Ass'n[120] provided a major victory for the league in the labor relationship. Leon Wood, a college basketball player drafted in the first round of the NBA draft, brought suit against the league and argued that the draft and salary cap were illegal restraints of trade.[121] Despite finding that the draft and salary cap actually injured Wood and others in the position of drafted players, the *Wood* court held that all trade restraints were the product of collective bargaining and thus could not be challenged on antitrust grounds.[122]

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112. *See id.*

113. *See generally* Sal Paolantonio, *Players, Owners Facing Tight Squeeze*, ESPN.COM (July 11, 2011), http://sports.espn.go.com/nfl/columns/story?columnist=paolantonio_sal&id=6756795 (describing the federal judge-mandated negotiations between the league and NFL player representatives).

114. *See Players Vote to Approve New Labor Deal, Put End to Extended Lockout*, SPORTS ILLUSTRATED (July 25, 2011 9:40 PM), http://sportsillustrated.cnn.com/2011/football/nfl/07/25/nfl-labor-deal.ap/index.html.

115. *See About the NBPA*, *supra* note 78 (discussing how the NBA recognized the NBPA as the exclusive union representative of all NBA players when the players threatened not to play in the first televised All-Stars game).

116. *Id.*

117. 325 F. Supp. 1049 (C.D. Cal. 1971), *stay granted*, 1971 WL 3015 (9th Cir. Feb. 16, 1971), *reinstated sub nom.* Haywood v. Nat'l Basketball Ass'n, 401 U.S. 1204 (1971).

118. *See id*. at 1062 (noting that the NBA operates in seventeen metropolitan areas, schedules games in numerous states, and receives revenue from nationwide broadcasts).

119. *See supra* notes 47–49 and accompanying text.

120. 809 F.2d 954 (2d Cir. 1987).

121. *Id*. at 956–57.

122. *Id*. at 959, 960 (rebuffing a basketball player's argument that his superior skills vis-à-vis other players should permit him to insist on individual bargaining, because "collective agreements routinely set standard wages for employees with differing responsibilities, skills, and levels of efficiency"); *see* McDonough *supra* note 6, at 833–34 (highlighting the fact that Wood still lost the suit even though at the time he was not yet a part of the bargaining unit but an in-coming college athlete, and explaining that the court relied on the definition of "employee" in the NLRA in holding against Wood).

Besides the *Wood* decision, the first major labor issue in the NBA arose in 1995.[123] Facing the imminent expiration of the CBA in 1994, the league and players managed to reach a no-strike, no-lockout agreement to protect the 1994–95 season; the players played under the regulations of the previous agreement in hopes of striking a new deal during the season.[124] However, following the expiration of the CBA on June 23, 1994 the NBA and its teams brought suit against the class of present and future NBA players seeking a judgment stipulating:

> (i) that the continued imposition of the disputed provisions of the CBA [the college draft, the salary cap, and the right of first refusal for free agents] would not violate the antitrust laws because that imposition is "governed solely by the labor laws and is exempt from antitrust liability under the nonstatutory exemption to the antitrust laws"; and (ii) that the disputed provisions are lawful even if the antitrust laws apply.[125]

The Second Circuit ruled for the league and cited the labor exemption as providing the league with immunity from possible antitrust challenges so long as there was a collective bargaining relationship between the parties.[126]

After the 1995 season, the loss in *Nat'l Basketball Ass'n v. Williams ("Williams I")*, and the failure to negotiate a new CBA, a group of NBA players who were unhappy with the current league provisions signed a petition to decertify the players association as their exclusive bargaining agent.[127] The association's biggest stars, led by Michael Jordan and Patrick Ewing, also brought an antitrust suit in District Court.[128] Eventually, the NLRB conducted

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123. *See* WONG, *supra* note 5, at 549 tbl.11.3 (noting that in 1995, the NBPA threatened to decertify during an owners' lockout).

124. Robert Bradley, *Labor Pains Nothing New to NBA*, ASS'N FOR PROF'L BASKETBALL RES., http://www.apbr.org/labor.html (last visited May 30, 2010).

125. *See Williams II*, 45 F.3d 684, 686 (2d Cir. 1995) (finding that the players had refused to negotiate with the NBA until the 1988 CBA had expired); *see also* McDonough, *supra* note 6, at 835 (indicating that the same restrictions had been challenged eight years prior in *Wood*).

126. *See* 45 F.3d at 691, 693 (holding that even after the expiration of a collective bargaining *agreement*, where there is a collective bargaining relationship employers can still bargain with a union, implement joint proposals, and use economic pressure to secure agreement on proposals).

127. *See* 1 AARON N. WISE & BRUCE S. MEYER, INTERNATIONAL SPORTS LAW AND BUSINESS 95 (1997) (describing the 1995 negotiations and the resulting attempt to get rid of the union leadership).

128. *See id.* (stating that the lawsuit alleged that any joint action by the NBA owners, whether a lockout, the return of the old salary cap system, or a new system, "would violate the antitrust laws in the absence of a union").

an election that would determine whether the players association would be decertified.[129] By a vote of 226–134 the union remained the exclusive bargaining agent.[130] Still without a CBA, the NBPA and the league continued to negotiate and eventually created a new agreement in July 1996, all without any significant work stoppages—either by a player strike or an owner lockout.[131]

The new six–year CBA, however, contained a provision allowing owners to re–open negotiations after three years if player salaries rose too high relative to league income, and in 1998, the NBA faced a work stoppage.[132] During the season, on March 23, 1998, the owners voted to reopen negotiations, and, after nine negotiation sessions that produced little progress, the league announced a lockout beginning July 1, 1998.[133] The lockout lasted six months, and right before the 1998–1999 season was set to be cancelled, the sides settled on a new CBA and agreed to play a shortened season beginning in February.[134] Both sides made concessions in the settlement, with the players suffering a new cap on individual salaries, while the owners lost in their efforts to institute a hard team salary cap.[135]

The most recent CBA came into existence on July 1, 2005 and expired on June 30, 2011.[136] The owners made the decision to refuse an option to continue the CBA until 2012, and the struggles in negotiation over the past six months have resulted in both sides questioning whether there will be an NBA season in 2011.[137] Prior to the expiration of the CBA, the NBPA filed an unfair labor charge against the league with the Board for unfair bargaining practices,

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129. *Id.*; *see* Murray Chass, *N.B.A. Taking a Timeout for Decertification Results*, N.Y. TIMES, Sept. 12, 1995, at B12 ("If the union wins, the players will continue to have a labor relationship with the N.B.A., short-circuiting an antitrust suit . . . [if] the NLRB certifies the results, Judge David Doty of United States District Court in Minneapolis will consider the players' request to issue a preliminary injunction ending the league's lockout of the players.").

130. David Steele, *NBA Players Vote for Union Decertification Fails; Lockout Could End Friday*, SAN FRANCISCO CHRON., Sept. 13, 1995, at B1.

131. *See* WISE & MEYER, *supra* note 127, at 95–96 (describing the tumultuous relationship between the owners and union following the decertification election).

132. Paul D. Staudohar, *Labor Relations in Basketball: The Lockout of 1998-99*, 122 MONTHLY LAB. REV. 3, 4-5 (1999) [hereinafter, Staudohar, *Labor Relations in Basketball*].

133. *Id.* at 4–5 (explaining that the league claimed nearly half of its 29 teams were losing money, and that players were receiving 57 percent of total revenue in salaries, a number much greater than the threshold 51.8% that allowed owners to reopen negotiations).

134. *Id.* at 8.

135. *Id.*

136. 2005 [NBA] Collective Bargaining Agreement art. XXXIX (unpublished contract) (on file with author), *available at* http://www.nbpa.org/cba/2005.

137. *See* Coon, *supra* note 3 ("If the league and players' union don't come to terms on a new agreement by then, the league will impose a lockout, a work stoppage that will disrupt business and could possibly lead to the cancellation of the entire 2011-12 season."); *see also* Chris Mannix, *As Two Sides Stand Firm, Lockout Seems Inevitable For NBA*, SPORTS ILLUSTRATED (July 12, 2010), http:// sportsillustrated.cnn.com/2010/writers/chris_mannix/07/12/stern.las.vegas/ (noting that the league's current proposal and the players' current proposal are "miles apart").

complaining the NBA's goal was to avoid meaningful negotiation until a lockout was in place.[138] Following the expiration of the CBA, the owners initiated a lockout,[139] and the biggest issue the two sides are in disagreement about is revenue sharing between owners and players.[140] NBA commissioner David Stern and NBPA executive director Billy Hunter have met for several negotiations, but since expiration, progress has stalled and both sides appear unafraid to discuss the possibility of a lengthy work stoppage.[141]

IV. ANALYSIS OF NLRB DECERTIFICATION AND ITS NEGATIVE EFFECTS

While the NFL players have decertified their union once before, both the NFLPA and NBPA considered the option of Board–regulated decertification in light of the threat of a lockout in 2011.[142] However, decertification of a union provides instability and it is unlikely to result in any large benefits—in contrast to the advantages of continued negotiation through an exclusive bargaining agent certified by the Board.

A. Legal Options of a Decertified Players' Association to Challenge Trade Restraints

The Eighth Circuit established that any trade restraint is a mandatory subject of collective bargaining. Yet, today almost all salary caps, free agency restrictions, and rookie drafts fall under the labor exemption—so long as a collective bargaining relationship exists.[143] Thus, a players' association who desires to pursue an antitrust claim against a league is presented with a many number of options under the Sherman Act.

In *Powell II*, the court lists several choices for labor organizations faced with possible restraints on trade, including exerting economic pressure and presenting claims to the Board.[144] Additionally, in *Williams I*, Judge Duffy opined that the players union could decertify under Board regulations and subsequently bring antitrust claims against the NBA, but did not advise the players to pursue this course of action.[145] As the Eighth Circuit explained:

138. *See* ESPN.COM, *supra* note 4.

139. *See id*.

140. *See* Coon, *supra* note 3 ("The players are guaranteed fifty-seven percent of the league's revenues . . . before expenses come out.").

141. *See* Adrian Wojnarowski, *NBA Lockout Threatens Entire Season*, YAHOO SPORTS, http://sports.yahoo.com/nba/news?slug=aw-wojnarowski_nba_lockout_players_063011 (June 30, 2011) ("[T]here's a real chance the NBA is gone for a full year now. This has the makings of the NHL's labor war of 2004-05, where the cost of instituting a hard salary cap cost the sport a complete season.").

142. *See generally* Coon, *supra* note 3 (noting that "fewer than ten percent of the players who experienced the lockout in 1998-99 are still in the league").

143. *See Powell II*, 930 F.2d 1293, 1303 (8th Cir. 1989) (holding that the labor exemption protects "agreements conceived in an ongoing collective bargaining relationship . . ." from antitrust liability). *See also supra* notes 135–39 and accompanying text (discussing the "impasse" and "bargaining relationship" tests).

144. *See id*.

145. *See* Nat'l Basketball Ass'n v. Williams *(Williams I)*, 857 F. Supp. 1069, 1078 (S.D.N.Y. 1994) (*aff'd*, 45 F.3d 684 (2d Cir. 1995).

> [W]e are not compelled to look into the future and pick a termination point for the labor exemption. The parties are now faced with several choices. They may bargain further . . . [t]hey may resort to economic force. And finally, if appropriate issues arise, they may present claims to the [Board]. We are satisfied that as long as there is a possibility that proceedings may be commenced before the Board, or until final resolution of Board proceedings and appeals therefrom, the labor relationship continues and the labor exemption applies.[146]

A decertified labor organization holds almost no actual power; instead, the power to bring legal action lies in the hands of individual employees.[147] Not only will the players have to provide their own legal representation— instead of relying on the union to bring suit or an unfair labor practices complaint against the league—but the chances of winning such lawsuits are not a certainty for the players.[148]

This theory is exemplified by *Caldwell*—where a player in the American Basketball Association brought suit against the league and his team for a suspension.[149] The court ruled, however, that because the American Basketball Association Players Association had received Board certification as the exclusive bargaining unit, Caldwell's proper pursuit of a claim was through the NLRB by alleging unfair labor practices, rather than an antitrust suit.[150]

More recently a group of NBA players lost their antitrust counterclaims in *Nat'l Basketball Ass'n v. Williams*.[151] In dicta, the court reasoned that there was no per se violation of section 1 of the Sherman Act, and therefore considered the reasonableness of the challenged restraints.[152] Applying a "rule of reason" analysis, the *Williams* court reasoned that the salary cap, the restrictions on free agency, and the college draft were not anti–competitive.[153]

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146. *Powell II*, 930 F.2d at 1303.

147. *See* Croke, *supra* note 90 at 177 (warning that decertification would leave the individual players to "fend for themselves").

148. *Compare* Mackey v. Nat'l Football League, 543 F.2d 606, 622 (8th Cir. 1976) (holding that the Rozelle Rule was a violation of antitrust law), *with Williams I*, 857 F. Supp. 1069, 1078–79 (S.D.N.Y. 1994) (deciding on exemption grounds but positing in dicta that the challenged trade restraints were not violations of antitrust law), *aff'd*, 45 F.3d 684 (2d Cir. 1995).

149. *See id.* at 526 (explaining that Caldwell alleged that the team and league conspired to "blacklist" him to ensure that he could never play in the league again).

150. *See id.* at 530 ("[I]f Caldwell is allowed to proceed with the present action, employees in similar circumstances will either never resort to the NLRB or will institute parallel administrative and antitrust proceedings with the risk of inconsistent adjudications.").

151. *See Williams I*, 857 F. Supp. at 1071, 1078, 1079 (characterizing professional athletic associations as joint ventures, not as "*competitors* in any economic sense" (quoting Smith v. Pro Football, Inc., 593 F.2d 1173, 1178–79 (D.C. Cir. 1978) (emphasis in original))).

152. *Id.* at 1078–79.

153. *See id*. at 1079 ("The pro-competitive effects of these practices, in particular the maintenance of competitive balance, may outweigh their restrictive consequences.").

Most recently, the Eighth Circuit's decision in *Brady v. NFL*[154] may be interpreted by other circuits as holding that lockouts are legal, even in the face of decertified unions.[155] This decision could greatly impact the strongest weapon of decertified unions, the assurance that decertified unions can bring antitrust claims against a league instituting a lockout. Even if such reading of the June 8, 2011 decision is a stretch of the imagination, the Eighth Circuit's opinion solidifies the notion that lockouts cannot be enjoined, and as such, any lockout would remain in place until the merits of the case are heard.[156] For example, the *Brady* case would not have been heard by a U.S. District Court until 2012, thus ensuring that without a negotiated deal, the NFL could have cancelled the upcoming season, despite whether or not the NFLPA elected to decertify.

Thus, continuing the union as the certified exclusive bargaining unit under the oversight of the NLRB is a more stable option in furthering the players' efforts to affect change in league provisions, as union lawsuits and unfair labor practice claims are less expensive and will be possibly more successful than individual antitrust lawsuits brought by players outside of the union.

Finally, there exists the possibility of NBA or NFL owners bringing a bad faith bargaining charge against their respective players' association concerning the decision to decertify.[157] Looking at the current status of the NFL, with every team voting—most unanimously—for decertification more than four months before the current CBA expires,[158] the league could argue that the players had no desire to reach an agreement.[159] By decertifying immediately following the CBA expiration, the NFL and the NBA players would be placing themselves in a different situation from the 1989 NFLPA, which only decertified following a failed court challenge and two seasons of play without an agreement in place.[160]

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154. Brady v. Nat'l Football League, Docket No. 11-1898 (8th Cir. 2011).

155 *See* Michael McCann, *Burning Questions From Eighth Circuit Ruling To Extend NFL Lockout*, SPORTS ILLUSTRATED (May 16, 2011) http://sportsillustrated.cnn.com/2011/writers/michael_mccann/05/16/nfl.lockout/index.html.

156 *See Brady* ("[W]e conclude that § 4(a) of the Norris-LaGuardia Act deprives a federal court of power to issue an injunction prohibiting a party to a labor dispute from implementing a lockout of its employees.").

157. *Cf.* HARDIN ET AL., *supra* note 14, at 803 (explaining that the Board can find bad faith even if a party is willing to meet, so long as the Bard finds that the party "is merely going through the motions of bargaining").

158. *See supra* note 110.

159. *See* NLRB v. Montgomery Ward & Co., 133 F.2d 676, 686 (9th Cir. 1943) (holding that the duty of good faith is an obligation "to participate actively . . . as to indicate a present intention to find a basis for agreement . . . '[with] an open mind and sincere desire to reach an agreement'" (quoting NLRB v. Reed & Prince Mfg. Co., 118 F.2d 874, 885 (1st Cir. 1941)).

160. *See generally* WONG, *supra* note 5 at 544–45 & tbl.11.3 (describing the history of the 1989 NFLPA decertification struggle).

B. NLRB-Provided Oversight for Players Associations as Certified Exclusive Bargaining Agents

Unlike the uncertainty of antitrust lawsuits, any certified bargaining agent has the ability to use NLRB regulations to challenge their employer.[161] Congress adopted the NLRA and its amendments in order to provide "a[n] array of rules and remedies" for employee unions to challenge their employers outside the scope of antitrust law.[162] The original Wagner Act, passed in 1935, sought to significantly change labor law through providing additional rights to employees and additional outlets for employee-management disputes.[163] Congress recognized that the only way to successfully implement the new labor rights was to establish "the type of administrative agency that had become a hallmark for much of the New Deal legislation."[164] With strict procedures and clear jurisdiction, the NLRB-regulated claims of unfair labor practices and bad faith negotiations provide labor unions with the stability necessary to challenge groups as powerful as sports leagues and team owners.[165] Finally, the presence of a collective bargaining unit and subsequent bargaining relationship do not exclude a union from bringing a successful antitrust suit against its employer, while the decertification of such union does preclude any unfair labor practice challenge under the Act.[166]

The presence of an exclusive bargaining agent and a collective bargaining relationship allow for parties to use economic sanctions. The players have the ability to strike, as set forth in the Act.[167] However, even during a strike, a union

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161. *See* HARDIN ET AL., *supra* note 14, at 27 (observing that the NLRA Act conferred a triad of essential rights: "(1) the right to organize; (2) the right to bargain collectively; and (3) the right to engage in strikes [and other concerted activities]").

162. Caldwell v. Am. Basketball Ass'n, 66 F.3d 523, 530 (2d Cir. 1995) (quoting *Williams II*, 45 F.3d 684, 693 (2d Cir. 1995)) ("Every employee who is locked out by a multiemployer group, every striker who is not reinstated, and every employee who is discharged could bring an antitrust action . . . Clearly, Congress had no such intention. As noted, the NLRA offers 'a[n] array of rules and remedies . . . and . . . application of antitrust principles to a collective bargaining relationship would disrupt collective bargaining as we know it.'").

163. *See* HARDIN ET AL., *supra* note 14, at 26-27 ("Caught in the labyrinth of modern industrialism . . . the employee can attain freedom and dignity only by cooperation with other employees." (quoting 79 CONG. REC. 7565 (1935) (statement of Sen. Robert Wagner)).

164. *See id*. at 28 (creating the Board).

165. *See generally* WONG, *supra* note 5, at 520 (outlining the procedural process of filing an unfair labor charge with the Board).

166. *See* Brown v. Pro Football, Inc., 518 U.S. 231, 250 (1996) ("[A]n agreement among employers could be sufficiently distant in time and in circumstances from the collective-bargaining process that a rule permitting antitrust intervention would not significantly interfere with that process."). The *Brown* decision also noted that investigation into the requirements of insulation from antitrust law should come from the Board "to whose 'specialized judgment' Congress 'intended to leave' many of the 'inevitable questions concerning multiemployer bargaining bound to arise in the future'." *See id.* (quoting NLRB v. Truck Divers Local 499, 353 U.S. 87, 96 (1957)).

167. *See* 29 U.S.C. § 157 (2006) ("Employees shall have the right . . . to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection . . . .").

is still bound to bargain in good faith.[168] Employers, on the other hand, have the ability to "lockout" their employees as a negotiation tactic in collective bargaining.[169] A likely provision in any CBA is a "no strike, no lockout" clause during the term of the CBA, which ensures that these economic sanctions will only be used if the agreement expires before a new one is signed.[170] If there is no exclusive bargaining unit, and thus no bargaining relationship, players would not have the statutory authority to strike,[171] yet it remains unclear whether owners could lock out their employees.[172]

From 1987–1989, the NFL played for two seasons without a collective bargaining agreement, with only a minor three-week strike in 1987.[173] However, when the NFLPA decertified in 1989, the owners lost their ability to lock out the players, but the players were also unable to bargain for any sort of benefits and were forced to play under the league's unilateral provisions concerning free agency and salary caps.[174] Thus, while a Board decertification may ensure that the NBA will play the 2011 season, if the season occurs, the league and owners could attempt to unilaterally decide upon the provisions surrounding every season played where the players do not have an exclusive bargaining unit.[175]

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168. *See* § 158(b)(3) ("It shall be an unfair labor practice . . . to refuse to bargain collectively with an employer, provided it is the representative of his employees subject to the provisions of section 159(a) . . . .").

169. *See* Am. Ship Bldg. Co. v. NLRB 380 U.S. 300, 318 (1965) (holding "an employer violates neither § 8(a) (1) nor § 8(a)(3) [of the Act] when, after a bargaining impasse has been reached, he temporarily shuts down his plant and lays off his employees for the sole purpose of bringing economic pressure to bear in support of his legitimate bargaining position.").

170. *See generally* WEISTART & LOWELL, *supra* note 46, at 823–29 (discussing the economic uses of strikes and lockouts by bargaining parties).

171. *See* 29 U.S.C. § 157 (2006) (granting employees the right to engage in concerted activities "for the purpose of collective bargaining or other mutual aid or protection").

172. *Compare* WISE & MEYER, *supra* note 127, at 95 ("[M]ultiple employers cannot conduct a lockout if there is no union"), *with* WEISTART & LOWELL, *supra* note 46, at 827 (stating that economic sanctions can only be used "so long as bargaining is pursued in good faith and the lockout is utilized only after the bargaining process has reached stalemate or impasse.").

173. *See id.* at 545–46 (charting the NFL collective bargaining history from 1968 to 2008, and including the 1987 player strike and the 1993 CBA signing).

174. *See generally* Thomas George, *N.F.L.'s 7-Year Plan Was Really 5 Years of Cheating History*, N.Y. TIMES, Jan. 7, 1993, at B15 (arguing that, prior to the 1993 NFL CBA, the league had instituted "a heavy-handed, one-sided free agency system" that produced only two free agent moves over five years).

175. *See* Coon, *supra* note 3 (noting that players not represented by a collective bargaining unit lose key protections and benefits).

Collective bargaining relationships in sports often produce benefits to the players in return for sacrificing much of their "free market" abilities through restraints like the draft or salary cap.[176] Both the NFL and NBA's current agreements contain explicit sections concerning health care, as well as retirement and pension plans, which are all benefits the union has accrued in negotiations with their respective leagues.[177] There will be little, if any incentive for the NBA to continue providing these benefits to the players in the event of union decertification.[178] As professional basketball can lead to long–sustaining and career–ending injuries, the presence of a retirement and pension plan is something of great value to all current, past, and future players in either league. Without a CBA—indeed—without a bargaining agent in general, it is unclear whether a pension plan would be as strong as the current plans are or if they the plans would exist at all.

Concerning player retirement, the short nature of professional athletic careers plays a role in pursuing actions against a league, as well as negotiations with leagues and owners. Between the lack of job security and the short length of a players' career (as well as his earnings peak), the possibility of playing under unilateral salary restraints for any amount of time can jeopardize the earning capacity of NBA athletes.[179] While the NFL players were ultimately successful in their lawsuits against the league in *Powell–McNeil* and *White*, the process from the 1987 strike to the 1993 court decisions lasted longer than an average NFL player's career.[180] Clearly, the success of these lawsuits comes at a price, while the ability to consistently play under mutually agreed-upon CBAs provides a more stable economic scheme for professional athletes.

Therefore, the abilities of a decertified union and its members to exact any change or to succeed in obtaining any beneficial economic provisions pales in comparison to both the powers of a certified union, as well as the limited capabilities of leagues who are obligated to negotiate with such unions under the NLRA.

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176. *See* Croke, *supra* note 90, at 176 (noting that collective bargaining negotiations produce benefits such as minimum team salaries, which would most likely be eliminated if a union decertified); *Union: NFL Will Cut Off Health Benefits in Event of a Lockout*, SPORTS BUS. DAILY (Oct. 20, 2010), http://www.sportsbusinessdaily.com/article/142994 (explaining that the NFL league office stated that if the two sides do not agree on a new CBA, the NFL would stop providing health care to NFL players and their families).

177. *See, e.g.*, NFL Collective Bargaining Agreement 2006-2012, *supra* note 178, at arts. XLVI, XLVII (explaining the responsibilities of the team owners to provide health coverage and retirement benefits); 2005 Collective Bargaining Agreement, *supra* note 108, at arts. III, IV (same).

178. *See, e.g.*, *Union: NFL Will Cut Off Health Benefits in Event of a Lockout*, *supra* note 192 (illustrating that without a CBA, leagues will cut the costs of providing benefits for their players).

179. *See* Lock, *supra* note 23, at 385 (arguing that because of a lack of job scurity and a short average career length, NFL players are unlikely to reach their earning potential if they strike or play without a CBA).

180. *See generally How Long is the Average NFL Career?*, LIVESTRONG, http://www.livestrong.com/article/15527-long-average-career-nfl-player/ (last visited Mar. 27, 2011) (explaining that an average career in the NFL is 3.3 years).

C. Economic Realities of Salary Negotiations and the Failure of the Free Market Argument in Today's Economy

One of the statutorily imposed mandatory subjects of collective bargaining is wages,[181] and the collective bargaining unit makes a significant difference in players' wages today. In professional sports, there is a large disparity in the salaries of top players and the players who receive the minimum contract.[182] While it is possible to argue that the decertification of a union and removal of a collective bargaining relationship would allow all players to receive their "free market worth,"[183] this thought process is severely shortsighted.[184] When the NBA attempted to decertify in 1995, it was led by superstars Michael Jordan and Patrick Ewing, who fought hard against the institution of a hard salary cap and received record-breaking salaries.[185] Thus, the benefit felt from the presence of a free market, or even the ability to circumvent certain salary restrictions, rises to the top.

This, in contrast to the anticompetitive nature of unions under the Board, seeks uniformity within the ranks of the union.[186] While the superstars of the NBA would probably see their contracts rise in a free market, there would be little, if any beneficial effect for the majority of the league.[187] Additionally, while players like Michael Jordan argued that there is a competitive disadvantage for "highly skilled" employees, much of the trade provisions in sports extend beyond specific salaries.[188] While opponents of certification may argue that the players associations would be committing unfair employee representation practices, such a claim is short sighted in light of *Steele v. Louisville &*

181. *See* 29 U.S.C. § 159(a) (2006) (specifying that collective bargaining units are the exclusive employee representatives allowed to collectively bargain for employees' wages).

182. *See* Staudohar, *Labor Relations in Basketball*, *supra* note 132, at 6 (explaining that, while the mean salary is $2.6 million, half of players make less than $1.4 million).

183. *See* McDonough *supra* note 6, at 859 (noting that the "non-statutory" labor exemption protects salary caps from antitrust claims).

184. *But cf.* WEISTART & LOWELL, *supra* note 46, at 813 (conceding how difficult it would be for "star" players to complain of a CBA that would benefit the majority of players to the star players' detriment).

185. *See* Staudohar, *Labor Relations in Basketball*, *supra* note 132, at 4, 5, 6 (explaining that when the 1996 CBA retained the salary cap, it also had a "Larry Bird" exception, under which Jordan was able to sign a one-year, $30 million contract). In Major League Baseball, when there was no salary cap, but only a "luxury tax," the top salary was over $20 million more than the league minimum. *See* WEILER & ROBERTS , *supra* note 51, at 307 (explaining that in 2003, Alex Rodriguez of the New York Yankees received $22 million salary in comparison to the league minimum of $300,00).

186. *See* Robert A. McCormick, *Interference on Both Sides: The Case Against the NFL-NFLPA Contract*, 53 WASH. & LEE L. REV. 397, 406-07 (1996) (explaining that the union's goal of reducing competition among employees regarding wages and conditions is accomplished when employers agree to establish uniform terms of employment).

187. *See generally* Staudohar, *Labor Relations in Basketball*, *supra* note 132, at 6–7 (discussing how, even with salary caps, bottom players tend to have little in the way of payouts compared to stars).

188. *See, e.g.*, NFL Collective Bargaining Agreement 2006-2012, *supra* note 108, at arts. VII, X, XXVIII (regulating issues such discrimination, personal appearance, and injury grievances); 2005 [NBA] Collective Bargaining Agreement, *supra* note 136, at arts. VI, XXVIII (incorporating attendance rules and telecom rights).

Nashville Railroad, which allows a union to make provisions for differing treatment among its members based on "competence and skill."[189]

Uncertainty of decertification extends additionally to the protections that a collective bargaining relationship provides to the union group as a whole in terms of wages, and that protection is vital in the economic realities of 2011.[190] The NBA's current salary situation illustrates the problematic possibilities of employees working without the protections of Board-regulated negotiations.[191] With teams acting more conservative economically, either the disparity in salary will skyrocket between the best players and the rest of the league, or the lack of salary cap could result in a decrease in salaries in general.[192]

Finally, the players may have a viable claim of bad faith bargaining against the owners due to the owners' refusal to turn over financial documents.[193] The NBPA has questioned the league's claims that teams are losing money in recent years, and the leagues and teams in general have not sufficiently opened their

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189. 323 U.S. 192, 203 (1944); *see, e.g.*, NFL Collective Bargaining Agreement 2006-2012, *supra* note 108, at art. XXIV, § 1(c) (listing several instances in which compensation can differ amongst players with different competency levels); 2005 [NBA] Collective Bargaining Agreement, *supra* note 136, at art. VII, § 4 (same).

190. *But see* Liz Mullen, *Hunter: Talk of $400M NBA Loss 'Baloney'*, SPORTS BUS. J. (May 31, 2010), http://www.sportsbusinessdaily.com/Journal/Issues/2010/05/20100531/This-Weeks-News/Hunter-Talk-Of-$400M-NBA-Loss-Baloney.aspx (expressing the view that while NBPA Executive Director Billy Hunter does not believe that the NBA is losing $400 million, the NBA has already provided the union with boxes of financial records in support of that claim).

191. *Compare 2010 NBA Free Agents and Signings*, BACKSEAT FAN, http://backseatfan.com/2010/07/2010-nba-free-agents-and-signings/ (last visited Mar. 27, 2011) (charting how, in the summer of 2010, 9 NBA players signed a maximum or near-maximum allowable contract despite owners' claims of financial hardship), *with* WONG, *supra* note 5, at 532 (noting that the removal of the salary *floor* would result in "tremendous cost savings at the players' expense"). *See generally* Michael J. Redding, *Third and Long: The Issues Facing the NFL Collective Bargaining Agreement Negotiations and the Effect of an Uncapped Year*, 20 MARQ. SPORTS L. REV. 95, 102 (2009) ("Operating without a minimum salary requirement would allow the owners to set the market for free agents and rookies without any artificial salary floors.").

192. *See* Redding, *supra* note 109, at 102 (noting how the NFL owners believe that "the current financial model is harming them by providing the players with too large of a revenue share").

193. *Compare* NLRB v. Truitt Mfg. Co., 351 U.S. 149, 755–56 (1956) ("Good faith bargaining necessarily requires that claims made by either bargainer should be honest claims . . . [if] . . . an argument is important enough to present in the give and take of bargaining, it is important enough to require some sort of proof of its accuracy."), *with* WEISTART & LOWELL, *supra* note 46, at 805 (stating that furnishing information to a union has been found to be an element of the employer's duty to bargain in good faith, but that first a union must make a "good faith request for the information to be furnished" and that such information has to be relevant).

books to the players' association.[194] While the law only requires an employer to disclose financial documents when there is a stated "inability to pay," the economic claims of the league may warrant an order to disclose financial information.[195] Even if a bad faith bargaining claim would be unsuccessful, forcing the NBA to claim that it could pay wages, but simply desires to lower them, would be a valuable bargaining chip in collective bargaining negotiations.

The NBPA should remain certified as the exclusive bargaining agent under the Board. Based on the stable options available to Board–certified unions in collective bargaining and the benefits of administrative oversight, as well as the recent legal challenges in the NFL labor dispute, decertifying either union and attempting to individually bargain for contracts without a CBA in place will ultimately hurt the players as a group.

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194. *See Union Head Smith: NFL Owners Gearing Up for Lockout in 2011*, NAT'L FOOTBALL LEAGUE, http://www.nfl.com/news/story/09000d5d81b1858f/article/union-head-smith-nfl-owners-gearing-up-for-lockout-in-2011 (last visited Oct. 5, 2010) (describing the union representative's complaints about the league's willingness to turn over financial documents). Billy Hunter has repeatedly questioned David Stern's claims of financial loss and has requested additional documents. *See* Mullen, *supra* note 190 (explaining that Hunter has requested "the sales prospectuses NBA teams have shown to buyers and would-be buyers of franchises in the last few years" to illustrate that teams are advertising themselves as profitable to potential buyers, while claiming losses to the union).

195. *See* Nielsen Lithographing Co. & Graphic Comms. Int'l Union, 305 N.L.R.B. 697, 701 (1991) (holding that an employer also need not disclose its "projection of its future ability to compete" but that such estimation of its ability to compete is not "equate[d]" with its ability to pay).

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