

IMMIGRATION POLICIES IN AMERICA: UNFRIENDLY AND DESTROYING THE AGRICULTURE INDUSTRY?

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I. INTRODUCTION

On April 23, 2010, the Arizona State Legislature sent shockwaves through many American communities¹ when it enacted SB 1070, a bill intended to aid in enforcing federal immigration laws within Arizona's borders.² In 2008, two years prior to enacting SB 1070, the Arizona legislature adopted HB 2745, known as the Legal Arizona Workers Act.³ The Act prohibits businesses from knowingly or intentionally hiring an "unauthorized alien," and also requires employers to use an online system to ensure that all hired workers are authorized to work.⁴ Both pieces of legislation have been challenged in the federal courts of the United States.⁵ Opponents of these strict immigration laws argue that they are implemented in an over-inclusive manner, subjecting immigrants to racial profiling and unfair law enforcement procedures.⁶ Immigration laws such as these are often controversial, as immigrant labor is a major driving force in America.⁷

Immigration reform is a controversial topic, even in the highest echelons of American politics.⁸ There has long been debate over who should be allowed to enter the country, and on what terms.⁹ When a state attempts to resolve this conflict by enacting state level immigration procedures, as Arizona has with SB 1070, those affected will inherently

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¹ Hatty Lee, *SB 1070 Protest in Arizona State Capital Draws Thousands*, COLOR LINES (May 29, 2010, 5:24 PM), http://colorlines.com/archives/2010/05/rally_at_arizona_state_capital_against_sb1070.html.

² S.B. 1070, 49th Leg., 2d Reg. Sess. (Ariz. 2010).

³ ARIZ. REV. STAT. §§ 23-211 (LexisNexis 2010).

⁴ *Legal Arizona Workers Act*, ARIZONA ATTORNEY GENERAL, TOM HORNE, <http://www.azag.gov/LegalAZWorkersAct/> (last visited Sept. 30, 2011).

⁵ *U.S. v. Arizona*, 703 F. Supp. 2d 980, 991 (D. Ariz. 2010); Brief for Respondents, *Chamber of Commerce v. Whiting*, 131 S. Ct. 1968 (2011) (No. 09-115), 2010 WL 4216271, at *i.

⁶ Barack Obama, *The Case for Comprehensive Immigration Reform*, Speech at American University (July 1, 2010) (*transcript available at* http://www.realclearpolitics.com/articles/2010/07/01/the_case_for_comprehensive_immigration_reform_106167.html).

⁷ Chris Collins, *Don't Ask, Don't Tell Drives Valley Employment*, THE FRESNO BEE (Nov. 14, 2010), <http://www.fresnobee.com/2010/11/14/2156227/fake-documents.html>.

⁸ *Id.*

⁹ *Id.*

have intense reactions.¹⁰ Most Americans agree *something* needs to be done to reform the current immigration system in the United States, but there is no consensus as to what the reform should consist of.¹¹

In 2010, 44% of U.S. farm workers were foreign-born workers¹² while only 61% of U.S. farm workers were American citizens.¹³ Most foreign-born migrant workers reside in the country illegally and have constituted the labor force of the agricultural industry for generations.¹⁴ According to President Obama, “a program of mass deportations would disrupt our economy and communities in ways that most Americans would find intolerable”.¹⁵ As a result, certain changes in immigration procedures could have staggering effects on American industry, particularly the agricultural sector. Some argue reform is needed which would allow those who work in America illegally to more easily gain citizenship.¹⁶ Especially since studies have shown that a reduction in the immigrant workforce in America could likely prove to be crippling to United States food producers.¹⁷ Commentators have noted that “without an immigrant labor force, much of the nation’s food production would not make it to supermarket coolers and shelves.”¹⁸ If America becomes viewed as a country that is unfriendly to immigrants, there could be a reduction in the number of foreign workers available to fill the labor demands of certain industries. Such a reduction could have potentially devastating effects on the food supply in the United States.

Currently, industries that hire illegal immigrant labor are working in a gray zone, utilizing hiring practices that tiptoe on the line of illegality. The laws allow for certain exceptions in hiring foreign workers for farm labor; however, hiring workers through these systems often proves to be costly to farmers.¹⁹ For the sake of economic predictability

¹⁰ *Id.*

¹¹ See Ruben Navarrette, *The Path to Immigration Reform*, REAL CLEAR POLITICS (June 20, 2010), available at http://www.realclearpolitics.com/articles/2010/06/20/the_path_to_immigration_reform_106035.html.

¹² *Rural Labor and Education: Farm Labor*, U.S. DEP’T OF AGRIC., ECON. RESEARCH SERV., <http://www.ers.usda.gov/Briefing/LaborAndEducation/farmlabor.htm#demographic> (last updated July 11, 2011).

¹³ *Id.*

¹⁴ Obama, *supra* note 6.

¹⁵ *Id.*

¹⁶ See Rick Jordahl, *Agriculture Needs Immigration Reform*, PORK MAGAZINE (Apr. 6, 2010), available at <http://www.cattlenetwork.com/cattle-resources/hot-topics/agriculture-needs-immigration-reform-114132829.html>.

¹⁷ Parr Rosson, Flynn Adcock, Dwi Susanto & David Anderson, *The Economic Impacts of Immigration on U.S. Dairy Farms*, NAT’L MILK PRODUCERS FED’N (2009), available at <http://www.nmpf.org/files/file/NMPF%20Immigration%20Survey%20Web.pdf>.

¹⁸ Jordahl, *supra* note 15.

¹⁹ LEGISLATIVE RESEARCH COMM’N, RESEARCH REP. NO. 305, IMMIGRATION IN KENTUCKY: A PRELIMINARY REPORT 53 (2002), available at <http://www.lrc.ky.gov/lrcpubs/Rr305.pdf> [hereinafter IMMIGRATION IN KENTUCKY].

and sustainability, American farms need an enforced, bright line immigration rule that can be relied upon when making labor decisions. Lawmakers are aware that *something* needs to be done, however the States have taken different approaches in addressing the issue. For example, compare Arizona Senate Bill 1070, which would punish employers who hire illegal immigrants, with U.S. House Resolution 2414: AgJobs Act of 2009, which would confer an “immunity” status on aliens who have performed agriculture work in the U.S. for a certain time period.²⁰

This note addresses the potential effects that over-inclusive immigration legislation, such as AZ SB 1070, will have on the American agriculture labor force. This analysis will begin with an overview of the U.S. agriculture industry’s reliance on immigrant labor. The focus will then shift to recent legislation that has targeted immigration procedures. Finally, the analysis will conclude by theorizing the potential effects of such legislation on the immigrant labor force. The note will propose that such legislation does not only have the intended effect of deterring illegal immigration into the United States, but may also punish those who have come to the United States legally and are just trying to earn a living.²¹

II. THE AGRICULTURE INDUSTRY’S RELIANCE ON IMMIGRANT LABOR

Guillermo Zamora, a California farm-labor contractor, “doesn’t hire Americans.”²² Instead, he relies almost exclusively on immigrants carrying forged citizenship documents, which can be purchased in California for less than \$100 from “fake document vendors.”²³ Though the government provides a system for employers to detect fake documents during the hiring process, contractors such as Zamora do not adhere to it. If this “game” of hiring illegal workers stops because of regulation, says Joseph Riofrio, “then the fruit isn’t picked, the vegetables aren’t picked, and the vibrant agriculture industry stops.”²⁴

Immigrant labor, both legal and illegal, is a driving force in American agriculture. In 2009, Texas A&M conducted a study that focused on the “economic impacts of immigration on U.S. dairy farms.”²⁵ According to the study, nearly one-half of U.S. meat-processing industry employees are foreign-born and of Hispanic origin.²⁶ Such figures are

²⁰ S.B. 1070, 49th Leg., 2d Reg. Sess. (Ariz. 2010); H.R. 2414, 111th Cong. (2009).

²¹ IMMIGRATION IN KENTUCKY, *supra* note 18, at 52-53.

²² Collins, *supra* note 7.

²³ *Id.*

²⁴ *Id.*

²⁵ Rosson et al., *supra* note 16 at 2.

²⁶ *Id.*

similar in the crop-producing industry.²⁷ The Texas A&M study focused exclusively on dairy farms in the U.S., though for purposes of this note it will be assumed that conclusions derived from the study would be universal across the nation's agriculture industry.

The Department of Labor has made an even more staggering estimate: of the 2.5 million farm workers in America, 52% are undocumented.²⁸ It is estimated that U.S. dairy farms employ around 138,000 full-time workers.²⁹ Of this number, close to 57,500 are immigrants.³⁰ If the hiring practices outlined by Guillermo Zamora in California are commonplace around the country, then one can only guess how many of these 57,500 people are actually legal workers.

Commentators reason that this high figure of undocumented workers can be blamed on a lack of legal channels to employment and a broken immigration system.³¹ Regardless of why there are so many illegal immigrants in America, one cannot ignore the fact that immigrants, even illegal ones, are essential to maintaining a functioning economy.³² Agriculture employers rely on immigrant labor to fill the low-skilled, low-cost labor niche.³³ This could be attributed to the fact that more Americans are attaining at least a high-school education. Fifty years ago, half of all American-born, working age adults had not completed high school.³⁴ Today, that figure has shrunk to 8%.³⁵ The increase in high-school graduation rates has led to a lack of low-cost labor. Immigrants can help satisfy that demand.

It is apparent that the economy could not sustain a full deportation of the [illegal] immigrant workforce. It is also essential that *something* be done to either streamline the legal immigration process for those already working in the country, allow for effective temporary worker programs, or a combination of both. States and the federal government appear to be searching for solutions that will serve the interests of both the American economy and of those who support a "closed borders" policy. Until a compromise is reached, there will continue to be heated debates over how to solve this "problem" that the nation finds itself in.

²⁷ *Id.*

²⁸ Sarah Rubin, *Will Immigration Law Doom America's Lettuce?*, THE ATLANTIC (May 11, 2010), <http://www.theatlantic.com/food/archive/2010/05/will-immigration-law-doom-americas-lettuce/56534/>.

²⁹ *Id.* at 9.

³⁰ *Id.* at 2.

³¹ Ron Smith, *Immigration Reform Vital for U.S. Agriculture*, SOUTHWEST FARM PRESS (Oct. 7, 2008), <http://southwestfarmpress.com/government/immigration-reform-vital-u-s-agriculture>.

³² Gregory Rodriguez, *Undocumented Workers: Essential but Unwanted*, L.A. TIMES (Oct. 13, 2010), available at <http://www.newamerica.net/node/38398>.

³³ *Id.*

³⁴ *Id.*

³⁵ *Id.*

III. AN OVERVIEW OF IMMIGRATION POLICIES AND REFORMS IN THE UNITED STATES, PAST AND PRESENT

A. H-2A: The Temporary Guestworker Program

The United States Congress, apparently aware of how greatly U.S. farms rely on immigrant labor, provides a program known as H-2A,³⁶ which establishes a “means for agricultural employers who anticipate a shortage of domestic workers to bring nonimmigrant foreign workers to the U.S. to perform agricultural labor or services of a temporary or seasonal nature.”³⁷ Under the program, an employer must “file an application with the Department of Labor stating that there are not sufficient workers who are able, willing, qualified, and available, and that the employment of aliens will not adversely affect the wages and working conditions of similarly employed U.S. workers.”³⁸ Any employer certified for a specific number of H-2A jobs must have initially attempted to find U.S. workers to fill these slots. Even after H-2A workers are recruited, employers must continue to engage in “positive recruitment” of U.S. workers³⁹, but it is unclear how such a requirement would be enforced.

This program is not widely used by agriculture employers. The Department of State issued only 86,000 H-2A certifications in 2009 even though there are over one million undocumented farm workers in America.⁴⁰ This is proof that the program is not being widely used. The lack of participation in the program could be attributed to the potentially high cost of compliance imposed on employers of H-2A workers.⁴¹ The program requires employers using H-2A workers to provide free housing, transportation, and meals to workers under contract.⁴² In an already struggling industry, many farmers simply do not have the resources to implement the necessary steps to effectuate a labor force through use of the H-2A program.⁴³ In order to comply with the system, some farmers

³⁶ 8 U.S.C.S. § 1101(a)(15)(H)(ii)(a) (LexisNexis 2011).

³⁷ *Work Authorization for Non-U.S. Citizens: Temporary Agricultural Workers (H-2A Visas)*, U.S. DEP'T OF LABOR, <http://www.dol.gov/compliance/guide/taw.htm> (last updated Sept. 2009).

³⁸ *Id.*

³⁹ *Id.*

⁴⁰ EMP'T AND TRAINING ADMIN. OFFICE OF FOREIGN LABOR CERTIFICATION, U.S. DEP'T OF LABOR, *THE FOREIGN LABOR CERTIFICATION REPORT: 2009 DATA TRENDS AND HIGHLIGHTS ACROSS PROGRAMS AND STATES 26* (2009), available at http://www.foreignlaborcert.doleta.gov/pdf/2009_Annual_Report.pdf.

⁴¹ *See H-2A Compliance Review*, U.S. DEP'T OF LABOR, <http://www.dol.gov/whd/regs/compliance/fmla/H2A.htm> (last visited Oct. 1, 2011).

⁴² *Id.*

⁴³ Charles Breiterman, *Conversation with a Farmer*, NUMBERSUSA (Sept. 4, 2009), <http://www.numbersusa.com/content/nusablog/cbreiter2/september-4-2009/conversation-farmer.html>.

are forced to hire independent contractors to complete the paperwork.⁴⁴ These contractors charge fees, which many farmers cannot afford.⁴⁵ Instead of serving as proponents of the temporary guestworker program, some of these farmers support amnesty for all of their illegal workers.⁴⁶

Opponents to this program note that it is difficult to implement due to several strict participation requirements.⁴⁷ One of the toughest provisions to comply with requires participant employers to secure suitable housing for guestworkers.⁴⁸ With so much difficulty in using the H-2A guestworker program, employers such as Guillermo Zamora choose to face the risk of hiring illegal immigrants through alternative channels.⁴⁹ These alternative channels often violate federal immigration laws and place employers at risk of sanctions and employees at risk of deportation.⁵⁰

B. Arizona SB 1070

A few states, in response to a substantial influx of illegal immigrants coupled with the hiring of illegal immigrants, have taken it upon themselves to enact strict immigration laws intended to curb such illegal activity. In April 2010, Arizona enacted what many believe to be the nation's toughest legislation addressing illegal immigration, SB 1070.⁵¹ The general aim of the legislation is to prosecute and deport illegal immigrants.⁵² The law, which proponents and critics alike said was the broadest and strictest immigration measure in generations, makes the failure to carry immigration documents a crime and gives the police broad power to detain anyone suspected of being in the country illegally.⁵³ Opponents of SB 1070 worry that because it is in a state law granting local law enforcement broad powers, people (mainly Hispanics) who are in the country legally could be subject to harassment.⁵⁴

“Arizona’s law orders immigrants to carry their alien registration documents at all times and requires police to question people if there’s

⁴⁴ *Id.*

⁴⁵ *Id.*

⁴⁶ *Id.*

⁴⁷ Frank Giles, *A Better Way for H-2A*, AM. VEGETABLE GROWER (Sept. 2008), available at <http://www.growingproduce.com/americanvegetablegrower/?storyid=248>.

⁴⁸ *Id.*

⁴⁹ See Collins, *supra* note 7.

⁵⁰ See S.B. 1070, 49th Leg., 2d Reg. Sess. (Ariz. 2010).

⁵¹ S.B. 1070, 49th Leg., 2d Reg. Sess. (Ariz. 2010).

⁵² *Id.*

⁵³ Randal C. Archibold, *Arizona Enacts Stringent Law on Immigration*, N.Y. TIMES (Apr. 23, 2010), <http://www.nytimes.com/2010/04/24/us/politics/24immig.html>.

⁵⁴ *Id.*

reason to suspect they're in the United States illegally."⁵⁵ The Act obligates police to make an attempt, during a "lawful stop, detention or arrest," to determine a person's immigration status if there is reasonable suspicion that the person is an illegal alien.⁵⁶ It will be a misdemeanor crime for an alien to be in Arizona without carrying documents demonstrating immigration status.⁵⁷ Additionally, it is an offense to transport an alien "in furtherance" of the alien's illegal presence in the U.S., to "conceal, harbor or shield" an alien, or to encourage or induce an alien to immigrate to the state, if the person "knows or recklessly disregards the fact" that the alien is in the U.S. illegally or that his or her immigration would be illegal.⁵⁸ It also targets those who hire or knowingly transport illegal immigrant laborers.⁵⁹

C. *What's the Problem with SB 1070?*

In the weeks following the signing of the Republican-sponsored SB 1070, Arizona saw a "sharp increase" in the number of Hispanics who became registered as Democrats in the state.⁶⁰ It became obvious very quickly that strong opposition existed to the idea that state and local law enforcement, instead of federal, would be provided with the power to control immigration. The negative reaction to SB 1070 was hardly a surprise, as similar programs have been struck down in other states around the country.

For example, in 1994, California approved what is commonly known as "California's Proposition 187."⁶¹ The proposition, referred to at the time as the "Save Our State" petition, was rooted in the notion that the illegal immigrants were to blame for crime, the poor economy, "draining state and federal tax dollars and services, and for committing injustices against California citizens."⁶² The premise of Proposition 187 seems very

⁵⁵ *What Does Arizona's Immigration Law Do?*, CNN POLITICS (Apr. 23, 2010), http://articles.cnn.com/2010-04-23/politics/immigration.faq_1_arizona-immigration-law-reform-sb1070?_s=PM:POLITICS.

⁵⁶ S.B. 1070 §2, 49th Leg., 2d Reg. Sess. (Ariz. 2010).

⁵⁷ *Id.*

⁵⁸ *Id.*

⁵⁹ *Id.*

⁶⁰ Daniel Gonzalez, *SB 1070 Backlash Spurs Hispanics to Join Democrats*, THE ARIZONA REPUBLIC (June 8, 2010), <http://www.azcentral.com/arizonarepublic/news/articles/2010/06/08/20100608arizona-immigration-law-backlash.html>.

⁶¹ *California Proposition 187, Illegal Aliens Ineligible for Public Benefits (1994)*, BALLOTPEdia, http://ballotpedia.org/wiki/index.php/California_Proposition_187_%281994%29 (last visited Oct. 1, 2011).

⁶² Gebe Martinez, *Learning from Proposition 187: California's Past is Arizona's Prologue*, PAC. PROGRESSIVE (May 10, 2010), <http://www.pacificprogressive.com/2010/05/learning-from-proposition-187-californias-past-is-arizonas-prologue.html>.

similar to that of Arizona SB 1070. Parts of the initiative required law enforcement officials to “verify a person’s immigration status.”⁶³ Arguments against Proposition 187 focused on the risk that such requirements would undoubtedly lead to acts of racial profiling and harassment, the same concerns previously raised by immigrants and others opposed to the Arizona bill.

Citizens of Arizona are afraid that strict state and local level immigration enforcement will lead to racial profiling and harassment.⁶⁴ This fear has the potential to drive many immigrants, both legal and illegal, out of the state in search of new homes in states that have not implemented such harassing policies.

D. The Federal Government’s Response

Legislation and enforcement of immigration laws has generally been allocated to the federal government. The Immigration Control and Reform Act of 1986, 8 U.S.C.S. § 1324(a), makes it illegal for employers in the United States to knowingly hire illegal aliens.⁶⁵ Other federally enacted legislation, such as the Immigrant Reform and Immigrant Responsibility Act of 1996 and the Patriot Act of 2001, provide further evidence that legislation of immigration policies has historically been a duty delegated to the federal government.

In response to Arizona’s enactment of SB 1070, the Department of Justice (DOJ), acting on behalf of the federal government, filed suit in Arizona federal court. The DOJ argued that the Arizona law was unconstitutional and would infringe on the Department’s ability to carry out federal immigration regulation. The DOJ argued the following in court:

In enacting a state policy of “attrition through enforcement,” Arizona’s S.B. 1070 ignores every objective of the federal immigration system, save one: the immediate apprehension and criminal sanction of all unlawfully present aliens. See S.B. 1070 § 1. Arizona’s one-size-fits-all approach to immigration policy and enforcement *undermines the federal government’s ability to balance the variety of objectives inherent in the federal immigration system*, including the federal government’s

⁶³ *Most of California’s Prop. 187 Ruled Unconstitutional*, CNN POLITICS (Mar. 19, 1998), http://articles.cnn.com/1998-03-19/politics/prop.187_1_illegal-immigrants-california-gov-social-service?_s=PM:ALLPOLITICS.

⁶⁴ Motion for Preliminary Injunction, *supra* note 63, at 7, 26.

⁶⁵ 8 U.S.C.S. §1324(a) (LexisNexis 2005).

focus on the most dangerous aliens. By requiring local police officers to engage in maximum inquiry and verification (on pain of civil suit) and by providing for the conviction and incarceration of certain foreign nationals in Arizona for their failure to register, for entering or traveling throughout the state using commercial transportation, or for soliciting work, the “balance” struck by S.B. 1070 is not only different from that of the federal government, *but it will interfere with the federal government’s ability to administer and enforce the immigration laws* in a manner consistent with the aforementioned concerns that are reflected in the INA. Despite the statute’s self-serving claim that it “shall be implemented in a manner consistent with federal laws regulating immigration,” S.B. 1070 § 12, the act mandates *a conflicting, Arizona-specific immigration policy* – “attrition through enforcement” – and prescribes various provisions that implement that policy in *conflict with federal priorities. To permit a hodgepodge of state immigration policies*, such as the one Arizona has attempted in S.B. 1070, would *impermissibly interfere* with the federal government’s balance of uniquely national interests and priorities in a number of ways.⁶⁶

One facet of the DOJ’s argument relates to Arizona’s attempt to “undermine the federal government’s ability to balance the variety of objectives inherent in the federal immigration system, including the federal government’s focus on the most dangerous aliens.”⁶⁷ The DOJ argument implies that there may be some benefits in addition to negative effects on illegal immigration. Enforcement of immigration policies, therefore, should be treated as the sensitive subject that it is and left up to federal agencies that can best take account for the “big picture” effects that immigration policies will have on the country as a whole.

E. The Potential Effect of SB 1070 and Similar Legislation

Farmers are simply not implementing federal guestworker programs such as H-2A. There has been debate over *why* the program

⁶⁶ Plaintiff’s Motion for Preliminary Injunction and Memorandum of Law in Support Thereof at 19, *U.S. v. Arizona* 703 F. Supp. 2d 980 (D. Ariz. 2010) (No. CV 10-1413-PHX-SRB) [hereinafter Motion for Preliminary Injunction], *available at* <http://lawprofessors.typepad.com/files/doj-pi-memo-sb-1070.pdf> (emphasis added).

⁶⁷ Obama, *supra* note 6.

isn't being used. From an economic perspective, it is obvious that employers believe that the risk of being caught and punished for hiring illegal immigrants is less than the cost of implementing the guestworker program. Current policies may be strong-arming farmers into breaking the law because the cost of legal labor is too high. This is evidence that the guestworker program has some major problems that need to be addressed.

Arizona, by enacting SB 1070, has attempted to take immigration policy enforcement (a historically federal role) into its own hands to respond to the continued influx of illegal immigrants and employer non-compliance with federal programs like H-2A. SB1070 may have achieved its intended result with little or no enforcement, as immigrants both illegal and legal are on the brink of leaving Arizona. What proponents of the programs may fail to take into account, however, is the effect of such a mass exodus on the farmers in the state who cannot afford to comply with existing federal programs.

Colorado provides an example of how strict, state level immigration enforcement policies can negatively affect agriculture. In 2006, the Colorado legislature passed what some considered to be the strictest immigration laws in the U.S. at the time.⁶⁸ In the months and years following the enactment, Colorado faced a labor shortage as immigrants began to flee the state.⁶⁹ The result of the outflow of workers had such a profound effect on the industry that "crops were left to spoil in the fields after the passage of legislation."⁷⁰ Colorado farmers became so desperate for labor that they considered contracts that would allow prison inmates to work in the fields.⁷¹ Farmers were not happy with this solution but had no other option. Their "livelihoods were on the verge of collapse."⁷²

This is the conundrum the agriculture industry is faced with: farmers depend on illegal immigrants for labor because they will not, and often cannot, comply with federal guestworker programs while States enact legislation that could potentially ruin the industry by cutting off access to this labor supply. States seem to be oblivious to the fact that immigrant labor, both illegal and legal, is vital to the agriculture industry. Arizona, California, and Colorado enacted legislation that seems to imply

⁶⁸ Elizabeth Burger, Colo. Legislative Council Staff, *Immigration in Colorado: State Impact and Recent Legislation*, ISSUE BRIEF NO. 06-04 (May 26, 2006), available at <http://www.colorado.gov/cs/Satellite?blobcol=urldata&blobheader=application%2Fpdf&blobkey=id&blobtable=MungoBlobs&blobwhere=1251619438048&ssbinary=true>; see *Colorado Lawmakers Pass Strict Illegal Immigration Laws*, FOXNEWS.COM (July 11, 2006), <http://www.foxnews.com/story/0,2933,202994,00.html>.

⁶⁹ See Nicholas Riccardi, *Going Behind Bars for Laborers*, L.A. TIMES (Mar. 1, 2007), <http://articles.latimes.com/2007/mar/01/nation/na-inmates1>.

⁷⁰ *Id.*

⁷¹ *Id.*

⁷² *Id.*

that they do not care where immigrants live, as long as it is not in their state. Illegal immigrants are commonly viewed as strains on the state resources of states. Often ignored, however, is the possibility that the very people the legislation was attempting to drive out may actually be the key to economic stability in the agriculture industry.⁷³ What results if current illegal immigrants are driven out of a state and potential immigrants are deterred from entering a state to work?

As the note progresses, the notion of “unfriendly immigration policies” will be referenced. The term refers to policies that incorporate enforcement practices that could lead to racial profiling and harassment. An “unfriendly” policy is a general term to describe a policy which could push immigrants, both legal and illegal, to leave a state. The aftermath of the 2006 Colorado legislation discussed *supra* would be an example of this.

IV. UNFRIENDLY IMMIGRATION POLICIES AND THEIR POTENTIAL EFFECTS ON AGRICULTURE

A. The Framework of the Analysis

A two-part analysis can be used to highlight the importance of immigrant labor in specific regions of the United States. The analysis begins by examining the economic effect of a complete elimination of immigrant labor. The findings of the aforementioned study on U.S. dairy farmers⁷⁴ will be used to approximate the effect of prohibiting the use of immigrant labor on the entire agricultural sector. The analysis will then shift to a state-specific application of the results in order to prove that policies reducing immigrant labor in certain states could have drastic negative effects on the U.S food supply.

B. Dairy Farms and Their Reliance on Immigrant Labor

In June 2009, the abovementioned Texas A&M study revealed that with “increased enforcement of U.S. immigration regulations and lack of Congressional action to resolve immigration issues, the prospects of reduced labor availability have adversely affected many sectors of U.S. agriculture.”⁷⁵ Additionally, the study noted that “immigrant labor has become an increasingly important component of many U.S. agricultural enterprises.”⁷⁶

⁷³ See Collins, *supra* note 7.

⁷⁴ Rosson et al., *supra* note 16

⁷⁵ *Id.*

⁷⁶ *Id.*

The study surveyed approximately 5,000 U.S. dairy farms.⁷⁷ The purpose of the survey was to “determine the extent to which farms were using hired foreign labor, wage and non-wage benefits, worker documentation, employee turnover and its effects on operational efficiency, and the extent to which shortages of foreign labor were impacting dairy farms and farmer’s perceptions of U.S. labor policy options.”⁷⁸

The survey concluded that nearly half of U.S. dairy farms employ immigrant labor and that 62% of the milk produced on farms was produced by immigrant labor.⁷⁹ Additionally, nearly one in five of the farms responded that they had experienced a labor shortage in the two years preceding the survey.⁸⁰ Such shortages are attributable to the difficulty of complying with the H-2A guestworker program as previously discussed.

The study also projects the economic impacts of a reduction in the immigrant labor force on U.S. dairy production. Assuming for purposes of this note that the reduction in foreign labor can be attributed to unfriendly immigration policy such as SB 1070, the study’s findings illustrate the effect that such policies would have on food production and price. The study analyzed the impact of a 50% reduction in immigrant labor and a 100% reduction in immigrant labor. It determined that a 50% reduction in foreign labor would result in about an 8% decrease in milk production.⁸¹ This 8% reduction would cause retail milk prices to increase 30%.⁸² A 100% reduction in foreign labor would have an even more drastic impact on production and price: a 16% decrease in production and 61% increase in price.⁸³

Such a decrease in production would have a devastating impact on the U.S. economy. The study projects that a 50% loss of foreign labor would result in an 11.2 billion dollar loss to/for the dairy industry.⁸⁴ This loss would constitute a nearly 23% reduction in the economic value of the dairy industry. A complete loss of foreign labor would result in a 22.3 billion dollar decrease in the value of the industry, constituting a loss in nearly half of its value.⁸⁵

Removal of the immigrant labor force would not only impact the economic output of farms. The study concluded that a reduction of foreign

⁷⁷ *Id.*

⁷⁸ *Id.* at 3.

⁷⁹ Rosson et al., *supra* note 16, at 5.

⁸⁰ *Id.* at 7.

⁸¹ *Id.* at 8.

⁸² *Id.*

⁸³ *See id.*

⁸⁴ *See id.* at 10 tbl.9.

⁸⁵ *See* Rosson et al., *supra* note 16.

workers and the resulting decline in economic output would actually have the secondary effect of eliminating thousands of jobs that are currently held by *native* workers!⁸⁶ It was estimated that U.S. dairies employed around 57,000 immigrant workers at the time the study was conducted. If half of all these immigrant workers (about 29,000) were eliminated from the workforce, the result would be a loss of 66,331 jobs.⁸⁷ The total native job loss, adjusted for the reduction in immigrant workers, would be over 37,000. This amount would double in the event of a 100% reduction in the immigrant workforce.⁸⁸

The results of the dairy study can be used to analyze the impact of a reduction in immigrant labor on the *entire* U.S. agricultural industry, and ultimately its effect on the price and availability of the food that Americans eat every day.

C. The Dairy Study Applied to Other Sectors of the Agriculture Industry

This section of the analysis will focus specifically on California, the top producer of food in the United States.⁸⁹ To show how unfriendly immigration policies affect the Agriculture sector as a whole, the results of the dairy study will be applied to California's agriculture industry. The analysis will use the ratio of immigrant labor present in the dairy farm study and assume that immigrant labor accounts for roughly the same proportion of the total labor force in all sectors of agriculture production. The purpose of this section is to show that access to food in America is, in some ways, dependant on immigrant labor, and that unfriendly immigration policies could work against the best interests of the American people. Additionally, these results will show that unfriendly, state immigration policies can affect consumers not even residing in the states implementing such policies.

In 2009, California crops accounted for 16% of the total commodity receipts in United States.⁹⁰ California produced the following crops in 2009, each which accounted for over 75% of total U.S. production of each crop: grapes, almonds, lettuce, strawberries, broccoli, lemons, celery, carrots, raspberries, cauliflower, and plums.⁹¹ If California enacted a strict immigration policy like Arizona's SB 1070, it is

⁸⁶ *Id.* at 12.

⁸⁷ *See id.* at 11 tbl.11.

⁸⁸ *Id.*

⁸⁹ *See State Fact Sheet: California*, U.S. DEP'T OF AGRIC., ECON. RESEARCH SERV., <http://www.ers.usda.gov/StateFacts/CA.htm> (last updated Dec. 16, 2010).

⁹⁰ *Leading Commodities by State*, U.S. DEP'T OF AGRIC., ECON. RESEARCH SERV., <http://www.ers.usda.gov/Data/FarmIncome/firkdmuXLS.htm#commod> (last updated Aug. 31, 2010) (select "California" in "Leading Commodities by State" selection box).

⁹¹ *Id.*

reasonable to assume that California's immigrant labor force would decrease substantially, similar to what occurred in Colorado. Also, for the purposes of this analysis, it will be assumed that implementing an unfriendly immigration policy in a state like California will have the same effect on Californian agriculture as a 100% reduction in the dairy industry immigrant workforce. Such an assumption is based on several factors, including California's close proximity to Mexico, similar to Arizona, its high population percentage of foreign-born persons (26%),⁹² and the fact that California relies heavily on immigrant labor.⁹³

By employing the results of the dairy farm study to examine California's agriculture industry, one can see the importance of keeping immigrant workers in the state. If California's food production were to decrease by 16%, the prices of many American foodstuffs would increase drastically. Food staples, including common vegetables such as lettuce, carrots, and broccoli, could potentially become much more expensive than they are today, as a result of dwindling supply. In the worst of situations, farmers wouldn't even be able find new workers to replace those leaving the state, and most of the nation's vegetable crops could be left to rot in the fields, as they were in Colorado.⁹⁴

This analysis of the potential impact of a reduction in immigrant labor shows that, if anything, states should be engaging in an intensive economic balancing test before enacting unfriendly immigration legislation. States must consider that immigrant populations may leave their states if they implement policies that immediately cut off illegal immigrants' abilities to be employed and negatively impact legal immigrants. The state must weigh the negative economic impact of a mass exodus on the agriculture industry against the potential positive impact of freeing up other funds, such as those related to health-care, education, and other social programs.

D. What Does All of This Mean?

The agriculture industry in America is sending the message that it cannot function without illegal immigrants who are willing to work tough jobs for low wages. When farmers attempt to follow immigration legislation by complying with hiring requirements, they are faced with the problem of not being able to find legal workers who are actually willing

⁹² STATE AND COUNTY QUICKFACTS: CALIFORNIA, U.S. CENSUS BUREAU, <http://quickfacts.census.gov/qfd/states/06000.html> (last updated Aug. 16, 2010).

⁹³ Collins, *supra* note 7.

⁹⁴ Riccardi, *supra* note 68.

to work.⁹⁵ This broken immigration system creates a dangerous dilemma for the agriculture industry.

Agricultural employers must engage in a cost-benefit economic analysis when making hiring decisions. They are forced to choose between one of two options: strictly complying with immigration laws, which often results in either excessive costs and difficulties finding workers or sidestepping the law and hiring cheap, hardworking, illegal immigrant labor while facing harsh penalties such as the revocation of the employer's business license.⁹⁶ A commentator at an American Farm Bureau conference noted, "agriculture, more than any other industry, faces a very difficult dilemma. On the one hand, farmers face liability, civil as well as criminal, for employing undocumented workers. On the other hand, there are not sufficient U.S. workers to meet farm needs."⁹⁷ There are valid concerns on both sides. The government has a legitimate interest in securing the border and deciding who can enter the United States, but the farmers also have a valid interest in obtaining the labor they need to keep their enterprises running.

V. THE WAY FORWARD

A. *What Do Farmer's Want?*

The American Farm Bureau has long held the view that immigration policy should be set by the federal government.⁹⁸ The AFB argues that Americans refuse to take the often difficult and low paying jobs that are necessary to the operation of the agriculture industry.⁹⁹ Farmers require labor to harvest their crops and maintain their livelihood. No one is arguing that America's borders should be open to everyone who wishes to enter. The industry simply wants the federal government to implement a guestworker program which will allow farmers to satisfy their labor needs without running the risk of criminal penalties and burdensome costs.¹⁰⁰

⁹⁵ Nancy Lofholm, *Colorado Orchards Try to Hire Locally but Workers Aren't Interested*, DENVER POST (Apr. 19, 2010), http://www.denverpost.com/ci_14911550.

⁹⁶ S.B. 1070 §6(F)(1)(c), 49th Leg., 2d Reg. Sess. (Ariz. 2010).

⁹⁷ *Farm Bureau Calls for Immigration Reform*, THE VOICE OF AGRIC. (Jan. 14, 2008), <http://www.fb.org/index.php?fuseaction=newsroom.newsfocus&year=2008&file=nr0114d.html>.

⁹⁸ Ray Henry, *Farm Lobbying Group Cautions States on Immigration*, CNSNEWS.COM (Jan. 11, 2011), <http://www.cnsnews.com/news/article/farm-lobbying-group-cautions-states-immi>.

⁹⁹ *Id.*

¹⁰⁰ *Farm Bureau Calls for Immigration Reform*, THE VOICE OF AGRIC. (Jan. 14, 2008), <http://www.fb.org/index.php?fuseaction=newsroom.newsfocus&year=2008&file=nr0114d.html>.

B. A Proposal

A system is needed which will secure our nation's borders and provide cheap and willing farm labor. State legislatures and Congress are all aware of this need, as shown by recent proposals relating to immigration reform.¹⁰¹ Senate Democrats have labeled their proposal REPAIR, the "Real Enforcement with Practical Answers for Immigration Reform" proposal.¹⁰² The proposal sets forth a compromise to satisfy those who want strict border control as well as those who rely on illegal immigrant labor. The reform would provide a "legal pathway" "for the estimated 10.8 million people who are already in the country illegally."¹⁰³ The proposed reform provides that "[i]llegal immigrants currently in the United States would be eligible for legal status in eight years, as long as they learned English, had not committed a crime and paid their taxes."¹⁰⁴

Such a plan is exactly what the agriculture industry in America needs in order to survive. By creating a path to citizenship to those already in the country, farms would be able to hire laborers from the pool of illegal immigrants without the fear of repercussions. Additionally, the industry would no longer be forced to deal with the costly H-2A guestworker program.

C. Leave it up to the Feds

States, interest groups, politicians, and citizens all have proposed various solutions to fix this broken system. If anything has become clear in the last several decades, it is that creation of immigration policies should be left up to the federal government. The federal government is the only governing body with the interest and ability to create a program, which will work for the country as a whole. State specific programs, such as Arizona SB 1070, will only result in causing problems such as inflated food prices or dwindling labor supplies caused by immigrants fleeing states in which unfriendly immigration policies have been implemented. The federal government can create a program that takes into account the interest of *all* the states. Uniformity of policy is important, especially if the federal government attempts to enforce immigration legislation.

The ability of states and local governments to create and enforce immigration laws has already been challenged in courts across the country. In July 2010, the U.S. District Court of Arizona issued an

¹⁰¹ Perry Bacon, Jr., *Democrats Unveil Immigration-Reform Proposal*, WASH. POST (Apr. 29, 2010), <http://www.washingtonpost.com/wp-dyn/content/article/2010/04/29/AR2010042904512.html>.

¹⁰² *Id.*

¹⁰³ *Id.*

¹⁰⁴ *Id.*

injunction against SB 1070 that temporarily prevented Arizona from implementing several portions of its immigration act due to preemption.¹⁰⁵ The Third Circuit also recently held that a local government could not enforce immigration laws based on similar grounds.¹⁰⁶ There seems to be a growing body of decisions which confine the regulation of immigration to the federal government and bar state attempts to enforce immigration policies. For the sake of the agriculture industry, this issue of “who can enforce” needs to be cleared up soon so that lawmakers can focus on what can actually be done.

VI. CONCLUSION

Without immigrant labor, the agriculture industry in America will struggle to survive. Currently, federal programs such as the H-2A guestworker program are not meeting the needs of farmers who are attempting to find workers through legal channels. States like Arizona, taking matters into their own hands, may be doing more harm than good. State-specific immigration policies are not the solution for our broken immigration system. Such policies are inherently self-interested and do not take into account the effects that strict, local-level immigration policies have on the nation as a whole.

The potential effects of removing immigrant labor from the industry would be devastating. Billions of dollars of production would be lost, along with thousands of jobs. Food prices around the country would inflate, potentially making it difficult for many Americans to put food on their tables.

A program needs to be implemented that serves the needs of the nation as a whole, not just the interests of specific states or political parties. The stark reality is that native-born Americans cannot satisfy the labor needs of farmers across the nation. The federal government, in implementing policies, needs to take the interests of the American agricultural industry into account by creating a simple, streamlined, and affordable guestworker program.

The best solution to the broken immigration system will include provisions that distinguish between immigrants who are in the country providing labor needs in industries where their labor is essential and those who come to the country simply to free ride off of available resources and social programs. The reality is that illegal immigrants are an integral part of our economy. This reality cannot be ignored. Mass deportations run the risk of shocking the labor inputs of industries in a way that could be

¹⁰⁵ U.S. v. Arizona, 703 F. Supp. 2d 980, 1008 (D. Ariz. 2010).

¹⁰⁶ Lozano v. City of Hazleton, 620 F.3d 170 (3d Cir. 2010), *vacated*, 131 S.Ct. 2958 (2011).

devastating to the nation as a whole. For the sake of every American, lawmakers should put their differences aside and fix this problem that runs the risk of seriously harming agriculture in the United States.