

WHAT YOU SEE IS WHAT YOU GUEST: WHETHER HOUSE BILL 6417 IS UNCONSTITUTIONAL

I. INTRODUCTION

Farmers, as citizens of the United States, enjoy their fundamental right to pursue a common calling, which is protected by the United States Constitution, Article IV, the Privileges and Immunities Clause.¹ A federal program originally established by the Illegal Immigration Reform and Immigrant Responsibility Act of 1996, E-Verify allows employers to verify prospective employees' work authorization status.² Although E-Verify presently exists as a voluntary program, certain states have mandated its use, in order to prevent fraudulent employment practices.³ House Bill 6417 - the Agriculture Guestworker and Legal Workforce Act – would establish a guest worker program and mandate nationwide that all employers use E-verify.⁴

For farmers, the passage of House Bill 6417 threatens to cause a labor shortage.⁵ Beginning at Part II, this Comment accounts the historic relationship of immigration law and California agriculture, as well as the

¹ U.S. CONST. art IV, §2, cl. 1.

² Department of Homeland Security & USCIS, *available at* <https://www.e-verify.gov> (last visited Jan. 5, 2019).

³ Rachel Feller, *Preempting State E-Verify Regulations: A Case-Study of Arizona's Improper Legislation in the Field of "Immigration Related Employment Practices"* 84 WASH. L. REV. 289, 297-298 (2009).

⁴ H.R. 6417, 115th Cong., 2d Sess. (2018). (Introduced; also known as "the Goodlatte Bill.")

⁵ Raymond A. Mohl, *The Politics of Expulsion: A Short History of Alabama's Anti-Immigration Law, HB 56*. 35 JOURNAL OF AM. ETHNIC HISTORY, n.3, 2016, 42-51. (To illustrate, consider Alabama's 2011 law, SB 56, the Beason-Hammon Alabama Taxpayer and Citizen Protection Act. SB 56 requires employers throughout the state to use E-Verify. More controversially, SB 56 requires state and local law enforcement officers to inspect immigration documents when under reasonable suspicion that persons at traffic stops are undocumented persons. SB 56 resulted in abandonment of the harvest after undocumented workers abandoned their employment. Ensuing crop losses estimated in the billions of dollars, impacting twenty percent of the state's domestic product. The constitutionality of SB 56 was affirmed by the United States Supreme Court in *Chamber of Commerce of U.S. v. Whiting*, 563 U.S. 582, 586 (2011).)

introduction of House Bill 6417, July 11, 2018.⁶ Part III outlines a legal standard regarding the fundamental right to pursue a common calling and whether the right of common calling may be protected against disparate treatment effected by the federal government.⁷ Part IV discusses whether farming is cognizable as a common calling, and remarks House Bill 6417's likely effects, causing labor shortage and unfair competition.⁸ Lastly, Part V suggests a better policy to make an authorized workforce, to grant amnesty to undocumented persons and subsidize U.S. worker employment.⁹ To conclude, Part VI puts forward considerable doubt whether House Bill 6417 can achieve fulfillment of any rational purpose in light of its likely effects on labor and the resulting shortage.¹⁰

II. FACTUAL BACKGROUND

In the late 1800s, California agriculture began, as an organized commercial effort, and immigrant laborers were instrumental to the building of the infrastructure necessary for the burgeoning industry, especially the irrigation of the San Joaquin and Imperial Valleys.¹¹ At the turn of the twentieth century, Congress enacted the first immigration laws, including the Chinese Exclusion Act of 1882 and the Gentleman's Agreement of 1907.¹² To many immigrants and undocumented persons, the National Origins Act of 1924 - and the establishment of the United States Border Patrol, three months after -

⁶ KELLY LYTLE HERNANDEZ, *MIGRA!: A HISTORY OF THE U.S. BORDER PATROL* 22 (2010); JOSEPH NEVINS, *OPERATION GATEKEEPER: THE RISE OF THE "ILLEGAL ALIEN" AND THE MAKING OF THE U.S.-MEXICO BOUNDARY* 96-101 (2002); H.R. 6417.

⁷ See *generally* *Toomer v. Witsell*, 334 U.S. 385 (1948) (establishing the right of common calling is a fundamental right); *Baldwin v. Fish and Game Commission of Montana*, 436 U.S. 371 (1978) (qualifying the right to common calling must relate to basic national livelihood); *Bolling v. Sharpe*, 347 U.S. 497, 499 (1954) (finding equal protection components in the Fifth Amendment's Due Process Clause to protect fundamental right of public school children against racial segregation in federal public schools).

⁸ See *Baldwin*, 436 U.S. 371; See also *Toomer*, 334 U.S. 385; H.R. 6417.

⁹ Bryn Siegel, *The Political Discourse of Amnesty in Immigration Policy*, 41 AKRON L. REV. 291, 298-300 (2008).

¹⁰ H.R. 6417; Camille J. Bosworth, *Guestworker Policy: A Critical Analysis of President Bush's Proposed Reform*, 56 HASTINGS L.J. 1095 (2005).

¹¹ HERNANDEZ, *supra* note 6, at 22.

¹² See *id.* at 25-26; NEVINS, *supra* note 6, at 96-101;

marked the dawning of a draconian age.¹³ In the 1930s, law enforcement activities caused the removal of a half-million undocumented persons.¹⁴

For California's farmers, the result was labor shortages, which in 1942 led to the enactment of the *bracero* program, from the Spanish term *brazo* for "arm," a wartime agreement between the United States and Mexican government.¹⁵ The *bracero* program sought to provide farmers with temporary guest workers, employed on a contractual basis, with provisions including housing and prevailing wages.¹⁶ Due to poor working conditions, however, many *bracero* workers abandoned their contracts to seek better employment conditions at their own risk, effecting an upsurge in illegal immigration.¹⁷ Congress ended the *bracero* program in 1964, in part due to rising illegal immigration, but also due to poor labor conditions for farm laborers.¹⁸ In 1967, Congress amended the Fair Labor Standards Act of 1950 to extend statutory protections to farm laborers, with provisions to protect employment conditions and establish minimum wages.¹⁹

Despite Congress enacting the Immigration Reform Act of 1965, employment of undocumented persons in farm labor persisted through the 1970s.²⁰ In 1977, President Jimmy Carter proposed a solution to lawmakers in two parts: an amnesty program for undocumented persons, and employer sanctions to curtail undocumented employment.²¹ President Jimmy Carter's idea became law a decade later, when Congress enacted the Immigration Reform and Control Act of 1986 ("IRCA").²² IRCA requires farmers and all employers to file I-9 documentation about the work authorization status of

¹³ HERNANDEZ, *supra* note 6, at 70-72; Nicholas P. De Genova, *Migrant "Illegality" and Deportability in Everyday Life*, 31 ANNU. REV. ANTHROPOL. 419, 433 (2002).

¹⁴ De Genova, *supra* note 13, at 433.

¹⁵ ERNESTO GALARZA, *MERCHANTS OF LABOR: THE MEXICAN BRACERO STORY, AN ACCOUNT OF THE MANAGED MIGRATION OF MEXICAN FARM WORKERS IN CALIFORNIA, 1942-1960* 12-16 (1964).

¹⁶ *Id.*; HERNANDEZ, *supra* note 6, at 110-111.

¹⁷ HERNANDEZ, *supra* note 6, at 110-111; Andrew J. Hazelton, *Farmworker Advocacy Through Guestworker Policy: Secretary of Labor James P. Mitchell and the Bracero Program*, 29 J. POL. HIST., no. 3, 2017, at 452.

¹⁸ REX L. COTTLE ET AL., *LABOR AND PROPERTY RIGHTS IN CALIFORNIA AGRICULTURE: AN ECONOMIC ANALYSIS OF THE CALRA 15* (1982).

¹⁹ *Id.*

²⁰ HERNANDEZ, *supra* note 6, at 214-215.

²¹ *See id.* at 214-215, 225; LEO R. CHAVEZ, *COVERING IMMIGRATION: POPULAR IMAGES AND POLITICS OF THE NATION* 95 (2001); *see also* Siegel, *supra* note 9, at 291, 298-300.

²² Siegel, *supra* note 9, at 291, 298-300.

their employees.²³ Also, IRCA made amnesty available to the one million undocumented persons present in the United States on the date of its introduction in 1986.²⁴ If a comparable program were enacted today, nearly eleven million undocumented persons would be eligible to apply for legal permanent residence.²⁵

In addition, IRCA amended the McCarran Walter Act of 1952 to codify the current H-2A program to allow farmers to hire foreign workers.²⁶ Fraudulent documentation, however, pervaded throughout the late 1980s and into the 1990s; accordingly, Congress enacted the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (“IIRIRA”).²⁷ IIRIRA imposed sanctions on undocumented persons to thwart their illegal entry or re-entry, subsequent to removal.²⁸ IIRIRA also created the Basic Pilot Program, now known as E-Verify, but also known as “EEV,” the employment eligibility verification program.²⁹

House Bill 6417 has two titles.³⁰ Title I, The Agriculture Guestworker Act, would create the H-2C visa, which is analogous to the present H-2A visa, and would require farmers to petition the Secretary of Homeland Security prior to hiring any H-2C workers.³¹ Title II, The Legal Workforce Act, would mandate all employers use E-Verify, impose a schedule of fines, and authorize state or local law enforcement to conduct investigations and audits, as well as to collect the fines resulting from prosecution.³²

²³ HOWARD R. ROSENBERG & DANIEL L. EGAN, LABOR MANAGEMENT LAWS IN CALIFORNIA AGRICULTURE 34 (1990).

²⁴ See Siegel, *supra* note 9, at 291, 298-300. (Amnesty is a reprieve from deportability. The government forgives an undocumented person’s unlawful presence, allowing the person to apply for documented status. With amnesty, the path to citizenship does not require an undocumented person to remove from the United States as a condition of eligibility.)

²⁵ Jeffery S. Passel & D’Vera Cohn, *Hispanic Trends: U.S. Undocumented Immigrant Total Dips to Lowest Level in a Decade*, PEW RESEARCH CENTER, Nov. 27, 2018, <http://www.pewhispanic.org>.

²⁶ Alice J. Baker, *Agriculture Guestworker Programs in the United States* 10 TEX. HISP. J.L. & POL’Y 79, 85-89 (2004).

²⁷ Siegel, *supra* note 9, at 291, 298-300.

²⁸ *Id.*

²⁹ Jim Harper, *Internal Enforcement: E-Verify, and the Road to a National ID* 32 CATO J., no. 1, Winter 2012, at 127.

³⁰ H.R. 6417, 115th Cong., 2d Sess., §202(a) (2018). (“(To amend) Section 274A(b) of the Immigration and Nationality Act (8 U.S.C. 1324a(b) to read as follows: (§§(...)(b)(2)(A), (B).)”)

³¹ H.R. 6417, §202(a).

³² *Id.*

III. LEGAL STANDARD

A. Constitutional Framework

1. The Privileges and Immunities Clause

The Privileges and Immunities Clause of the United States Constitution provides that “the Citizens of each State shall be entitled to all Privileges and Immunities of Citizens in the Several States.”³³ Distinct from fundamental rights acknowledged elsewhere in the Constitution, the privileges and immunities of Article IV, Section 2, are a certain class of fundamental rights, distinguished because they are essential to the Nation as a republic, and as a union, rather than a league of independent, sovereign states.³⁴ The fundamental rights that are protected by Privileges and Immunities Clause are “(the right) to pursue a common calling, the ability to transfer property, and access to the courts.”³⁵ The Privileges and Immunities Clause forbids classifications and disparate treatment along lines of residence or non-residence, when that treatment impacts a citizen in the exercise of any one of those fundamental rights.³⁶ Presently, this Comment concerns the right to pursue a common calling.³⁷

2. Federal Activity Effecting Disparate Treatment

³³ U.S. CONST., art IV, §2, cl. 1.

³⁴ *Toomer v. Witsell*, 334 U.S. 381, 395-96 (citing *Paul v. Virginia*, 1868 8 Wall. 168 (1868)) (“The primary purpose of this clause, like the clauses between which it is located—those relating to full faith and credit and to interstate extradition of fugitives from justice—was to help fuse into one Nation a collection of independent, sovereign States.”); U.S. CONST., art. IV, §2, cl. 1.

³⁵ *Baldwin v. Fish and Game Commission of Montana*, 436 U.S. 371, 383 (1978) (citing *Ward v. Maryland*, 12 Wal. 1418 (1878); *Canadian Norther R. Co. v. Eggen*, 252 U.S. 553 (1920); *Blake v. McClung*, 172 U.S. 236 (1898)).

³⁶ *Id.* (“Some distinctions between residents and nonresidents merely reflect the fact that this is a Nation composed of individual States, and are permitted; other distinctions are prohibited because they hinder the formation, the purpose, or the development of a single Union of those States.”).

³⁷ U.S. CONST. art IV, §2, cl.1; *see also Toomer*, 334 U.S. at 389; *see also Baldwin*, 436 U.S. at 383, 388.

Consider the Fourteenth Amendment's Citizenship Clause, which reads, "All persons born or naturalized in the United States, are subject to the jurisdiction thereof, are citizens of the United States and the State wherein they reside."³⁸ Holding that the "'right to travel' ... embraces at least three different components," the United States Supreme Court in *Saenz v. Roe*, 526 U.S. 489 (1999), at 500, considered the Citizenship Clause as a source of protection for United States citizens in their right to be treated as a citizen of the state to which they choose to travel and reside in, by virtue of their "two political capacities, one *state* and one *federal*."³⁹

The protection for the right to travel, by analogy, may be available to protect the right of common calling, where the federal government effects disparate treatment on citizens, with or without regard to their political capacity as citizens of a state, and when disparate treatment classifications develop by impact on different groups of farmers.⁴⁰ The next Section will discuss the right of common calling, as decided by the United States Supreme Court in *Toomer v. Witsell*, 334 U.S. 385 (1948), and *Baldwin v. Fish and Game Commission of Montana*, 436 U.S. 371 (1978), where states effect disparate treatment of residents and nonresidents.⁴¹

3. Common Calling and Disparate Treatment

³⁸ U.S. CONST. amend. XIV, §1.

³⁹ See generally *Saenz v. Roe*, 526 U.S. 489, 500 (1999) (emphasis added), (the Court held unconstitutional California Health and Welfare Code section 11450.03, a statute restricting availability of California welfare benefits to newly-arrived citizens, in violation of their right to travel. "The 'right to travel' ... protects the right of a citizen of one State to enter and to leave another State, the right to be treated as a welcome visitor rather than an unfriendly (person) when temporarily present in the second State, and, for those travelers who elect to become permanent residents, the right to be treated like other citizens of that State.").

⁴⁰ See generally *Bolling v. Sharpe*, 347 U.S. 497, 499 (1954). ("In view of our decision that the Constitution prohibits the states from maintaining racially segregated public schools, it would be unthinkable that the same Constitution would impose a lesser duty on the Federal Government." The United States Supreme Court held that the Equal Protection Clause of the Fourteenth Amendment contains protective components relating to the Due Process Clause of the Fifth Amendment, protecting District of Columbia public school children from racial discrimination effected by segregation in federal public schools.)

⁴¹ *Toomer*, 334 U.S. at 389; see also *Baldwin*, 436 U.S. at 383, 388.

A general standard may be synthesized of the rules in *Toomer* and *Baldwin* to determine whether a state regulation violates the right to pursue of common calling.⁴² The Privileges and Immunities Clause forbids a state to effect disparate treatment of resident and nonresident citizens of that state acting in the exercise of the right to pursue a common calling, unless the common calling in particular is not “sufficiently basic to the livelihood of the Nation,” and unless the disparate treatment bears a close relation to valid, independent reasons, such as disparate treatment justified by different tax regimes.⁴³

In *Toomer v. Witsell*, 334 U.S. 385 (1948), the United States Supreme Court invalidated South Carolina statutes and regulations effecting disparate treatment of resident and nonresident commercial shrimpers.⁴⁴ Except as to provisions requiring the nonresident commercial shrimpers to pay South Carolina income taxes in the South Carolina waters, the nonresident commercial shrimpers suffered disparate treatment because fees for nonresident commercial shrimping licenses were one hundred times the rate of fees for resident commercial shrimping licenses.⁴⁵ Recognizing that “like many other constitutional provisions, the privileges and immunities clause is not an absolute,” the Court’s standard of review to determine whether a state effecting disparate treatment of residents and nonresidents in the pursuit of a common calling requires a determination of whether “valid independent reasons ... do exist and whether the degree of discrimination bears a close relation to them.”⁴⁶

⁴² *Toomer*, 334 U.S. at 389; *see also Baldwin*, 436 U.S. at 383, 388.

⁴³ *Toomer*, 334 U.S. at 396; *see also Baldwin*, 436 U.S. at 383, 388.

⁴⁴ *See generally Toomer*, 334 U.S. at 389. (The nonresident commercial shrimpers did not challenge South Carolina’s preservation provisions, forbidding “trawling for shrimp in the State’s inland waters, which are the habitat of the young shrimp for the first few months of their life.”)

⁴⁵ *See generally id.* (The state statute imposed a fee of \$25 per shrimp boat owned by resident commercial shrimpers, or \$2500 per shrimp boat owned by nonresident commercial shrimpers. The Court awarded injunctive remedies, also barring regulations requiring nonresident commercial shrimpers to “dock, unload, pack and stamp their catch at a South Carolina port,” thus allowing the state to impose on the commercial shrimpers and assess the statutory fees, with consequent fines and possible imprisonment for infraction.)

⁴⁶ *Id.* at 396 (citing *Ward v. Maryland*, 1870, 12 Wall. 418 (1870); other citations omitted. “(The privileges and Immunities clause) does bar discrimination against citizens of other States where there is no substantial reason for the discrimination beyond the mere fact that they are citizens of other States. But it does not preclude disparity of treatment in the many situations where there are perfectly valid independent reasons for it.”)

In *Baldwin v. Fish and Game Commission of Montana*, 436 U.S. 371 (1978), the Supreme Court of the United States applied the standard from *Toomer* and held that elk hunting was not related to any protected common calling.⁴⁷ Noting that the cost of elk population maintenance is exacted from Montana residents by state taxes, the Court found disparate treatment of nonresidents about license fees to hunt elk were within Montana's regulatory powers to effect.⁴⁸ The Court reasoned that a only a livelihood "bearing upon the vitality of the Nation as a single entity" would qualify as a protected common calling.⁴⁹ Elk hunting, in particular, does not so qualify because elk hunting is a leisurely pursuit that is costly in itself, and elk hunting is not an activity undertaken to pursue a livelihood.⁵⁰ As the Court also noted, the license fee scheme in Montana did not totally exclude nonresident elk hunters from their pursuit of the leisurely activity.⁵¹

B. H.R. 6417 Provisions Summarized

The following Sections summarize the provisions of House Bill 6417, creating the H-2C visa and mandating farmers and all employers use E-

⁴⁷ *Toomer*, 334 U.S. at 389; see also *Baldwin*, 436 U.S. at 383, 388.

⁴⁸ See generally *Baldwin*, 436 U.S. at 383, 388. (The state regulation effected disparate treatment of residents and nonresidents where a license to hunt solely elk would be available to Montana residents at reduced rate, but nonresidents had no such option and were required to purchase a combination license, at twenty-five times over the resident rate. To hunt solely elk, Montana residents paid a license fee of \$9, but retained an option to obtain a combination hunting license for \$30. A combination license would entitle a license holder "to take to take one elk, one deer, one black bear, and game birds, and to fish with hook. (citation omitted).") Nonresidents could purchase, at a fee of \$225, a combination license, but not a license to hunt solely elk.)

⁴⁹ *Id.*

⁵⁰ *Id.* ("We do not decide the full range of activities that are sufficiently basic to the livelihood of the Nation that the States may not interfere with a nonresident's participation therein without similarly interfering with a resident's participation. Whatever rights or activities may be "fundamental" under the Privileges and Immunities Clause, we are persuaded, and hold, that elk hunting by nonresidents in Montana is not one of them.")

⁵¹ *Id.*

Verify.⁵² Subsequently, Part IV will discuss the extent to which these provisions are likely to cause labor shortage.⁵³

I. Hiring Eligible H-2C Workers

i. Contract basis

A farmer may employ H-2C workers either on a contract basis, or on an at-will basis.⁵⁴ If H-2C workers are sought on a contract basis, a farmer must petition the Secretary of Homeland Security for a grant of H-2C workers, stating the expected number of H-2C workers sought and attesting whether the offer of employment is on a contract basis or for temporary labor or services; have available benefits, wages and working conditions; the non-displacement of U.S. workers; and made sufficient efforts to recruit U.S. workers.⁵⁵ In order to satisfy requirements of making sufficient recruitment efforts, the farmer may place a solicitation at the State workforce department, which must remain posted for a duration of thirty days.⁵⁶

ii. At-will basis

Farmers who wish to hire H-2C workers on a basis of at-will employment must first petition for status as registered agriculture employers.⁵⁷ Similarly as above, the petitioning farmer must attest that no U.S. workers were displaced or fired to hire H-2C workers, and that sufficient recruitment efforts were made, shown by posting a solicitation for a duration of thirty days.⁵⁸ Additionally, petitioning farmers must attest that they would employ laborers at-will; have not been subject to disbarment in past three years or disqualification in the past five years; have available benefits, wages and conditions of employment; and agree to notify the Secretary of Homeland Security within seventy-two hours of commencement or cessation of

⁵² H.R. 6417, 115th Cong., 2d Sess. (2018).

⁵³ Ed Pilkington, *Alabama Immigration: Crops Rot as Workers Vanish to Avoid Crackdown*, THE GUARDIAN, Dec. 14, 2011, <https://www.theguardian.com/world/2011/oct/14/alabama-immigration-law-workers>.

⁵⁴ H.R. 6417, §§103(a), (b).

⁵⁵ H.R. 6417, §103(a).

⁵⁶ *Id.* (“(to amend) Chapter 2 of title II of Immigration and Nationality Act (8 U.S.C. §1181 et seq.) ... by inserting after Section 218A: (§218A(b)(5)(B)).”)

⁵⁷ H.R. 6417, §103(b).

⁵⁸ *Id.*

employment.⁵⁹ Upon the Secretary's grant of registered agricultural employer status, the farmer may then employ at-will H-2C workers, who have been properly admitted to the United States under an H-2C contract, but only if those workers have fulfilled their obligations to the contract which was the basis for their admission.⁶⁰

iii. Abandonment

If an H-2C worker abandons the employment obligation, an employer within seventy-two hours may notify the Secretary of Homeland Security and designate an undocumented laborer as a candidate for H-2C eligibility, only if, however, that candidate "(A) was unlawfully present in the U.S. on July 11, 2018; and (B) performed agriculture labor for at least 5.75 hours during each of at least 180 days out of the two-year period ending on July 11, 2018."⁶¹ Provided that the eligible candidate depart the United States and remain in his or her home country for the required period, as well as be subject to a background check and in person interview, the Secretary of Homeland Security may waive the grounds of inadmissibility and other grounds of deportability connected to that person's illegal presence or entry.⁶²

2. Numerical Cap on H-2C Visas

⁵⁹ *Id.* ("(to amend) Chapter 2 of title II of Immigration and Nationality Act (8 U.S.C. §1181 et seq.) ... by inserting after Section 218B: (§218B(c)).")

⁶⁰ *Id.* ("(to amend) Chapter 2 of title II of Immigration and Nationality Act (8 U.S.C. §1181 et seq.) ... by inserting after Section 218B: (§218B(a)).")

⁶¹ H.R. 6417, §103(a). ("(to amend) Chapter 2 of title II of Immigration and Nationality Act (8 U.S.C. §1181 et seq.) ... by inserting after Section 218A: (§§218A(o), (p)(2)).")

⁶² *See generally Id.* ("(to amend) Chapter 2 of title II of Immigration and Nationality Act (8 U.S.C. §1181 et seq.) ... by inserting after Section 218A: (§218A(p)(1))." (H-2C workers who have abandoned their contracts are not eligible and grounds of removal will attach to those workers, unless the H-2C workers first return to their home countries, stay there for a period of time equal to the lesser of sixty days or one twelfth of the total duration that the H-2C worker stayed in the United States, be subject to a background check and in-person interview, and satisfy all other eligibility requirements.))

House Bill 6417's first title, "the Agricultural Guestworker Act," imposes numerical caps on the number of H-2C visas created under the program.⁶³ The base allocation begins at 410,000 visas, and at the end of every fiscal year in which the base allocation was exhausted or not exhausted, may be increased by ten percent, or decreased by five percent.⁶⁴ In the first two years following the enactment of House Bill 6417, the Secretary of Homeland Defense may additionally increase the base allocation by any amount; and after the first two years, the base allocation may be additionally increased by up to ten percent.⁶⁵ The base allocation may not be decreased below a total 410,000 visas.⁶⁶

3. H-2C Worker Eligibility Requirements

Whether on at-will or contract employment basis, ten percent of the H-2C worker's wages are attached and deposited to a fund, dispersible upon departure.⁶⁷ Because House Bill 6417 authorizes a temporary period of stay, H-2C workers may stay in the United States only thirty-six months, but may extend the period of stay, after removal to and a period of remaining in the home country.⁶⁸ Failure of H-2C workers to remove to the home country and remain for required periods will attach grounds of removal and grounds of inadmissibility, as well as ineligibility for the H-2C program.⁶⁹ Also, House Bill 6417 amends section 101(a)(15)(H) of the Immigration and

⁶³ H.R. 6417, §103(b). ("(to amend) Chapter 2 of title II of Immigration and Nationality Act (8 U.S.C. §1181 et seq.) ... by inserting after Section 218B: (§218B(d)).")

⁶⁴ *Id.* ("(to amend) Chapter 2 of title II of Immigration and Nationality Act (8 U.S.C. §1181 et seq.) ... by inserting after Section 218B: (§218B(d)(iii)).")

⁶⁵ *Id.* ("(to amend) Chapter 2 of title II of Immigration and Nationality Act (8 U.S.C. §1181 et seq.) ... by inserting after Section 218B: (§218B(d)(vi)).")

⁶⁶ *Id.* ("(to amend) Chapter 2 of title II of Immigration and Nationality Act (8 U.S.C. §1181 et seq.) ... by inserting after Section 218B: (§218B(d)(iv)).")

⁶⁷ H.R. 6417, §103(a). ("(to amend) Chapter 2 of title II of Immigration and Nationality Act (8 U.S.C. §1181 et seq.) ... by inserting after Section 218A: (§218A(q)).")

⁶⁸ *Id.* ("(to amend) Chapter 2 of title II of Immigration and Nationality Act (8 U.S.C. §1181 et seq.) ... by inserting after Section 218B: (§218A(m)).")

⁶⁹ *Id.* ("(to amend) Chapter 2 of title II of Immigration and Nationality Act (8 U.S.C. §1181 et seq.) ... by inserting after Section 218A: (S218A(n)(2)).")

Naturalization Act of 1996, in order to specify that “no spouse or children of the nonimmigrant may be admitted.”⁷⁰

4. Penalties

Any material misrepresentations by the employer may result in civil monetary penalties, or disqualification from eligibility to receive H-2C workers.⁷¹ Penalties are graduated to fit the degree of culpability; a willful violation of the requirement to not displace or fire U.S. workers in any thirty-day period prior to the petition or falsely attesting to the fulfillment of that requirement carries a penalty of \$15,000 per violation.⁷² Falsely attesting to make efforts to recruit U.S. workers carries a penalty of \$5,000 per violation.⁷³ An error of material fact related to other attestations, such as available benefits, wages and working conditions, may result in a penalty of \$1,000 per violation.⁷⁴ Also, disqualification periods, beginning with up to one year, may result from petition violations, with disqualification periods increasing for every subsequent violation; whether two years, five years or permanent disqualification.⁷⁵

5. Mandatory Use of E-Verify

House Bill 6417’s second title, the “Legal Workforce Act,” mandates that employers make an inquiry, using E-Verify to verify employees’ employment authorization.⁷⁶ During the verification period, an employer obtains and examines an individual’s identification documents, uses E-Verify to make an inquiry, and receives from E-Verify an initial response, whether confirmation, non-confirmation, or tentative non-confirmation of the

⁷⁰ H.R. 6417, §103(b). (“(to amend) Chapter 2 of title II of Immigration and Nationality Act (8 U.S.C. §1181 et seq.) ... by inserting after Section 218B: (§218B(c)).”)

⁷¹ H.R. 6417, §103(a). (“(to amend) Chapter 2 of title II of Immigration and Nationality Act (8 U.S.C. §1181 et seq.) ... by inserting after Section 218A: (§218A(h)).”)

⁷² *Id.* (“(to amend) Chapter 2 of title II of Immigration and Nationality Act (8 U.S.C. §1181 et seq.) ... by inserting after Section 218A: (§218A(h)(3)(A)).”)

⁷³ *Id.*

⁷⁴ *Id.* (“(to amend) Chapter 2 of title II of Immigration and Nationality Act (8 U.S.C. §1181 et seq.) ... by inserting after Section 218A: (§§218A(h)(2), (3)).”)

⁷⁵ *Id.*

⁷⁶ H.R. 6417, §202(a). (“(to amend) Section 274A(b) of Immigration and Nationality Act (8 U.S.C. §1324a(b)) to read as follows: (§274A(b)(1)(C)(i)(II)).”)

individual's employment authorization.⁷⁷ An initial response of confirmation shows the worker is authorized; non-confirmation shows the worker is not authorized, and must be terminated, unless the farmer admits to unlawful continued employment.⁷⁸ If the initial response shows tentative non-confirmation, a secondary confirmation process begins, and allows ten days or more for the individual worker to show authorization.⁷⁹

The Secretary of Homeland Security may require employers to use the E-Verify photo matching tool, which may possibly include facial recognition technology.⁸⁰ During an audit or investigation, an employer using facial recognition technology would satisfy evidentiary requirements to show "good faith use of the system."⁸¹

State and local law enforcement agencies may enforce the Federal regulation and conduct audits and investigations, at their own cost.⁸² An employer may not be subject to both a State and Federal audit and investigation for the same violation, but H.R. 6417 invests a right of first refusal in "whichever entity, Federal agency or State, is first to initiate the enforcement action."⁸³ State agencies interested in enforcing the Federal regulation may collect any fines assessed, or use their right of first refusal and defer to federal agencies interested in the same.⁸⁴

IV. ANALYSIS

A. Whether Farming Qualifies as a Common Calling

To qualify as a common calling, farming as a livelihood must be sufficiently "basic to the livelihood of the Nation."⁸⁵ Commercial shrimping

⁷⁷ *Id.* ("(to amend) Section 274A(b) of Immigration and Nationality Act (8 U.S.C. §1324a(b)) to read as follows: (§§274A(b)(1)(C)(ii)).")

⁷⁸ *Id.*

⁷⁹ *Id.* ("(to amend) Section 274A(b) of Immigration and Nationality Act (8 U.S.C. §1324a(b)) to read as follows: (§274A(b)(1)(C)(ii)(II)).")

⁸⁰ H.R. 6417, §212.

⁸¹ H.R. 6417, §205. ("(to amend) Section 274A(a)(3) of Immigration and Nationality Act (8 U.S.C. §1324a(a)(3)) to read as follows: (§274A(a)(3)(B)).")

⁸² H.R. 6417, §206. ("(to amend) Section 274A(h)(2) of Immigration and Nationality Act (8 U.S.C. §1324a(h)(2)) to read as follows: (§274A(h)(2)(B)(ii)).")

⁸³ *Id.*

⁸⁴ *Id.*

⁸⁵ *Baldwin v. Fish and Game Commission of Montana*, 436 U.S. 371, 383, 388 (1978). ("Only with respect to those 'privileges' and 'immunities' bearing upon the vitality of the Nation as a single entity must the State treat all citizens, resident and

is such a livelihood, but elk hunting is merely recreation.⁸⁶ Farming is similar to commercial shrimping, except that farming entails planting seed and harvesting crops, as opposed to using a boat and trawling for shrimp.⁸⁷ Farming is not similar to elk hunting, nor to recreational activities in general, because farming is conducive to supporting a person's livelihood.⁸⁸ Therefore, farming is a common calling within the privileges and immunities clause protection.⁸⁹ Section B will discuss the extent to which House Bill 6417 effects disparate treatment of farmers.⁹⁰

B. H.R. 6417 Provisions and Anticipated Impact

This Section considers whether disparate treatment may be shown by its impact; *id est*, when farmers who comply with House Bill 6417's provisions suffer unfair competition against other farmers who take advantage of a situation "prone to error and fraud."⁹¹

1. Calendar Requirements and Related Costs

House Bill 6417 effects impractical petition calendar requirements, summarized above, that frustrate farming pursuits.⁹² In order to comply with calendar requirements for hiring H-2C workers, farmers must show that they have made efforts to solicit the services of U.S. workers.⁹³ This requirement may be satisfied by posting announcements to state or local job boards, and

nonresident, equally. (...) We do not decide the full range of activities that are sufficiently *basic to the livelihood of the Nation* that the States may not interfere with a nonresident's participation therein without similarly interfering with a resident's participation." (emphasis added.)

⁸⁶ *Id.*; see also *Toomer v. Witsell*, 334 U.S. 377, 389 (1948).

⁸⁷ *Toomer*, 334 U.S. at 389; see also *Baldwin*, 436 U.S. at 383, 388.

⁸⁸ *Baldwin*, 436 U.S. at 383, 389.

⁸⁹ *Toomer*, 334 U.S. at 389; see also *Baldwin*, 436 U.S. at 383, 388.

⁹⁰ *Toomer*, 334 U.S. at 389; see also *Baldwin*, 436 U.S. at 383, 388.

⁹¹ *Toomer*, 334 U.S. at 389; see also *Baldwin*, 436 U.S. at 383, 388; see also Harper, *supra* note 29, at 129.

⁹² H.R. 6417, 115th Cong., 2d Sess. (2018).

⁹³ H.R. 6417, §103(a). ("(to amend) Chapter 2 of title II of Immigration and Nationality Act (8 U.S.C. §1181 et seq.) ... by inserting after §218 the following: (§218A(b).")

maintaining the posted announcement for at least thirty days.⁹⁴ Because the Secretary of Homeland Security is allowed to require a period of up to twenty-eight days prior to the need for hire date, a farmer requiring workers to pick and pack during the harvest season will need to solicit United States workers at least fifty-eight days in advance of what may be an unpredictable harvest season.⁹⁵ The prospect of U.S. workers being interested in and available to make an agreement on these terms is foreseeably unlikely, because the employment contract is temporary in duration and runs with the harvest season.⁹⁶ Due to this inherent limitation about employment conditions, twenty-eight days of notice to the Secretary of Homeland Security and thirty days of U.S. worker priority recruitment amounts to an untenable burden on farmers.⁹⁷

2. Audits and Inspections

During review of the petition for H-2C workers, the Secretary of Homeland Security reserves a right to audit and inspect the attestations of the farmers, who consent to such an audit by filing a petition.⁹⁸ In addition, the Secretary may find that the farmer's petition is incomplete and request for more evidence that farmer has fulfilled the attestations.⁹⁹ Furthermore, House Bill 6417 authorizes State and local law enforcement agencies to enforce the federal regulation and collect related fines, so long as a Federal agency has not done so already.¹⁰⁰ As of 2011, fourteen states have enacted mandatory E-verify requirements, indicating a difference of opinion from the thirty-six states who have not done so.¹⁰¹ By corollary, farmers will be investigated and audited according to the political temperament of the community in which they reside, and whether or not the state or local agency has taken a hardline about fraudulent documentation.¹⁰² Therefore, farmers are likely to suffer

⁹⁴ *Id.* (“(to amend) Chapter 2 of title II of Immigration and Nationality Act (8 U.S.C. §1181 et seq.) ... by inserting after §218 the following: (§218A(b)(5)(B)).”)

⁹⁵ *Id.*

⁹⁶ *Id.*

⁹⁷ *Id.*

⁹⁸ *Id.*

⁹⁹ *Id.* (“(to amend) Chapter 2 of title II of Immigration and Nationality Act (8 U.S.C. §1181 et seq.) ... by inserting after Section 218A: (§218A(d)(1)).”)

¹⁰⁰ H.R. 6417, §206. (“(to amend) Section 274A(h)(2) of Immigration and Nationality Act (8 U.S.C. §1324a(h)(2)) to read as follows: (§274A(h)(2)(B)(ii)).”)

¹⁰¹ Feller, *supra* note 3, at 297-298.

¹⁰² H.R. 6417, §206. (“(to amend) Section 274A(h)(2) of Immigration and Nationality Act (8 U.S.C. §1324a(h)(2)) to read as follows: (§274A(h)(2)(B)(ii)).”)

disparate treatment, when the law is enforced with disparate zeal from region to region.¹⁰³

3. *Whether At-Will H-2C Workers can be Found*

House Bill 6417 allows a farmer to petition for registered agricultural employer status and hire H-2C workers at-will.¹⁰⁴ To further the ends of increasing connectivity between employers and authorized H-2C workers, House Bill 6417 encourages the Secretary of Homeland Security to develop an Internet application where registered agricultural employers may browse and find H-2C workers.¹⁰⁵ Although the purpose of such an application is practical, the application's features may prove burdensome to many farmers, especially those without reliable Internet access.¹⁰⁶ Furthermore, if the Secretary fails to develop or maintain such an application, the burden will be put on farmers to find an alternative.¹⁰⁷ Such a burden is unreasonable, and it is foreseeable that many farmers will choose instead to hire any workers they can find, despite the risk entailed.¹⁰⁸

4. *Candidate Undocumented Workers Grounds for Removal*

If a properly hired H-2C worker has abandoned his obligation to the contract, then the farmer may petition the Secretary of Homeland Security to waive the grounds of removal for a candidate undocumented worker illegally present in the United States.¹⁰⁹ The Secretary may then authorize that candidate undocumented worker to become an H-2C worker.¹¹⁰ In order to become eligible for H-2C status, however, that candidate worker will first

¹⁰³ See generally *Toomer v. Witsell*, 334 U.S. 377, 389 (1948) (finding disparate treatment when out-of-state commercial shrimpers were required to pay additional taxes on their catch in South Carolina waters); see generally *Baldwin v. Fish and Game Commission of Montana*, 436 U.S. 371, 383, 388 (1978) (finding elk hunting not to qualify as a protected common calling, despite disparate treatment when out-of-state elk hunters were required to pay higher license fees).

¹⁰⁴ H.R. 6417, §103(b). (“(to amend) Chapter 2 of title II of Immigration and Nationality Act (8 U.S.C. §1181 et seq.) ... by inserting after Section 218B: (§218B(c)).”)

¹⁰⁵ H.R. 6417, §108.

¹⁰⁶ *Id.*

¹⁰⁷ *Id.*

¹⁰⁸ *Id.*

¹⁰⁹ H.R. 6417, §103(a). (“(to amend) Chapter 2 of title II of Immigration and Nationality Act (8 U.S.C. §1181 et seq.) ... by inserting after Section 218A: (§§218A(o), (p)(2)).”)

¹¹⁰ *Id.*

need to remove himself – as well as any illegally present spouse or children – to his or her home country, where he or she will need to remain for sixty days.¹¹¹ By this time, the harvest season may have ended.¹¹² By requiring the farmer to petition on behalf of the worker, who must subsequently be made unavailable to the farmer, House Bill 6417 burdens farmers.¹¹³ As a result, House Bill 6417 is likely to cause labor shortage and the crops foreseeably will rot.¹¹⁴

V. RECOMMENDATION

Demonstrably, House Bill 6417 serves two purposes: one, to deter fraudulent documentation, and two, to ensure farmers employ U.S. workers as top priority.¹¹⁵ The ends of effecting change in naturally occurring conditions of the labor market, however, would be better effected by proactive means, such as subsidies for farmers to stimulate U.S. worker employment, and a new amnesty program, comparable to IRCA of 1986.¹¹⁶ Rather than goading a law enforcement race among the state, local, and federal agencies to audit, investigate and collect related fines, a better policy would facilitate U.S. worker employment with subsidies.¹¹⁷ Rather than impractical petition process in order to hire workers at the discretion and calendar of the Secretary of Homeland Security, a better policy would let undocumented workers who work in agriculture do so lawfully by providing amnesty.¹¹⁸ At a minimum, a better policy would accommodate temporary workers' spouses and children.¹¹⁹ Likewise, a better policy would not require candidate temporary workers to remove from the United States, because those workers so removed foreseeably will be unwilling to pursue authorization in the temporary program.¹²⁰

¹¹¹ *Id.*

¹¹² *Id.*

¹¹³ *Id.*

¹¹⁴ Pilkington, *supra* note 53.

¹¹⁵ H.R. 6417.

¹¹⁶ *See* Siegel, *supra* note 9, at 298-300.

¹¹⁷ Chad G. Marzen and William Woodyard II, *Catholic Social Teaching, the Right to Immigrate, and the Right to Regulate Borders: A Proposed Solution for Comprehensive Immigration Reform Based upon Catholic Social Principles*, 53 SAN DIEGO L. REV. 781 (2016).

¹¹⁸ Siegel, *supra* note 9, at 298-300.

¹¹⁹ HERNANDEZ, *supra* note 6, at 214-215, 225.

¹²⁰ Siegel, *supra* note 9, at 298-300.

VI. CONCLUSION

Mandatory use of E-Verify, enforced by audits and investigations, will curtail fraudulent documentation in farm employment.¹²¹ House Bill 6417's provisions, however, are likely to cause labor shortage, similar to state hardline regulations, such as Alabama's HB 56.¹²² By creating a right of first refusal among federal, state and local law enforcement agencies, House Bill 6417's impact on farmers will vary from region to region, either enforced with zeal, or not at all.¹²³ House Bill 6417 does not facilitate farmers hiring U.S. workers, and offers no practical alternative to hiring available undocumented workers.¹²⁴ The untenable requirements of House Bill 6417's petitions to hire H-2C workers will impart hardship on many farmers who comply.¹²⁵ Many farmers will have no alternative at the harvest season but to employ undocumented workers, and House Bill 6417 will likely cause a rise of fraudulent documentation in farm employment, and therefore fail to serve its purpose.¹²⁶ House Bill 6417 and the mandatory use of E-Verify foreseeably will cause labor shortage, therefore it should never be enacted, unless it also provides amnesty and subsidies.¹²⁷

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¹²¹ Harper, *supra* note 29, at 125-137.

¹²² Mohl, *supra* note 5, at 42.

¹²³ Feller, *supra* note 3, at 297-298.

¹²⁴ H.R. 6417, 115th Cong., 2d Sess. (2018).

¹²⁵ *Id.*

¹²⁶ Bosworth, *supra* note 10.

¹²⁷ Harper, *supra* note 29, at 125-137.

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