

# USDA CERTIFIED LEGAL PRODUCERS: A PROGRAM TO GIVE CONSUMERS A VOICE AND A CHOICE IN IMMIGRATION REFORM

## I. INTRODUCTION

The illegal immigration of Mexican farm workers into the United States is a complex and far-reaching issue that affects businesses,<sup>1</sup> consumers,<sup>2</sup> and immigrants alike.<sup>3</sup> In fact, the illegal immigration issue is the impetus behind vast amounts of proposed legislation at the local, state and national levels,<sup>4</sup> with seventy-five percent of Americans indicating that they “think the United States . . . is not doing enough” in terms of illegal immigration into the country.<sup>5</sup> State budgets have be-

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<sup>1</sup> See e.g., Philip Martin, *Immigration Reform: Implications for Agriculture*, AGRIC. & RES. ECON. UPDATE (U. of Cal. Giannini Found., Davis, Cal.), Mar./Apr. 2006, at 1- 3, [http://agecon.ucdavis.edu/extension/update/articles/v9n4\\_1.pdf](http://agecon.ucdavis.edu/extension/update/articles/v9n4_1.pdf); Philip Martin, *Immigration Reform: What Does It Mean for Agriculture?* AGRIC. AND RES. ECON. UPDATE (Univ. of Cal. Giannini Foundation, Davis, Cal.), Sept./Oct. 2009, at 1.

<sup>2</sup> See Editorial, *Immigration Reform that Helps Growers, Consumers, Economy*, THE BAKERSFIELD CALIFORNIAN (Mar. 23, 2010), <http://www.bakersfield.com/opinion/editorials/x1664565930/Immigration-reform-that-helps-growers-consumers-economy> (pointing out that the “ready labor force” that immigrants provide helps consumers through greater control over pesticides use and food safety when compared with food imported from overseas).

<sup>3</sup> See, e.g., *Immigrant Deaths in Arizona Desert Soaring in July*, FOX NEWS, July 16, 2010, <http://www.foxnews.com/us/2010/07/16/immigrant-deaths-arizona-desert-soaring-july/>; Hugh Patterson, *Mexican Drug Cartel Violently Murders 72 Penniless Immigrants*, EXAMINER.COM, Aug. 25, 2010, <http://www.examiner.com/headlines-in-san-francisco/mexican-drug-cartel-violently-murders-72-penniless-immigrants>.

<sup>4</sup> See, e.g., *2011 State Immigration-Related Bills*, NAT’L CONFERENCE OF STATE LEGISLATURES, <http://www.ncsl.org/default.aspx?TabID=756&tabs=951,119,851#951> (noting that in the first quarter of 2011 state legislatures introduced almost 1,600 immigration-related bills); *Arizona, Polls, REPAIR*, 16 RURAL MIGRATION NEWS, no. 3, July 2010, [http://migration.ucdavis.edu/rmn/comments.php?id=1548\\_0\\_4\\_0](http://migration.ucdavis.edu/rmn/comments.php?id=1548_0_4_0).

<sup>5</sup> *Washington Post-ABC News Poll*, WASH. POST (June 6, 2010), [http://www.washingtonpost.com/wp-srv/politics/polls/postpoll\\_060810.html?sid=ST2010061700014](http://www.washingtonpost.com/wp-srv/politics/polls/postpoll_060810.html?sid=ST2010061700014).

come burdened with the costs of education,<sup>6</sup> law enforcement and incarceration,<sup>7</sup> social services, and emergency health services associated with the illegal immigration population.<sup>8</sup> In California, illegal immigrants create a state fiscal burden of about 21.7 billion dollars annually.<sup>9</sup>

On a national level, the net economic impact of illegal immigration appears to be fiscally positive, albeit slight.<sup>10</sup> Many illegal immigrants pay social security taxes but will never collect the benefits.<sup>11</sup> Further, the bountiful, low-wage labor that the illegal immigrants provide the agricultural industry allows native-grown produce to remain competitively priced with imported produce harvested by cheap foreign labor.<sup>12</sup> As a

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<sup>6</sup> See, e.g., *Plyler v. Doe*, 457 U.S. 202, 215-223 (1982). (holding that children of illegal immigrants are constitutionally guaranteed an education); MARTIN, JACK, *FED'N FOR AM. IMMIGR. REFORM, BREAKING THE PIGGY BANK: HOW ILLEGAL IMMIGRATION IS SENDING SCHOOLS INTO THE RED*, 1-2 (2005), available at <http://www.fairus.org/site/DocServer/piggybank05.pdf?docID=2301> (reporting that in 2004, California spent over 7.7 billion dollars to educate children of illegal immigrants).

<sup>7</sup> See Jordy Yager, *GAO: \$1.5B to jail unlawful immigrants*, THE HILL (April 23, 2011, 10:37 AM), <http://thehill.com/blogs/blog-briefing-room/news/157459-gao-15b-to-jail-unlawful-immigrants-each-year> (reporting substantial and increasing numbers of incarcerated “non-U.S. citizens” in federal and state prisons).

<sup>8</sup> See GORDON H. HANSON, COUNSEL ON FOREIGN RELATIONS, *THE ECONOMIC LOGIC OF ILLEGAL IMMIGRATION* 22, 25 (2007). See generally Transcript of Oral Argument at 7-8, *Chamber of Commerce v. Whiting*, 131 S. Ct. 1968 (2011) (No. 09-115), available at [http://www.supremecourt.gov/oral\\_arguments/argument\\_transcripts/09-115.pdf](http://www.supremecourt.gov/oral_arguments/argument_transcripts/09-115.pdf). (Scalia, J., “States are in serious trouble financially [due to] unrestrained immigration”).

<sup>9</sup> JACK MARTIN & ERIC A. RUARK, *THE FISCAL BURDEN OF ILLEGAL IMMIGRATION ON UNITED STATES TAXPAYERS*, 70 (2010), available at [http://www.fairus.org/site/DocServer/USCostStudy\\_2010.pdf?docID=4921](http://www.fairus.org/site/DocServer/USCostStudy_2010.pdf?docID=4921).

<sup>10</sup> HANSON, *supra* note 8, at 25-26.

<sup>11</sup> *Id.* at 21 n.40. See also STEVEN A. CAMAROTA, *THE HIGH COST OF CHEAP LABOR: ILLEGAL IMMIGRATION AND THE FEDERAL BUDGET*, 14, 24-26 (2004), available at <http://www.cis.org/articles/2004/fiscal.pdf>. (indicating that, in 2002, “Households Headed by Illegal Aliens” contributed on average \$1,687 annually to Social Security through taxes, and “Households Headed by Illegal Aliens” received on average only \$289 annually in Social Security and Medicare benefits combined (emphasis added)).

<sup>12</sup> See e.g., Letter from Craig J. Regelbrugge et al, Chairpersons, Agricultural Coalition for Immigration Reform to Elton Gallegly, Chairman, and Zoe Lofgren, Ranking Member, House Judiciary Subcommittee on Immigration Policy and Enforcement 1, 6 (Feb. 10, 2011) (on file with author), available at [http://www.immigrationworksusa.org/uploaded/ACIR%20Statement\\_House%20Judiciary%20Immigration\\_%20Sbcmt2-10-11.pdf](http://www.immigrationworksusa.org/uploaded/ACIR%20Statement_House%20Judiciary%20Immigration_%20Sbcmt2-10-11.pdf); OXFAM AMERICA, *LIKE MACHINES IN THE FIELDS: WORKERS WITHOUT RIGHTS IN AMERICAN AGRICULTURE* 2, 35 (2004), available at <http://www.oxfamamerica.org/files/like-machines-in-the-fields.pdf>. See generally MARK KRICKORIAN, *GUESTWORKER PROGRAMS: A THREAT TO AMERICAN AGRICULTURE* 2 (2001), <http://www.cis.org/GuestworkerPrograms-AmericanAgriculture> (suggesting that without immigrant agricultural guestworker programs, produce prices will soar and America will become dependant on imported food sources).

result, this low-wage labor helps sustain a robust agribusiness industry<sup>13</sup> with significant federal tax contributions.<sup>14</sup> Additionally, the illegal immigrant population is willing to perform work that is absolutely essential to successful agribusiness; yet, it is work that traditionally the domestic population is unwilling to perform.<sup>15</sup> The convoluted issues of the illegal immigration of Mexican farm workers may be of greater significance and more complex today, but the underlying need for seasonal, low wage farm workers has been at issue for decades.<sup>16</sup>

The crux of the problem centers around the need to provide United States agribusiness employers the substantial numbers of low-wage, temporary farm workers they must have, while simultaneously stemming the tide of undocumented illegal immigrants entering and residing in the country in order to take these jobs.<sup>17</sup> Representative Zoe Lofgren of California, chair of the House Immigration Subcommittee, criticized previous unsuccessful attempts at immigration reform, concluding that “[c]omprehensive immigration reform needs to meet the legitimate employment needs in the future.”<sup>18</sup> California, an *agricultural powerhouse* with a plethora of seasonal farm jobs and an abundance of agricultural

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<sup>13</sup> Off. of Pub. Affairs, Cal. Dept. of Food and Agric., *New state record for farm cash receipts in 2010 -- \$37.5 billion*, PLANTING SEEDS: FOOD & FARMING NEWS FROM CDFR (August 30, 2011), <http://plantingseedsblog.cdfa.ca.gov/wordpress/?p=302> (reporting that California’s “81,700 farms and ranches received a record high \$37.5 billion for their output [in 2010],” representing almost 12% of the nationwide 2010 total).

<sup>14</sup> See *Statistics by Subject: National Statistics for Taxes*, U.S. DEPT. OF AGRIC. NAT. AGRIC. STAT. SERV. (MAR. 4, 2012), [http://www.nass.usda.gov/Statistics\\_by\\_Subject/result.php?C21EF8B6-430A-3241-8475-0632875306BB&sector=ECONOMICS&group=EXPENSES&comm=TAXES](http://www.nass.usda.gov/Statistics_by_Subject/result.php?C21EF8B6-430A-3241-8475-0632875306BB&sector=ECONOMICS&group=EXPENSES&comm=TAXES) (showing \$10.8 billion paid in taxes by U.S. farmers in 2010).

<sup>15</sup> See, e.g., JOHN THOMAS ROSEN-MOLINA, DANIEL A. SUMNER ET AL., AIC WHITE PAPERS ON CALIFORNIA AGRICULTURAL ISSUES: AGRICULTURAL WORKFORCE 1 (2009), available at <http://aic.ucdavis.edu/publications/whitepapers/whitepapers.pdf>; Garance Burke, *Americans Don’t Appear to Want Farm Work*, USA TODAY (September 27, 2010), [http://www.usatoday.com/money/workplace/2010-09-27-farm-work\\_N.htm](http://www.usatoday.com/money/workplace/2010-09-27-farm-work_N.htm) (reporting that of 1,160 advertised farmworker positions, only 36 were filled by domestic labor).

<sup>16</sup> See LINDA LEVINE, CONG. RESEARCH SERV., THE EFFECTS ON U.S. FARM WORKERS OF AN AGRICULTURAL GUEST WORKER PROGRAM 1-3 (2009), available at <http://www.nationalaglawcenter.org/assets/crs/95-712.pdf>.

<sup>17</sup> See Martin, *Immigration Reform: What Does It Mean for Agriculture?*, *supra* note 1, at 2, 4.

<sup>18</sup> *AgJOBS, Immigration Reform*, 16 RURAL MIGRATION NEWS, no. 1, Jan. 2010, [http://migration.ucdavis.edu/rmn/more.php?id=1508\\_0\\_4\\_0](http://migration.ucdavis.edu/rmn/more.php?id=1508_0_4_0).

producers and growers,<sup>19</sup> will be dramatically affected by any illegal immigration reform.<sup>20</sup>

This Comment will identify the factors underlying the illegal immigration of Mexicans into the United States, as well as shortcomings of the current policies in place to prevent unauthorized immigration into the United States. This Comment will point out the disparity between the needs of American agribusinesses in terms of seasonal farm labor and the foreign labor provided by the current government program designed to fill those needs. This Comment will also discuss a key piece of legislation before the Senate that can dramatically improve agribusiness access to foreign farm labor and the living and working conditions of unauthorized immigrant agricultural workers currently living in the United States. Synthesizing this information, this Comment will advocate for a new government-subsidized program designed to address the needs of agribusinesses while improving opportunities for seasonal foreign farm workers. The *Certified Legal Producers* program proposed will reward agribusiness employers who utilize federal databases to verify the legitimacy of their employees and voluntarily subject themselves to random, periodic checks for compliance with lawful employment standards. These agribusinesses will be deemed United States Department of Agriculture (“USDA”) *Certified Legal Producers* and will be entitled to label their products as such, benefiting from a government-sponsored advertising and promotional campaign aimed at increasing demand for legally produced products. This Comment will analyze similar agricultural programs currently in place, comparing the organizational and subsidization aspects of those programs with the proposed *Certified Legal Producers* program. Finally, this Comment will review the constitutionality of subsidization and government sponsored commodity advertising, finding that the *Certified Legal Producers* program withstands Constitutional scrutiny.

## II. BACKGROUND

The need for a substantial, seasonal, temporary and low-cost labor force has been evident since United States farmers began producing

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<sup>19</sup> See, e.g., PLANTING SEEDS, *supra* note 13 (noting 81,700 California farms and ranches in 2010); *Farm Workers: 2007, EEOC, Indigenous, AgJOBS, Immigration Reform*, 16 RURAL MIGRATION NEWS, no. 1, Jan. 2010, [http://migration.ucdavis.edu/rmn/more.php?id=1506\\_0\\_3\\_0](http://migration.ucdavis.edu/rmn/more.php?id=1506_0_3_0) (reporting that in 2007, California had over 600,000 farm jobs); *California: Indicators, Napa, Immigration*, 16 RURAL MIGRATION NEWS, no. 1, Jan. 2010, [http://migration.ucdavis.edu/rmn/more.php?id=1499\\_0\\_2\\_0](http://migration.ucdavis.edu/rmn/more.php?id=1499_0_2_0).

<sup>20</sup> See *California: Indicators, Napa, Immigration*, *supra* note 19.

crops for community consumption toward the end of the 19<sup>th</sup> century.<sup>21</sup> In 1942, the federal government enacted the Bracero program in order to provide farmers with the workers that they needed.<sup>22</sup> For twenty-two years, the Bracero program provided American farmers with temporary “Mexican farm workers.”<sup>23</sup> The program provided jobs to Mexican citizens, at a greater pay rate than they would receive in Mexico, while simultaneously supplying American agricultural businesses with a low cost seasonal labor force, although some disparaged the program as simply government-sponsored “legalized slavery.”<sup>24</sup> In the 1960s, an abundance of “illegal agricultural workers” provided agricultural businesses greater access to the labor they needed and the Bracero program was eliminated in part due to attrition.<sup>25</sup>

Since the end of the Bracero program, farmers continue to employ large numbers of Mexican farm workers through the government-sponsored H-2A temporary guest worker program<sup>26</sup> and through the employment of immigrants, who are in the country legally and illegally.<sup>27</sup> The substantial agricultural employment opportunities have resulted in an exodus of citizens from Mexico entering the United States in order to work.<sup>28</sup> In 2010, there were an estimated 10.8 million illegal immigrants residing in the United States with sixty-two percent of those immigrants

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<sup>21</sup> See Martin, *Immigration Reform: What Does It Mean for Agriculture?*, *supra* note 1, at 2.

<sup>22</sup> *Mexican Immigrant Labor History*, PBS.ORG, <http://www.pbs.org/kpbs/theborder/history/timeline/17.html>. See also *History of the Bracero Program, 1942-1964*, Nat'l. Museum of Am. Hist., SMITHSONIAN INSTITUTION, <http://latino.si.edu/education/NMAHLatino.htm>.

<sup>23</sup> See PBS.ORG, *supra* note 22.

<sup>24</sup> See *The Bracero Program*, THE FARMWORKERS' WEBSITE, <http://www.farmworkers.org/bracerop.html>.

<sup>25</sup> See PBS.ORG, *supra* note 22.

<sup>26</sup> See *United States Quick Facts*, GLOBAL WORKERS JUSTICE ALLIANCE, [http://www.globalworkers.org/migrationdata\\_US.html](http://www.globalworkers.org/migrationdata_US.html).

<sup>27</sup> See Martin, *Immigration Reform: What Does It Mean for Agriculture?*, *supra* note 1, at 1-2.

<sup>28</sup> See, e.g., JEFFERY PASSEL & D'VERA COHN, PEW HISPANIC CTR., MEXICAN IMMIGRANTS: HOW MANY COME? HOW MANY LEAVE? i (July 22, 2009), available at <http://pewhispanic.org/files/reports/112.pdf> (concluding that most people that leave Mexico come to the U.S., with 10% of the people born in Mexico currently residing in the U.S.); Jesus Canas et al., *Commentary on Session III, U.S.-Mexico Remittances: Recent Trends & Measurement Issues*, FED. RES. BANK OF DALL.: PROCEEDINGS, 2006, at 213, available at <http://dallasfed.org/research/pubs/migration/canas.pdf> (stating that “15 percent of the Mexican-born labor force – are in the United States”); HANS P. JOHNSON, ILLEGAL IMMIGRATION 5-6 (2006), available at [http://www.ppic.org/content/pubs/atissue/AI\\_406HJAI.pdf](http://www.ppic.org/content/pubs/atissue/AI_406HJAI.pdf).

coming from Mexico.<sup>29</sup> California, likely a result of its proximity to Mexico and its expansive agricultural industry, is the State of choice to a majority of the illegal immigrants,<sup>30</sup> with almost ten percent of the California labor force being illegal.<sup>31</sup> It is estimated that over fifty percent of the farm workers in California are illegal immigrants.<sup>32</sup>

The net economic effect of illegal immigration overall is debatable, and probably insignificant on a national scale.<sup>33</sup> However, at the state and local levels, most concur that overall illegal immigration is a financial drain, with illegal immigrants utilizing state services, but not paying the state income taxes that fund those same services.<sup>34</sup> Further, it is well-established that a significant amount of money earned by illegal immigrants is sent to family members in their native countries, with Mexicans living in the United States remitting an estimated twenty-two billion dollars back to Mexico in 2010.<sup>35</sup>

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<sup>29</sup> See MICHAEL HOFFER ET AL., DEPT. OF HOMELAND SECURITY, ESTIMATES OF THE UNAUTHORIZED IMMIGRANT POPULATION RESIDING IN THE UNITED STATES: JANUARY 2010, OFF. OF IMMIG. STAT. 2, 4 (2011), [http://www.dhs.gov/xlibrary/assets/statistics/publications/ois\\_ill\\_pe\\_2010.pdf](http://www.dhs.gov/xlibrary/assets/statistics/publications/ois_ill_pe_2010.pdf) (indicating that 6.6 million of the 10.8 million unauthorized foreigners currently living in the U.S. are from Mexico).

<sup>30</sup> See, e.g., *id.* (identifying California, with 2.6 million, as the state with the most “unauthorized immigrants”); JEFFERY PASSEL & D’VERA COHN, PEW HISPANIC CTR., A PORTRAIT OF UNAUTHORIZED IMMIGRANTS IN THE UNITED STATES ii, iii (2009), available at <http://pewhispanic.org/files/reports/107.pdf>.

<sup>31</sup> A PORTRAIT OF UNAUTHORIZED IMMIGRANTS, *supra* note 30, at iii (noting that an estimated 1.85 million workers in California’s labor force are illegal).

<sup>32</sup> Philip Martin, *Guest Workers for California Agriculture?*, AGRIC. AND RES. ECON. UPDATE (Univ. of Cal. Giannini Found., Davis, Cal.), Fall 2001, at 7, [http://agecon.ucdavis.edu/extension/update/articles/v5n1\\_4.pdf](http://agecon.ucdavis.edu/extension/update/articles/v5n1_4.pdf). See also EDUC. DEV. DEP’T, STATE OF CAL., CALIFORNIA’S AGRICULTURAL EMPLOYMENT, 2008, <http://www.calmis.ca.gov/file/agric/ca-ag-profile.pdf> (showing that more than half of California’s 2008 agricultural work force of 372,600 persons, some 194,125 workers, were “classified as foreign born and not U.S. citizens”).

<sup>33</sup> See, e.g., JOHNSON, *supra* note 28, at 10 (finding that “illegal immigrants pay social security taxes but never collect the benefits”); HANSON, *supra* note 8, at 24-26 (noting that “immigrants (including many illegals) pay federal income and withholding taxes,” but most of their expenses “are borne primarily at the state and local level”).

<sup>34</sup> See HANSON, *supra* note 8, at 22, 25-26 (pointing out that U.S.-born children of illegal immigrants are U.S. citizens, and thus entitled to education and social services including welfare).

<sup>35</sup> SANKET MOHAPATRA ET AL., THE WORLD BANK, OUTLOOK FOR REMITTANCE FLOWS 2011-13, 10 (Migration & Dev. Brief 16, May 23, 2011), <http://siteresources.worldbank.org/EXTDECPROSPECTS/Resources/476882-1157133580628/MigrationandDevelopmentBrief16.pdf>. See also, e.g., Jesus Canas et al., *Explaining the Increase in Remittances to Mexico*, FED. RES. BANK OF DALL.: SOUTHWEST ECONOMY (July/Aug. 2007), <http://dallasfed.org/research/swe/2007/swe0704b.cfm>; RAUL HERNÁNDEZ-COSS, THE U.S.-MEXICO REMITTANCE CORRIDOR: LESSONS ON SHIFTING FROM INFORMAL TO FORMAL

To compound the problem, the recent interest in building up the fence between Mexico and the United States may very well be contributing to additional problems.<sup>36</sup> Whereas, historically, in the Bracero program, and in the current H-2A temporary guest worker program,<sup>37</sup> participants must return to Mexico upon completion of the seasonal work,<sup>38</sup> today's increased border security has the undesired effect of making it more difficult for illegal immigrants to "travel back and forth" across the border.<sup>39</sup> Reflecting this dilemma, unemployment rates of illegal immigrants are higher than those of legal citizens, and, in 2009, hovered around 10.4 percent.<sup>40</sup> Moreover, illegal immigrants from Mexico find themselves in poverty at percentages nearly twice that of the native population.<sup>41</sup>

As the government attempts to stem the tide of illegal immigrants crossing the border by erecting taller and longer fences,<sup>42</sup> the fundamental issue is often overlooked. Traditionally, there have been vast employment opportunities in the United States for motivated Mexican workers who are unable to find work in Mexico.<sup>43</sup> A migration toward areas of greater employment and earning opportunities is a natural and predictable response by people in unfavorable living conditions.<sup>44</sup> In addition to the increased employment opportunities are the greater pay

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TRANSFER SYSTEMS 4-5 (2005), available at [http://siteresources.worldbank.org/EX/TAML/Resources/396511-1146581427871/US-Mexico\\_Remittance\\_Corridor\\_WP.pdf](http://siteresources.worldbank.org/EX/TAML/Resources/396511-1146581427871/US-Mexico_Remittance_Corridor_WP.pdf).

<sup>36</sup> See JOHNSON, *supra* note 28, at 13 ("Because [increased border] enforcement has increased the danger and cost of crossing the border, many of those who come in now stay longer. . . . Many cyclical crossers have now become long-term settlers.").

<sup>37</sup> See generally *infra* pp. 10-12.

<sup>38</sup> See OXFAM AMERICA, *supra* note 12, at 42-43.

<sup>39</sup> STUART ANDERSON, NATL. FOUND. FOR AM. POL'Y, DEATH AT THE BORDER 8 (2010), <http://www.nfap.com/pdf/0505brief-death-at-border.pdf>; See also JOHNSON, *supra* note 28, at 13.

<sup>40</sup> See JEFFERY PASSEL & D'VERA COHN, PEW HISPANIC CTR., U.S. UNAUTHORIZED IMMIGRATION FLOWS ARE DOWN SHARPLY SINCE MID-DECADE 9 (2010), available at <http://pewhispanic.org/files/reports/126.pdf>

<sup>41</sup> See JEFFERY PASSEL & D'VERA COHN, A PORTRAIT OF UNAUTHORIZED IMMIGRANTS IN THE UNITED STATES, *supra* note 30, at iv.

<sup>42</sup> See DHS: *Border, Interior, Services*, 16 RURAL MIGRATION NEWS, no. 2, Apr. 2010, [http://migration.ucdavis.edu/rmn/more.php?id=1533\\_0\\_4\\_0](http://migration.ucdavis.edu/rmn/more.php?id=1533_0_4_0) (indicating that 650 miles of the 2,000-mile U.S.-Mexico border have been fenced).

<sup>43</sup> See *The Bracero Program*, *supra* note 24.

<sup>44</sup> H.R. Rep. 99-682(I), 99th Cong. (2nd Sess. 1986) ("Employment is the magnet that attracts aliens here illegally"); See also, *e.g.*, ANDERSON, *supra* note 39 at 4-5 (2010), ("Poverty in Mexico combined with the pull of better economic opportunities in the United States leads people to risk their lives on the journey to America"); HANSON, *supra* note 8, at 14-15.

rates associated with agricultural work in the United States.<sup>45</sup> Comparable farm work pays nine times more in the United States than in Mexico.<sup>46</sup>

Legal and illegal migration of Mexican workers into the United States continues at a steady rate.<sup>47</sup> This reflects the need for Mexican workers to find employment and the desire of certain United States industries, namely agriculture, to employ them.<sup>48</sup> While there are programs in place that provide a legal right to temporarily,<sup>49</sup> and sometimes permanently,<sup>50</sup> live and work in the United States, more than half of all Mexican immigrants ultimately circumvent the legal channels.<sup>51</sup> These unauthorized immigrants typically lack education<sup>52</sup> and thus gravitate toward low-skilled jobs,<sup>53</sup> generally submitting themselves to much more deplorable working conditions than legal immigrants and domestic employees.<sup>54</sup> The nature of their illegal status makes the group subject to more abuse, including illegally dangerous work environments and inhumane treatment.<sup>55</sup> Legal immigrants, on the other hand, have greater access to legal remedies, providing them an avenue to file complaints and lawsuits if necessary in order to rectify illegal or unethical treatment.<sup>56</sup>

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<sup>45</sup> See JOHNSON, *supra* note 28, at 5 (pointing out that U.S. jobs and wages are higher than in the countries that illegal immigrants leave).

<sup>46</sup> See *id.*

<sup>47</sup> See, e.g., RANDALL MONGER & JAMES YANKAY, DEPT. OF HOMELAND SECURITY, U.S. LEGAL PERMANENT RESIDENTS: 2010, OFF. OF IMMIG. STAT.: ANNUAL FLOW REPORT 1, 4 (2011), available at [http://www.dhs.gov/xlibrary/assets/statistics/publications/lpr\\_fr\\_2010.pdf](http://www.dhs.gov/xlibrary/assets/statistics/publications/lpr_fr_2010.pdf) (showing that in 2010, over 139,000 people from Mexico were granted legal permanent residence status in the United States); HOEFER, *supra* note 29, at 3 (reporting that 1,000,000 illegal immigrants entered the United States between 2005 and 2009).

<sup>48</sup> See Martin, *Immigration Reform: What Does It Mean for Agriculture?*, *supra* note 1, at 1-2.

<sup>49</sup> See generally *infra* pp.10-11.

<sup>50</sup> See MONGER, *supra* note 47, at 1.

<sup>51</sup> PEW RES. CTR., PEW HISPANIC CTR., *Mexican Immigrants in the United States, 2008* 1 (April 15, 2009), <http://pewhispanic.org/files/factsheets/47.pdf>.

<sup>52</sup> See JEFFERY PASSEL & D'VERA COHN, A PORTRAIT OF UNAUTHORIZED IMMIGRANTS IN THE UNITED STATES, *supra* note 30, at 10-11 (reporting that 47% of 25-64 year old unauthorized immigrants have not completed high school, compared with 22% for legal immigrants and 8% for U.S. born citizens).

<sup>53</sup> *Id.* at 14.

<sup>54</sup> See OXFAM AMERICA, *supra* note 12, at 1-3, 17-18.

<sup>55</sup> See, e.g., *id.*; Chris Collins, *Workers Endure Bad Conditions with Little Recourse*, THE FRESNO BEE, Nov. 18, 2010, <http://www.fresnobee.com/2010/11/18/2163632/workers-endure-bad-conditions.html>.

<sup>56</sup> See *Alien*, CORNELL UNIVERSITY LAW SCHOOL (Aug. 19, 2010), <http://topics.law.cornell.edu/wex/alien>.

A. *Past Legislation: The Immigration Reform and Control Act*

In 1986, the federal government recognized the impetus behind illegal immigration and enacted the Immigration Reform and Control Act (“IRCA”).<sup>57</sup> IRCA sought to discourage and punish businesses from hiring illegal immigrants, while granting immediate amnesty to certain illegal immigrants.<sup>58</sup> While the IRCA provisions seem straightforward, historically IRCA has received lax enforcement.<sup>59</sup> The farming lobby is a powerful and influential force in state and federal governments.<sup>60</sup> These lobbyists represent the agribusinesses that benefit from the cheap labor source that illegal workers provide.<sup>61</sup> Additionally, the statutory language of IRCA itself is ambiguous and weak. In order to be in violation, an employer must “knowingly” hire an alien that is unauthorized to work in “such employment.”<sup>62</sup> Criminal sanctions can be imposed on U.S. employers only if they engage in a “pattern or practice” of hiring unauthorized workers, ensuring that all but the most flagrant violators will be overlooked.<sup>63</sup> Immigrations and Customs Enforcement (“ICE”)

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<sup>57</sup> Immigration Reform and Control Act of 1986, Pub. Law No. 99-603, 100 Stat. 3359 (codified as amended in scattered sections of 8 U.S.C.). See also *Hoffman Plastic Compounds, Inc. v. NLRB*, 535 U.S. 137, 147, 155 (2002) (Rehnquist, C.J., “In 1986 . . . Congress enacted IRCA, a comprehensive scheme prohibiting the employment of illegal aliens in the United States. . . . IRCA ‘forcefully’ made combating the employment of illegal aliens central to [t]he policy of immigration law.” *INS v. National Center for Immigrants’ Rights, Inc.*, 502 U.S. 183, 194, and n. 8 (1991)”).

<sup>58</sup> See *Immigration Reform and Control Act of 1986 (IRCA)*, U.S. CITIZENSHIP AND IMMIGRATIONS SERVICES, <http://www.uscis.gov/portal/site/uscis/menuitem.5af9bb95919f35e66f614176543f6d1a/?vgnnextchannel=b328194d3e88d010VgnVCM10000048f3d6a1RCRD&vgnextoid=04a295c4f635f010VgnVCM1000000ecd190aRCRD>.

<sup>59</sup> See *Chamber of Commerce v. Whiting*, *supra* note 8, at 8:7-8:12, available at <http://lawprofessors.typepad.com/files/transcript.pdf>. (Scalia, J., referring to IRCA, “[T]he Federal Government has – has simply not enforced the immigration regulations.”)

<sup>60</sup> See, e.g., Lauren Etter & Greg Hitt, *Farm Lobby Beats back Assault on Subsidies*, WALL ST. J., Mar. 28, 2008, <http://online.wsj.com/article/SB120657645419967077.html> (reporting that the agribusiness industry spent over \$80 million on lobbying in 2007); *Farm, Agribusiness Lobbying Costs Top \$100 million in 2009*, AGRI-PULSE (Agri-Pulse Communications, Inc., Vol. 6, No. 7) Feb. 17, 2010, at 1, <http://www.northamericandevon.com/pdfs/02172010.pdf>.

<sup>61</sup> See Memorandum from American Farm Bureau Federation on Agricultural Labor to Agribusiness Members (Sept. 2011), available at <http://www.fb.org/issues/docs/aglabor12.pdf>.

<sup>62</sup> 8 U.S.C. § 1324a(a)(1)(A) (West 2012) (“It is unlawful . . . to hire . . . an alien knowing the alien is an unauthorized alien . . . with respect to such employment . . .”).

<sup>63</sup> 8 U.S.C. § 1324a(f)(1) (West 2012) (“Criminal Penalty: Any person who engages in a pattern or practice of violations of subsection (a)(1)(A) . . .”). See generally Martin, *Immigration Reform: Implications for Agriculture*, *supra* note 1, at 3 (reporting that in

admittedly targets “employers who are *egregiously* violating immigration laws, especially when those violations can compromise our nation’s security.”<sup>64</sup> Further, to circumvent IRCA and avoid prosecution, agribusinesses utilize farm labor contractors, who often engage in unscrupulous practices,<sup>65</sup> but, as independent contractors, can potentially shield the agribusinesses from the liability associated with the hiring of illegal workers.<sup>66</sup>

With little to lose, and much to gain, many of California’s agribusinesses employ illegal immigrants.<sup>67</sup> These workers represent a population that is available for temporary, seasonal and immediate work, and a willingness to work for low wages in poor employment conditions.<sup>68</sup> There are an estimated 194,000 illegal farm workers in California.<sup>69</sup> This labor force cannot be presently filled solely with domestic labor as the domestic labor force is unwilling to work long hours, for low wages, in dirty and dangerous work.<sup>70</sup> This labor force also cannot be filled through the current legal immigration guest worker program, or H-2A, which is “cumbersome and ineffective, resulting in the certification of at best only a few thousand of the hundreds of thousands of agricultural workers needed by the industry.”<sup>71</sup>

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2004 there were only “three notices of intent to fine (NIF) employers for violations of employer sanctions laws, down from 1,000 to 2,000 NIFs a year in the 1990s.”)

<sup>64</sup> See *Fact Sheet: Worksite Enforcement*, “What Types of Industries does ICE target?”, U.S. IMMIGRATION AND CUSTOMS ENFORCEMENT, <http://www.ice.gov/news/library/factsheets/worksite.htm>. (emphasis added).

<sup>65</sup> See OXFAM AMERICA, *supra* note 12, at 2, 20 (quoting a San Joaquin Valley farm labor contractor discussing labor law violations, “Ninety-nine percent of all contractors break the law. Not one, not two – all of us.”).

<sup>66</sup> See, e.g., *Id.* at 20, 40, 43, 48; PHILIP MARTIN, FARM LABOR SHORTAGES: HOW REAL? WHAT RESPONSE?, CTR. FOR IMMIGR. STUDIES BACKGROUNDER 6 (2007), [http://www.cis.org/no\\_farm\\_labor\\_shortages.html](http://www.cis.org/no_farm_labor_shortages.html). See generally J. Daniel Fernandez and Travis Turner, *Los Hechados*, NORTH COAST JOURNAL, June 10, 2010, available at <http://www.northcoastjournal.com/news/2010/06/10/los-hechados/> (reporting that in June 2008, an ICE raid on a Humboldt County bulb farm resulted in twenty-three arrests, but the employer was not fined and simply hired a labor contractor out of Madera and filled those positions with more illegal workers).

<sup>67</sup> See Martin, *Guest Workers for California Agriculture?*, *supra* note 32, at 7.

<sup>68</sup> See OXFAM AMERICA, *supra* note 12, at 1-4.

<sup>69</sup> EDUC. DEV. DEP’T, STATE OF CAL., *supra* note 32 (finding that in 2008, 52.1% of persons in California’s “agricultural labor force” of 372,600 were “foreign-born, not a U.S. citizen”).

<sup>70</sup> See, e.g., Garance Burke, *supra* note 15; *AgJOBS: Provisions, Eligibility*, 15 RURAL MIGRATION NEWS, no. 3, July 2009, [http://migration.ucdavis.edu/rmn/more.php?id=1466\\_0\\_4\\_0](http://migration.ucdavis.edu/rmn/more.php?id=1466_0_4_0).

<sup>71</sup> AM. FARMLAND TR., CAL. AGRIC. VISION, CAL. DEPT. OF FOOD & AGRIC., CALIFORNIA AGRICULTURAL VISION: STRATEGIES FOR SUSTAINABILITY 14 (Dec.

### B. Current H-2A Program

The H-2A program has been in place since 1952.<sup>72</sup> The present-day H-2A program provides foreign agricultural workers to employers who have petitioned the U.S. Citizenship and Immigration Services for the temporary guest workers.<sup>73</sup> Agricultural employers seeking H-2A workers must show that there is a viable and anticipated need for a specific number of seasonal foreign workers and that attempts to fill those positions with U.S. workers have been unsuccessful.<sup>74</sup> Further, employers must agree to provide H-2A workers with appropriate no-cost housing, subject to governmental inspections and compliance.<sup>75</sup> Employers must also ensure that “[t]he employment of the alien . . . will not adversely affect the wages and working conditions of workers in the United States similarly employed.”<sup>76</sup> Minimum wage rates for H-2A workers are set by the U.S. Department of Labor, and vary by State.<sup>77</sup> These minimum wage rates are calculated so as to prevent employment of the imported guest workers from driving down the current wage rate of domestic employees performing comparable work.<sup>78</sup> The 2011 minimum wage rate for H-2A workers in California was \$10.31 per hour.<sup>79</sup>

In 2010, the H-2A program provided 55,921 seasonal guest workers to agricultural businesses nationwide, with ninety-four percent of those workers coming from Mexico.<sup>80</sup> However, only 5,018 of those H-2A

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2010), available at [http://www.cdfa.ca.gov/agvision/docs/Ag\\_Vision\\_Final\\_Report\\_Dec\\_2010.pdf](http://www.cdfa.ca.gov/agvision/docs/Ag_Vision_Final_Report_Dec_2010.pdf).

<sup>72</sup> LEVINE, THE EFFECTS ON U.S. FARM WORKERS OF AN AGRICULTURAL GUEST WORKER PROGRAM, *supra* note 16, at 3.

<sup>73</sup> *H-2A Temporary Agricultural Program, Foreign Labor Certification*, U.S. DEPT OF LABOR (last updated Aug. 26, 2011), <http://www.foreignlaborcert.doleta.gov/h-2a.cfm>.

<sup>74</sup> See, e.g., 20 C.F.R. § 655.100 (West 2012); 8 U.S.C. § 1188(a) (West 2012); WAGE & HOUR DIV., U.S. DEPT. OF LABOR, FACT SHEET #26: SECTION H-2A OF THE IMMIGRATION AND NATIONALITY ACT 1 (Feb. 2010), <http://www.dol.gov/whd/regs/compliance/whdfs26.pdf>.

<sup>75</sup> 8 U.S.C. § 1188(c)(4) (West 2012). See also 20 C.F.R. § 655.122(d) (West 2012).

<sup>76</sup> 8 U.S.C. § 1188(a)(1)(B) (West 2012). See also 20 C.F.R. § 655.100(b) (West 2012).

<sup>77</sup> See 20 C.F.R. § 655.120 (West 2012).

<sup>78</sup> See Temporary Agricultural Employment of H-2A Aliens in the United States; Final Rule, 75 Fed. Reg. No. 29, 6884, 6886, 6891 (Feb. 12, 2010), available at [http://www.foreignlaborcert.doleta.gov/pdf/H2A\\_Final.pdf](http://www.foreignlaborcert.doleta.gov/pdf/H2A_Final.pdf) (commenting on purpose behind Adverse Effect Wage Rate (“AEWR”) used in H-2A program and how AEWR is computed and applied to affect wages of H-2A workers).

<sup>79</sup> *Adverse Effect Wage Rates – Year 2011*, U.S. DEPT OF LABOR (last updated Mar. 16, 2011), <http://www.foreignlaborcert.doleta.gov/adverse.cfm>.

<sup>80</sup> See *More H-2 Information*, GLOBAL WORKERS JUSTICE ALLIANCE, [http://www.globalworkers.org/migrationdata\\_US\\_more.html#Process](http://www.globalworkers.org/migrationdata_US_more.html#Process) (reporting that,

visas were issued for California's 350,000-plus farm jobs.<sup>81</sup> The discrepancy is obvious, and today's H-2A temporary guest program cannot meet the needs of California agribusinesses for foreign farm labor employment.

### C. Future Legislation: AgJOBS

Currently, there is proposed legislation in Congress that would greatly increase the numbers of farm workers legally available to agribusinesses while simultaneously mandating a restructuring of the inefficient and vastly under-utilized H-2A program.<sup>82</sup> The Agricultural Job Opportunities, Benefits, and Security Act of 2011 ("AgJOBS"), introduced in the Senate in June 2011,<sup>83</sup> is a major component of a comprehensive immigration reform bill.<sup>84</sup> AgJOBS proposes to legitimize up to 1.35 million previously-undocumented agricultural workers in the next five years.<sup>85</sup> Unauthorized immigrant farm workers who qualify under AgJOBS will be granted provisional "blue card status" which will entitle them to live and work in the United States, as well as travel within and outside the United States.<sup>86</sup> A qualifying agricultural worker,<sup>87</sup> along with his or her spouse and any minor children who are present in the United States, will

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according to the U.S. Dept. of State, in 2010, 52,317 of the 55,921 H-2A seasonal guest workers came from Mexico).

<sup>81</sup> See, e.g., ST. OF CAL. EMPLOY. DEV. DEPT., CALIFORNIA AGRICULTURAL BULLETIN 1-2 (3<sup>rd</sup> Qtr. 2010), available at <http://www.calmis.ca.gov/file/agric/2010-3cab.pdf> (indicating that during the third quarter of 2010, there were over 350,000 agricultural employment jobs in California); Chris Collins, *Special Report on Illegal Immigration: Entry into U.S. a Game of Chance for Low-skilled Workers*, THE SACRAMENTO BEE, Nov. 20, 2010, <http://www.sacbee.com/2010/11/20/3200075/special-report-on-illegal-immigration.html> (suggesting that there may be as many as "650,000 farmworkers in California alone," with most being illegal immigrants).

<sup>82</sup> See, e.g., *infra* notes 83-95 and accompanying text; *supra* notes 71, 80-81 and accompanying text.

<sup>83</sup> Comprehensive Immigration Reform Act of 2011, S. 1258, 112th Cong. §§ 150-159 (2011) (introduced June 22, 2011), available at <http://www.gpo.gov/fdsys/pkg/BILLS-112s1258is/pdf/BILLS-112s1258is.pdf>.

<sup>84</sup> *Id.*

<sup>85</sup> *Id.* § 151(h).

<sup>86</sup> *Id.* § 151(a), § 151(b), § 151(c), § 151(i)(1).

<sup>87</sup> *Id.* § 151(a) (defining an "alien who qualifies" as one who has worked in agriculture for at least 150 days "during the 24-month period ending on December 31, 2010", is "otherwise admissible to the United States under [8 U.S.C. § 1182]", and has "not been convicted" of a crime involving "bodily injury, threat of serious bodily injury, or harm to property in excess of \$500").

be issued a “blue card” with identifying biometric data.<sup>88</sup> In three to five years, upon meeting certain criteria – namely, continued substantial employment in the agriculture industry – the blue card holder may apply for permanent resident alien “green card” status.<sup>89</sup>

In addition to legalizing current unauthorized farm workers, AgJOBS also proposes employer-friendly changes to the current H-2A program in order to streamline the program and make it more effective by responding to the unique needs of agribusinesses.<sup>90</sup> AgJOBS would allow farm employers to self-certify<sup>91</sup> their needs for agricultural guest workers with certification taking place within seven days of application.<sup>92</sup> These concessions will allow farmers more flexibility, a vital component to farm labor employment given the uncertainty inherent in crop production that is subject to nuances in the weather and annual climate variances.<sup>93</sup> Further, AgJOBS would allow farm employers to pay H-2A workers a “reasonable housing allowance” in lieu of the free housing that they had been required to provide under previous H-2A regulations.<sup>94</sup> Additionally, AgJOBS would freeze wages for H-2A workers at the January 2011 levels for three years, giving Congress a chance to review the current H-2A wage-setting mechanisms in place.<sup>95</sup> AgJOBS would immediately supply agribusinesses with the legal workers they need, while providing many unauthorized immigrant farm workers currently living in the United States greater access to the rights, benefits and opportunities afforded those legally living in the United States.<sup>96</sup> A solution to the disparity

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<sup>88</sup> *Id.* § 151(f) (indicating that issued cards will contain “biometric identifiers, including fingerprints and a digital photograph; and physical security features designed to prevent tampering, [and] counterfeiting”).

<sup>89</sup> Comprehensive Immigration Reform Act of 2011, S. 1258, 112th Cong. § 153(a) (2011), available at <http://www.gpo.gov/fdsys/pkg/BILLS-112s1258is/pdf/BILLS-112s1258is.pdf>.

<sup>90</sup> See *infra* notes 91-95 and accompanying text.

<sup>91</sup> S. 1258, 112th Cong. § 159 (2011), *supra* note 83 (amending Sec. 218 of the Immigration and Nationality Act (“INA”) to require that applications be reviewed by the U.S. Secretary of Labor “only for completeness and obvious inaccuracies”) (to be codified at INA § 218(e)(2)(B)).

<sup>92</sup> S. 1258, 112th Cong. § 159 (2011), *supra* note 83 (providing that “certification shall be provided not later than 7 days after the application filed”).

<sup>93</sup> AM. FARM BUREAU – ECON. ANALYSIS TEAM, IMPACT OF MIGRANT LABOR RESTRICTIONS ON THE AGRICULTURAL SECTOR 12, 19 (Feb. 2006), available at <http://www.extension.org/mediawiki/files/9/91/labor-econanal06206.pdf>.

<sup>94</sup> S. 1258 § 159 (amending Sec. 218 of the INA to require use of the “statewide average fair market rental” of comparable localities to determine the “reasonable housing allowance”) (to be codified at INA § 218A(b)(1)(G)).

<sup>95</sup> See *id.* (amending Sec. 218 of the INA) (to be codified at INA § 218(b)(3)(B)).

<sup>96</sup> See *supra* notes 85-95 and accompanying text.

between needed illegal workers and protected legitimate workers centers on finding a way to legitimize enough workers to satisfy the needs of agribusiness, while at the same time providing enhanced opportunities for those businesses complying with immigration laws.

### III. PROPOSAL: USDA CERTIFIED LEGAL PRODUCERS PROGRAM

This Comment advocates implementation of a voluntary, state-wide *USDA Certified Legal Producers* (“CLP”) program that is subsidized by the California Department of Food and Agriculture (“CDFA”) and the USDA.<sup>97</sup> The program requires participant-employers to comply with a set of standards established by the CDFA. Compliance will allow the agribusiness to advertise through promotions and labeling that they are a *USDA Certified Legal Producer*, meaning that they only employ workers who are legally able to work in the United States.<sup>98</sup> The program would be overseen by the CDFA, which would subsidize the operating costs associated with implementation and marketing, including an aggressive, nationwide advertising and promotion program. This would be similar to other CDFA agriculture marketing programs currently in place, such as the California Milk Processor Board’s (“CMPB”) “Got Milk?”<sup>®</sup> campaign, the California Milk Producers Advisory Board’s (“CMAB”) “Happy Cows – Real California Cheese<sup>®</sup>” campaign, and the “California Grown<sup>®</sup> – Be Californian, Buy California” campaign.<sup>99</sup> Agribusinesses choosing to enroll in the program would have to use the federal government’s internet-based E-verify system to check employee eligibility,<sup>100</sup> and would subject themselves to random site checks by the CDFA for continued compliance.<sup>101</sup> The additional costs to the businesses associated with ensuring compliance will be recouped with higher prices demanded for the *USDA Certified Legal Producer* products.<sup>102</sup> Studies have conclusively determined that aggressive advertising programs can

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<sup>97</sup> See *infra* notes 122-123, 125, 185-189 and accompanying text.

<sup>98</sup> See *infra* notes 132-134 and accompanying text.

<sup>99</sup> See *Marketing Branch Home: Marketing Orders, Agreements, Councils and Commission Laws*, CAL. DEP’T OF FOOD AND AGRIC., <http://www.cdfa.ca.gov/mkt/mkt/ordslaw.html>.

<sup>100</sup> See *E-Verify*, DEP’T OF HOMELAND SEC., [http://www.dhs.gov/files/programs/gc\\_1185221678150.shtm](http://www.dhs.gov/files/programs/gc_1185221678150.shtm). (“E-Verify is an Internet-based system that allows an employer, using information reported on an employee’s Form I-9, Employment Eligibility Verification, to determine the eligibility of that employee to work in the United States.”).

<sup>101</sup> See *infra* notes 143-144 and accompanying text.

<sup>102</sup> See *infra* notes 105-106, 165-172 and accompanying text.

increase demand for certain products,<sup>103</sup> and that consumers are willing to pay more money for agricultural products, the specialized production of which comports with their political and ideological views.<sup>104</sup> Further, this program would reduce job opportunities for illegal workers, thereby creating a deterrence to future illegal immigration and an impetus for self-deportation.<sup>105</sup> The CLP program will be an effective alternative to aggressive anti-illegal immigration statutes and legislation, which tend to incite anger and encourage complaints of racism.<sup>106</sup>

The caveat, however, is that the federal government must find a way to provide the necessary farm workers to the agribusinesses that desperately need them.<sup>107</sup> While a higher purchase point price will allow complying businesses to pay more in labor costs yet maintain existing profit margins, it remains unlikely that the workforce, even at a higher hourly rate can be filled solely with domestic labor, given the temporary, seasonal,

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<sup>103</sup> See *Columbia Business School Case Study on Real California Cheese® Campaign*, CAL. MILK ADVISORY BD. (Apr. 8, 2005), [http://www.californiadairypressroom.com/Press\\_Releases/Case\\_Studies/Columbia\\_Business\\_School\\_Case\\_Study\\_on\\_Real\\_California\\_Cheese\\_Campaign](http://www.californiadairypressroom.com/Press_Releases/Case_Studies/Columbia_Business_School_Case_Study_on_Real_California_Cheese_Campaign) [hereinafter *Columbia Business School*] (finding that cheese production in California increased over 700% from 1983 to 2005 due largely to the Real California Cheese® marketing campaign, “dramatically [transforming] the state’s dairy industry and [helping] make California the nation’s leading producer”).

<sup>104</sup> See, e.g., Kristin Kiesel and Sofia B. Villas-Boas, *USDA Organics: What is it Worth to the Consumer?* AGRIC. & RES. ECON. UPDATE 6-8 (Univ. of Cal. Giannini Found., Davis, Cal.), Nov./Dec. 2007, [http://www.agecon.ucdavis.edu/extension/update/articles/v11n2\\_2.pdf](http://www.agecon.ucdavis.edu/extension/update/articles/v11n2_2.pdf) (finding that Americans are willing to pay more money for USDA organic labeled milk); Yuko Onozaka, et al., *What Exactly are They Paying For? Explaining the Price Premium for Organic Fresh produce, Agricultural and Resource Economics*, AGRIC. & RES. ECON. UPDATE 2-4 (Univ. of Cal. Giannini Found., Davis, Cal.), July/Aug. 2006, [http://www.agecon.ucdavis.edu/extension/update/articles/v9n6\\_1.pdf](http://www.agecon.ucdavis.edu/extension/update/articles/v9n6_1.pdf) (concluding that research has found that Americans are willing to pay more for pesticide-free produce as well as that which is grown in an environmentally-friendly manner).

<sup>105</sup> See e.g., Stephen Magagnini, *Improving Mexican Economy Draws Undocumented Immigrants Home from California*, THE SACRAMENTO BEE, Jul. 28, 2011, <http://www.sacbee.com/2011/07/28/3799513/improving-mexican-economy-draws.html> (reporting that “300,000 undocumented immigrants have left California since 2008,” because it has become easier to find employment in Mexico); JEFFERY PASSEL & D’VERA COHN, UNAUTHORIZED IMMIGRANT POPULATION: NATIONAL AND STATE TRENDS, 2010 1-3 (2011), available at <http://pewhispanic.org/files/reports/133.pdf>; *Unauthorized Foreigners, 2000-2009*, 16 RURAL MIGRATION NEWS, no. 4, Oct. 2010, [http://migration.ucdavis.edu/rmn/more.php?id=1579\\_0\\_1\\_0](http://migration.ucdavis.edu/rmn/more.php?id=1579_0_1_0).

<sup>106</sup> See Amanda Lee Myers and Jacques Billeaud, *Arizona Law Comes After Years of Mounting Anger*, ABC NEWS (July 25, 2010), <http://abcnews.go.com/US/arizona-immigration-law-years-mounting-anger/story?id=11247140>.

<sup>107</sup> See *AgJOBS: Provisions, Eligibility*, *supra* note 70.

and grueling nature of the work.<sup>108</sup> The current version of the AgJOBS bill, or a similar measure, would be a vital component to any successful immigration reform, including the proposed CLP program. AgJOBS would legitimize illegal workers who have a history of regularly working in the United States agriculture industry thereby providing agribusinesses with the reliable, experienced, and legal workers they need.<sup>109</sup> In legitimizing these unauthorized farm workers, the AgJOBS bill would provide these immigrants greater access to the basic rights and benefits afforded those legally living in the United States.<sup>110</sup> In addition, the AgJOBS bill proposes to “streamline the H-2A [agricultural guest worker] program,” effectively providing agribusinesses access to greater numbers of legal seasonal foreign farm workers.<sup>111</sup>

Ultimately, the CLP program will reward complying agribusinesses through increased consumer demand for their products and consumer willingness to pay premium prices in order to voice their political opinions at the supermarket checkout counter.<sup>112</sup> Migrant farm workers will benefit by becoming legitimate employees, and legal U.S. residents, and will no longer be treated as second-class citizens, which often happens to immigrants who are in the country illegally.<sup>113</sup>

#### IV. IMPLEMENTATION

Governmental subsidization of the agricultural industry for societal and economic gain has a long and well-documented history in the United

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<sup>108</sup> See *id.*, *supra* note 70 (indicating that California lettuce producers were “unable to find enough [U.S.] workers to harvest lettuce in spring 2008 despite paying \$10 to \$19 an hour”).

<sup>109</sup> See *e.g.*, *id.* (suggesting that “[a]bout eighty percent of [currently] unauthorized crop workers would qualify [for legalized status].”); *supra* notes 83-95 and accompanying text.

<sup>110</sup> See Comprehensive Immigration Reform Act of 2011, S. 1258, 112th Cong. § 151(i)(1) (2011), available at <http://www.gpo.gov/fdsys/pkg/BILLS-112s1258is/pdf/BILLS-112s1258is.pdf> (“an alien granted blue card status (including a spouse or child of the alien granted derivative status) shall be considered to be an alien lawfully admitted for purposes of any law . . .”).

<sup>111</sup> See *e.g.*, *Immigration Reform: AgJOBS*, 16 RURAL MIGRATION NEWS, no. 2, Apr. 2010, [http://migration.ucdavis.edu/rmn/more.php?id=1530\\_0\\_4\\_0](http://migration.ucdavis.edu/rmn/more.php?id=1530_0_4_0); Collins, *supra* note 81.

<sup>112</sup> See, *e.g.*, *supra* notes 103-104 and accompanying text; *infra* notes 144, 163-170 and accompanying text.

<sup>113</sup> See, *e.g.*, OXFAM AMERICA, *supra* note 12, at 1-3; *America Needs AgJOBS, Not Harsh Guestworker Programs*, IMMIGRATION POLICY CENTER, <http://www.immigrationpolicy.org/just-facts/america-needs-agjobs-not-harsh-guestworker-programs>.

States.<sup>114</sup> In 1933, the Agricultural Adjustment Act (“Farm Bill”) was passed in an attempt to encourage American farmers to continue producing even during the tough economic times of the Great Depression.<sup>115</sup> Congress declared that it was the policy of Congress to balance supply and demand for farm commodities so that prices would support a decent income for farmers.<sup>116</sup> The 1933 Farm Bill provided federal monies to supplement farmer incomes in order to allow farmers to stay in business, as the government recognized the need for self-sufficiency in terms of domestic-grown food.<sup>117</sup> The Farm Bill has been renewed at every opportunity since its inception seventy-seven years ago.<sup>118</sup> Today, it has, on average, a budget of nearly fifty-seven billion dollars annually.<sup>119</sup> Some of these funds are used for the USDA’s Specialty Crop Block Grant program,<sup>120</sup> which awarded a sixty-four million dollar federal grant to California for promotion of its agricultural products.<sup>121</sup>

Statewide, the CDFA is involved in certifying and promoting many agricultural commodities through market programs, with producers and handlers typically sharing the costs associated with the programs.<sup>122</sup> However, the “Be Californian, Buy California” (“California Grown<sup>®</sup>”) campaign is funded primarily with USDA federal block grant monies and

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<sup>114</sup> See e.g., *Farm Bills*, THE NAT’L AGRIC. LAW CTR. <http://www.nationalaglawcenter.org/farmbills/#33>; *infra* notes 115–117 and accompanying text.

<sup>115</sup> See Agricultural Adjustment Act of 1933, Pub. Law No. 73-10, 48 Stat. 31 (1933), available at <http://www.nationalaglawcenter.org/assets/farmbills/1933.pdf>. (“An Act to relieve the existing national economic emergency by increasing agricultural purchasing power, to raise revenue for extraordinary expenses incurred by reason of such emergency, to provide emergency relief with respect to agricultural indebtedness . . .”).

<sup>116</sup> See Agricultural Adjustment Act of 1933, Pub. Law No. 73-10, 48 Stat. 31, 31-32 (1933).

<sup>117</sup> See Agricultural Adjustment Act of 1933, Pub. Law No. 73-10, 48 Stat. 31, 31, 38 (1933).

<sup>118</sup> See, e.g., Food, Conservation, and Energy Act of 2008, P.L. 110-246, 122 Stat. 1651 (codified as amended in scattered sections of titles 7, 15, 16 and 21 of the U.S.C.); *Farm Bills*, *supra* note 114.

<sup>119</sup> See Letter from Peter R. Orszag, Director, Congressional Budget Office, to Tom Harkin, Chairman, Committee on Agriculture, Nutrition, and Forestry (May 13, 2008), available at <http://www.cbo.gov/ftpdocs/92xx/doc9230/hr2419conf.pdf> (“\$35 billion is for agricultural commodity programs”).

<sup>120</sup> See *Commodity Areas*, USDA AGRIC. MKTG. SERV., <http://www.ams.usda.gov/AMSV1.0/ams.fetchTemplateData.do?template=TemplateN&navID=SpecialtyCropBlockGrant0Program&rightNav1=SpecialtyCropBlockGrant0Program&topNav=&leftNav=CommodityAreas&page=SCBGP&resultType>.

<sup>121</sup> See A. K. Kawamura, *Welcome*, THE BUY CALIFORNIA INITIATIVE, <http://www.buycalinit.com/> (last visited Jan. 5, 2011).

<sup>122</sup> See *What are Marketing Programs?*, CAL. DEP’T OF FOOD AND AGRIC., MKTG. DIV., <http://www.cdfa.ca.gov/mkt/mkt/about.html> (last visited Mar. 2, 2012).

is managed by the CDFA.<sup>123</sup> The California Grown<sup>®</sup> campaign created a partnership between government entities and the agriculture industry to promote the consumption of California-grown produce<sup>124</sup> and provides a comparable framework in which a CLP program could work.

The CLP program, similar to California Grown<sup>®</sup>, would be a hybrid of the federal and state agricultural programs whereby the federal government subsidizes the program and the state department of agriculture implements the program.<sup>125</sup> Some nominal costs associated with program participation will be borne by the agribusinesses as a result of enrolling in, and utilizing the federal E-verify system.<sup>126</sup> Furthermore, complying businesses may be forced to increase wages in order to attract legitimate workers in lieu of current illegal workers.<sup>127</sup> In the alternative, similar to the CMPB “Got Milk?<sup>®</sup>” and CMAB “Happy Cows – Real California Cheese<sup>®</sup>” campaigns and the California Organics Program<sup>®</sup>, agribusinesses wishing to become *USDA Certified Legal Producers* could directly subsidize the program, with assessments in this case based upon the numbers of employees or size of the farms.<sup>128</sup> These costs will be recouped with higher prices and increased demand at the marketplace created by effective marketing programs financed by these monies.<sup>129</sup>

CLPs would be agribusinesses that employ legitimate farm workers. By labeling their products with the CLP label they are guaranteeing to the consumer that they are complying with the federal IRCA provisions, and that none of their employees are working in the country illegally.<sup>130</sup> Complying businesses will agree to open their doors to random workplace inspections to ensure continuing compliance, which is similar to

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<sup>123</sup> See, e.g., THE BUY CALIFORNIA INITIATIVE, *supra* note 121; CAL. DEP’T OF FOOD AND AGRIC., “BUY CALIFORNIA” MKTG. AGREEMENT, ST. OF CAL. DEP’T OF FOOD AND AGRIC. MKTG. BRANCH (2011), available at <http://www.cdfa.ca.gov/mkt/mkt/pdf/buycal.pdf>.

<sup>124</sup> See *Program Overview*, CA GROWN, <http://www.californiagrown.org/program/overview.asp> (last visited Mar. 2, 2012).

<sup>125</sup> See *supra* notes 119-124 and accompanying text.

<sup>126</sup> See Jena Baker McNeill, Policy Analyst for Homeland Security, The Heritage Foundation, Testimony before Committee of Oversight et al., U.S. H. R. (July 23, 2009), available at <http://www.heritage.org/research/testimony/e-verify-challenges-and-opportunities> (indicating that employer costs to set up and operate the E-Verify system averaged about \$22 per employee vetted).

<sup>127</sup> See LINDA LEVINE, CONG. RESEARCH SERV., IMMIGRATION: THE LABOR MARKET EFFECTS OF A GUEST WORKER PROGRAM FOR U.S. FARMERS, CSR5 (2004), available at [http://digitalcommons.ilr.cornell.edu/key\\_workplace/198](http://digitalcommons.ilr.cornell.edu/key_workplace/198).

<sup>128</sup> See *infra* notes 150-151, 158, 164 and accompanying text.

<sup>129</sup> See *infra* note 146 and accompanying text.

<sup>130</sup> Immigration Reform and Control Act § 101, 8 U.S.C. § 1324(a) (2005); See also *Hoffman Plastic Compounds, Inc. v. NLRB*, 535 U.S. 137, 147, 155 (2002).

the existing CDFA-operated marketing programs in place.<sup>131</sup> Additionally, CLP businesses, as a result of their voluntary enrollment in the program, will be required to run all current and future employees through the existing federal E-verify database.<sup>132</sup>

#### A. E-Verify

E-Verify allows employers to electronically verify the immigration status of their newly hired employees.<sup>133</sup> Enrollment in and use of E-Verify is quick, easy, and inexpensive.<sup>134</sup> Yet, E-Verify has proven to be extremely effective and accurate with over ninety-six percent of all employees vetted through the internet-based E-Verify instantly confirmed as legal to work.<sup>135</sup> As of May 2009, less than half a percent of all E-Verify returns were erroneous non-confirmations of documented U.S. citizens, thereby necessitating additional inquiry to resolve.<sup>136</sup> Further, as an incentive to use E-Verify, employers who vet their employees through the federal database can rely on the good faith use of E-Verify as an affirmative defense in the event they are charged with the hiring of illegal workers.<sup>137</sup>

Currently, federal contractors must use E-Verify, and ten states utilize the database to verify the eligibility status of recently hired state employees.<sup>138</sup> Arizona, South Carolina, and Mississippi require all employers, both in the public sector and private sector, to use E-Verify,<sup>139</sup> with the

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<sup>131</sup> See, e.g., CAL. ORGANIC PROD. ACT OF 2003, CAL. HEALTH & SAFETY CODE § 110959 (West 2012), available at <http://www.cdfa.ca.gov/is/docs/copa2003.pdf> (requiring “spot inspections” of organic producers to “verify continuing compliance” with the California Organic Products Act of 2003); CAL. MKTG. ACT OF 1937, CAL. FOOD & AGRIC. CODE §§ 59282-59283 (West 2012), available at <http://www.cdfa.ca.gov/mkt/mkt/pdf/mrktact07.pdf>.

<sup>132</sup> See, e.g., *E-Verify Overview*, U.S. CITIZENSHIP AND IMMIGR. SERV., <http://www.uscis.gov/portal/site/uscis/menuitem.eb1d4c2a3e5b9ac89243c6a7543f6d1a/?vgnextoid=7f19fb41c8596210VgnVCM100000b92ca60aRCRD&vgnnextchannel=7f19fb41c8596210VgnVCM100000b92ca60aRCRD> (last visited Mar. 2, 2012); McNeill, *supra* note 126.

<sup>133</sup> See *E-Verify Overview*, *supra* note 132.

<sup>134</sup> Janice Kephart, Director of National Security Policy, Center for Immigration Studies, Testimony before Committee of Oversight et al., U.S. H. R. (July 23, 2009), available at <http://www.cis.org/Testimony/E-Verify-ChallengesAndOpportunities>.

<sup>135</sup> *Id.* (reporting that in May 2009, 96.1% of employees vetted through E-verify were instantly confirmed).

<sup>136</sup> *Id.*

<sup>137</sup> *Id.*

<sup>138</sup> *DHS: Border, Interior, Services*, *supra* note 42.

<sup>139</sup> Kephart, *supra* note 134.

United States Court of Appeals, Ninth Circuit, upholding an Arizona law that mandates that all Arizona employers use the system.<sup>140</sup>

The main component of the CLP program would involve mandatory use of E-verify by those choosing to enroll in the program. Concurrent with such use would be random periodic workplace inspections, similar to the California Organics Program<sup>®</sup> and National Organics Program<sup>®</sup>, both of which regulate the production and labeling of USDA Organic products.<sup>141</sup> In order to discourage fraudulent participation in the program, such checks would include verification of records of employees, as well as reconciliation of numbers of employees and submitted queries.<sup>142</sup>

To enroll, agribusinesses would simply provide the requisite paperwork to the CDFA indicating their willingness to comply with the program's rules and requirements. After vetting their employees through E-Verify and subsequent approval, the employer would be permitted to use the *USDA Certified Legal Producer* seal on all products produced at the business.

### *B. Existing CDFA Marketing Templates for Commodity Advertising*

The CDFA would implement the CLP program, utilizing the same models that are currently in place for similar agricultural programs.<sup>143</sup> Monies provided, through federal subsidization or participant enrollment fees would be used for enforcement, promotion, and marketing and advertising. A nationwide advertising program would be implemented to create awareness of the program and demand for its products, similar to

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<sup>140</sup> *Chicanos Por La Causa, Inc. v. Napolitano*, 558 F.3d 856, 866-867 (9th Cir. 2009).

<sup>141</sup> See CAL. ORGANIC PROD. ACT OF 2003, CAL. HEALTH & SAFETY CODE §§ 110880, 110890, 110895, 110900, 110959 (West 2012) (“[T]he director shall conduct a program of spot inspections . . . to verify continuing compliance with this article and the regulations adopted by the [National Organics Program] . . .”).

<sup>142</sup> See CAL. ORGANIC PROD. ACT OF 2003, CAL. FOOD & AGRIC. CODE §§ 46000, 46029(a) (West 2012) (Proposed CLP statutory language to be modeled after the California Organics Program<sup>®</sup>, i.e. “Any producer, handler, processor or retailer of product sold as certified legally produced shall immediately make available for inspection by, and shall upon request, within 72 hours of the request, provide a copy to, the secretary, the Attorney General, any prosecuting attorney, any governmental agency responsible for enforcing laws related to the production or handling of products sold as certified legally produced, or any record required to be kept under this section for purposes of carrying out this act.”).

<sup>143</sup> See, e.g., CAL. MKTG. ACT OF 1937, CAL. FOOD & AGRIC. CODE §§ 59282-59283 (West 2012); HEALTH & SAFETY § 110959 (West 2012); *infra* notes 146-164 and accompanying text.

the highly successful Got Milk?<sup>®</sup> and Happy Cows/Real California Cheese<sup>®</sup> campaigns.<sup>144</sup>

The CMAB Real California Cheese<sup>®</sup> program has created nationwide demand for California-produced cheese and has survived lawsuits questioning the constitutionality of the program.<sup>145</sup> The groundwork for the program was laid in 1937, through implementation of the California Marketing Act, California Food and Agricultural Code section 58601 *et seq.* The California Marketing Act was established “to develop more efficient and equitable methods [of marketing commodities,]” and to “provide methods and means for [maintaining] present markets, or for [developing] new or larger markets, for commodities that are grown within [the] state . . . .”<sup>146</sup> The CMAB, formed as a result of the Milk Marketing Order which came out of the California Marketing Act, is authorized to “conduct research, prepare and present educational programs, engage in advertising and promotional activities, and develop and regulate the use of certification marks for dairy products.”<sup>147</sup> These programs and activities are funded by compulsory assessments based on volume of milk produced by each of the state’s dairy producers.<sup>148</sup> The CMAB represents the more than 1,600 dairy farmers in California, with twenty-four of the dairy farmers comprising the board of directors which governs its activities.<sup>149</sup>

“The growth of the California cheese industry over the past 20-plus years is nothing short of a tremendous success story,” noted Michelle Greenwald, a Columbia University Graduate School of Business professor, and author of a Real California Cheese<sup>®</sup> case study.<sup>150</sup> The promotion “[began] in 1983 when the CMAB” recognized the increasing surplus of the state’s milk supply at the farm level.<sup>151</sup> Based on the Stanford Research Institute’s projections for significant growth in the demand for cheese products, the California dairy industry “focused on cheese pro-

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<sup>144</sup> See, e.g., HARRIS INTERACTIVE, “GOT MILK?” FROM MEMORABLE TO MOTIVATIONAL 6 (2007), available at [http://www.harrisinteractive.com/vault/HI\\_BSC\\_CASESTUDY\\_Milk.pdf](http://www.harrisinteractive.com/vault/HI_BSC_CASESTUDY_Milk.pdf); *Columbia Business School*, *supra* note 103.

<sup>145</sup> See, e.g., *Gallo Cattle Company v. California Milk Advisory Board*, 185 F.3d 969, 977 (9th Cir. 1999); *Columbia Business School*, *supra* note 103.

<sup>146</sup> CAL. MKTG. ACT OF 1937, CAL. FOOD & AGRIC. CODE §§ 58652, 58654 (West 2012).

<sup>147</sup> *Gallo*, 185 F.3d at 971.

<sup>148</sup> *Id.*

<sup>149</sup> See *Mission of the CMAB*, REAL CALIFORNIA MILK, <http://www.realcaliforniamilk.com/about/cmab/> (last visited Sept. 6, 2011).

<sup>150</sup> *Columbia Business School*, *supra* note 103.

<sup>151</sup> *Id.*

duction and created the Real California Cheese<sup>®</sup>] certification mark.”<sup>152</sup> “California cheese production grew” by over 700% from inception of the program in 1983 until 2005.<sup>153</sup> The program, in addition to success at the production level, also survived a challenge of constitutionality to the mandatory nature of the program posed by cheese producer Gallo Cattle Company.<sup>154</sup> In *Gallo Cattle Company v. California Milk Advisory Board*, 185 F.3d 969 (9th Cir. 1999), the Ninth Circuit of the United States Court of Appeals held that the CMAB’s compulsory assessments for promotion and advertising of California milk and dairy products did not violate “Gallo’s First Amendment rights.”<sup>155</sup>

The CMPB Got Milk<sup>®</sup> campaign is a processor-funded state fluid milk promotion program funded by a three cent per fluid gallon assessment on the state’s milk producers.<sup>156</sup> The CMPB was created in 1993 as a response to a decrease in milk consumption.<sup>157</sup> While the CMPB is funded by the producers, pursuant to the California Marketing Act, the CDFA provides oversight and administration of the CMPB and its programs.<sup>158</sup> Similarly, with the CMAB and CMPB marketing templates in place, administration by the CDFA of a *Certified Legal Producers* program would comport with what the CDFA is already doing and has been doing for decades, as provided for by the California Marketing Act.<sup>159</sup>

### C. Comparable Programs and Predictable Results

The California Organic Program<sup>®</sup>, although missing the promotional elements that are prevalent in the CMAB and CMPB programs, provides another strong existing CDFA framework on which to base a CLP program. The National Organic Program<sup>®</sup> and the statewide California Organic Program<sup>®</sup> require producers of agricultural products sold as organic to be certified if their annual gross sales exceed five thousand

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<sup>152</sup> *Id.* (noting that the campaign integrated “advertising, public relations, consumer and trade promotion, in-store and on-premise merchandising, foodservice programs and Internet promotion”).

<sup>153</sup> *Id.*

<sup>154</sup> *Gallo*, 185 F.3d at 975-977.

<sup>155</sup> *Id.* at 975-978.

<sup>156</sup> Douglas B. Holt, *got milk?*, ADVERTISING EDUCATIONAL FOUNDATION (2002), [http://www.aef.com/on\\_campus/classroom/case\\_histories/3000](http://www.aef.com/on_campus/classroom/case_histories/3000).

<sup>157</sup> *Id.* See also Press Release, *got milk?*, *Chocolate Milk: The Treat of Choice this Halloween* (Oct. 17, 2011) (on file with author), available at [http://gotmilk.com/pdf/news/Milk\\_Halloween\\_Event.pdf](http://gotmilk.com/pdf/news/Milk_Halloween_Event.pdf).

<sup>158</sup> See CAL. MKTG. ACT OF 1937, CAL. FOOD & AGRIC. CODE §§ 58605, 58654, 58711, 58712 (West 2012).

<sup>159</sup> See AGRIC. §§ 58601, 58605, 58654 (West 2012).

dollars.<sup>160</sup> This certification allows these producers to use USDA Organic labels on their products.<sup>161</sup> In California, the programs are administered through the CDFA, with costs of program administration and promotion paid directly by participating growers, and through federal subsidies.<sup>162</sup>

The USDA label is a boon to organic growers.<sup>163</sup> Studies have determined that “consumers are willing to pay a premium for . . . labels that address health and environmental-related concerns.”<sup>164</sup> In fact, some consumers were willing to pay a 40-45% price premium for organically labeled milk.<sup>165</sup> A 2000-2003 study analyzing over 40,000 daily purchases found that participating households were willing to pay, on average, twenty-three cents per gallon, or ten percent, more for USDA organically labeled milk.<sup>166</sup> A mathematical variation using the same data, put the average figure at sixty-three cents per gallon of organic milk in determining a “willingness to pay for the USDA organic seal.”<sup>167</sup> Further, the study determined that in addition to a willingness to pay more for the organic milk products, consumers were more willing to purchase organically labeled milk products in general.<sup>168</sup> Milk products labeled USDA organic were sixteen percent more likely to be purchased than similar products not bearing the organic designation.<sup>169</sup> Another study which evaluated the purchasing habits of California consumers in terms of “willingness to pay” concluded that “voluntary contribution to society

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<sup>160</sup> *California Organic Program*, CAL. DEP’T OF FOOD AND AGRIC., [http://www.cdfa.ca.gov/is/i\\_&c/organic.html](http://www.cdfa.ca.gov/is/i_&c/organic.html) (last visited Sept. 6, 2011).

<sup>161</sup> *See NOP Regulations*, U.S. DEP’T OF AGRIC., AGRIC. MKTG SERV. (Feb. 4, 2010), <http://www.ams.usda.gov/AMSv1.0/ams.fetchTemplateData.do?template=TemplateN&navID=NationalOrganicProgram&leftNav=NationalOrganicProram&page=NOPSealinNOPStandards&description=NOP%20Seal%20in%20the%20NOP%20Regulations&acct=nopgeninfo>.

<sup>162</sup> *See, e.g., California Organic Program*, *supra* note 160; *Organic Cost Share Programs*, U.S. DEP’T OF AGRIC., AGRIC. MKTG SERV. (Jul. 27, 2011), <http://www.ams.usda.gov/AMSv1.0/ams.fetchTemplateData.do?template=TemplateQ&leftNav=NationalOrganicProgram&page=NOPCostSharing&description=Organic%20Cost%20Share%20Program&acct=nopgeninfo>.

<sup>163</sup> *See Kiesel & Villas-Boas*, *supra* note 104, at 6 (concluding that “[l]abeling a milk product as organic has significant and very sizable effects”).

<sup>164</sup> *See, e.g., id.*; Yuko Onozaka et al., *supra* note 104, at 4.

<sup>165</sup> *See Kiesel & Villas-Boas*, *supra* note 104, at 6.

<sup>166</sup> *Id.* at 5-7.

<sup>167</sup> *Id.* at 8.

<sup>168</sup> *Id.* at 6.

<sup>169</sup> *See Id.*

as a whole through their product choice . . . is a significant motivation [for consumers].”<sup>170</sup>

This empirical evidence suggests that there would be increased demand and a willingness to pay a price premium for CLP foods in light of the strong feelings that Americans currently have about illegal immigration.<sup>171</sup> The purchase of CLP products would allow consumers to voice their political and philosophical views on immigration through economic decision making.<sup>172</sup> Combining this, with the aggressive, nationwide advertising and promotion strategies similarly employed by the CMAB’s “Happy Cows<sup>®</sup>” program and CMPB’s “Got Milk?<sup>®</sup>” campaign, the CLP program will effectively generate a significant increase in demand and a willingness to pay more for legally harvested produce.

*D. Labor Costs in Relation to Total Price Paid: Will the Price Premium be Sufficient?*

On average, farmers receive about eighteen percent of the “food dollar expenditures” made by consumers for purchases of agricultural products at grocery stores.<sup>173</sup> Farm labor costs account for approximately one-fourth of the total monies received by the farmer.<sup>174</sup> Thus, less than five percent of the retail price paid reflects the actual labor costs associated with harvesting the produce.<sup>175</sup> Therefore, for every dollar spent on produce at the supermarket, roughly twenty cents goes to the farmer with almost five cents of that going towards farm labor.<sup>176</sup> Extrapolating this information, it is evident that even a doubling of farm labor wages would

<sup>170</sup> Onozaka et al., *supra* note 104, at 4.

<sup>171</sup> See, e.g., *Washington Post - ABC News Poll*, *supra* note 5 (finding that 75% of those polled felt that the U.S. was “not doing enough to keep illegal immigrants from coming into this country”); *supra* notes 164-170 and accompanying text.

<sup>172</sup> See generally, e.g., *Washington Post - ABC News Poll*, *supra* note 5 (finding that 57% of those polled supported “a program giving ILLEGAL immigrants now living in the United States the right to live here LEGALLY if they pay a fine and meet other requirements”); Onozaka et al., *supra* note 104, at 3-4 (indicating that consumers are willing to pay more for produce that is identified as “pesticide free” or “environmentally friendly”).

<sup>173</sup> PATRICK CANNING, U.S. DEPT. OF AGRIC. ECON. RES. SERVICE, A REVISED AND EXPANDED FOOD DOLLAR SERIES: A BETTER UNDERSTANDING OF OUR FOOD COSTS 5, 8, 16, 19-21 (2011), available at <http://www.ers.usda.gov/Publications/ERR114/ERR114.pdf> (noting that when adding in the “away-from-home” purchases, farmers receive less than 12% of consumer “food dollar expenditures”).

<sup>174</sup> See, e.g., *id.* at 19-21; *Food Spending: 2009*, 16 RURAL MIGRATION NEWS, no. 4, Oct. 2010, [http://migration.ucdavis.edu/rmn/more.php?id=1573\\_0\\_5\\_0](http://migration.ucdavis.edu/rmn/more.php?id=1573_0_5_0).

<sup>175</sup> CANNING, *supra* note 175, at 19-21.

<sup>176</sup> *Id.*

likely only increase produce prices at the supermarket roughly five percent.<sup>177</sup>

While implementation of any illegal immigration strategy, including the proposed CLP program, will have some adverse affect on agribusinesses' labor costs, the extent is unclear and depends on the amount of workers retained for the farm work. A good measuring stick for the response of agribusinesses to any proposed changes, such as the CLP program, is to look at the reaction of farmers after the Bracero program was terminated. In 1966, mainly due to the absence of Bracero workers, farm worker wages for crops that had previously been harvested primarily with Bracero labor increased by forty percent.<sup>178</sup> If this forty percent wage increase were passed on to consumers, the five cent farm labor cost per dollar spent at the supermarket<sup>179</sup> would raise to seven cents, thereby "rais[ing] the price of a one dollar item . . . from \$1.00 to \$1.02."<sup>180</sup> This forty percent wage increase would only increase the average amount spent by consumers on fresh fruits and vegetables by "at the most . . . about sixteen dollars a year," yet would be enough to raise the income of a seasonal farmworker above federal poverty levels.<sup>181</sup> Therefore, any increase in labor costs incurred by participating CLP employers, even a forty percent wage increase, could be recouped with nominal retail price increases that are unlikely to have any significant impact on consumer purchase decisions.<sup>182</sup>

With the proposed CLP program borrowing the certification, accreditation and enforcement standards from the California Organics Program<sup>®</sup>,<sup>183</sup> and the promotional template from the CMAB,<sup>184</sup> CLP agribusinesses will enjoy increased demand for their products and in turn increased profits. All increases in labor and organizational costs associated with participation in the program would be effectively offset with consumer willingness to pay more for the CLP products. The CLP program will create voluntary employer compliance with the Congression-

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<sup>177</sup> See *supra* notes 173-176 and accompanying text.

<sup>178</sup> *Food Spending: 2009*, *supra* at note 174.

<sup>179</sup> See *supra* notes 173-176 and accompanying text.

<sup>180</sup> MARTIN, FARM LABOR SHORTAGES: HOW REAL? WHAT RESPONSE?, *supra* note 66, at 13.

<sup>181</sup> PHILIP MARTIN, FARM EXPORTS AND FARM LABOR, EPI BRIEFING PAPER, 1-2 (Econ. Pol'y Inst., 2011), <http://www.epi.org/page/-old/briefingpapers/BriefingPaper295.pdf> (noting that the average U.S. household spends \$430 annually on fresh fruits and vegetables, and that a 40% increase in farm wages would improve annual earnings for the individual seasonal farmworker from \$10,000 to \$14,000).

<sup>182</sup> See *supra* notes 179-181 and accompanying text.

<sup>183</sup> See *supra* notes 141, 160-162 and accompanying text.

<sup>184</sup> See *supra* notes 147-153 and accompanying text.

ally-mandated IRCA provisions, while providing legitimate employment for many Mexicans currently living in the United States, and will give consumers a clear and convincing voice in the process.

#### V. COMPORTING WITH EXISTING LEGISLATION AND FIRST AMENDMENT CHALLENGES TO CERTIFIED LABELING

Current legislation and case law strongly support the CLP program. Governmental monies needed to operate the voluntary program could be obtained by the State of California by way of federal block grant similar to the process in which the State obtained funding for the California Grown<sup>®</sup> program.<sup>185</sup> The current Farm Bill<sup>186</sup> provides for substantial mandatory funding including the “reauthorization of the program making block grants to states for research, marketing, and promotion projects benefiting specialty crops, providing \$466 million over ten years in mandatory funds.”<sup>187</sup> This provision paves the way for a grant to California to promote legally-produced food thereby benefiting the farmers who harvest those products. At the state level, the CDFA has received federal grant funding to advertise and promote California-grown products,<sup>188</sup> and a new program to promote California legally-produced food would seem a comparable venture that could be organized in a similar manner. In addition to the federal grant, the state of California budgeted six million dollars of its own toward the California Grown<sup>®</sup> campaign.<sup>189</sup> In the interests of reducing the fiscal drain of illegal immigration on the State,<sup>190</sup> this Comment proposes that the State supplement any federal grant monies with money of its own, as necessary.

Perhaps the biggest legal concern would be by non-participating employers who question the legality of using government funds for a select group, as well as the implications that those agricultural employers failing to display the label must have illegal workers. Many federal subsidies and grants are aimed at a specific agricultural farming practice,

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<sup>185</sup> See Kawamura, *supra* note 121. See also CAL. DEP’T OF FOOD AND AGRIC., “BUY CALIFORNIA” MKTG. AGREEMENT, ST. OF CAL. DEP’T OF FOOD AND AGRIC. MKTG. BRANCH (2011), available at <http://www.cdfa.ca.gov/mkt/mkt/pdf/buycal.pdf>.

<sup>186</sup> Food, Conservation, and Energy Act of 2008, P.L. 110-246, 122 Stat. 1651 (codified as amended in scattered sections of titles 7, 15, 16 and 21 of the U.S.C.).

<sup>187</sup> JEAN M. RAWSON, CONG. RESEARCH SERV., SPECIALTY CROPS: 2008 FARM BILL ISSUES (2008), available at <http://www.ncfh.org/pdfs/2k9/8138.pdf>.

<sup>188</sup> See Kawamura, *supra* note 121.

<sup>189</sup> See *id.*

<sup>190</sup> See *supra* note 9 and accompanying text.

whether it is organic growing,<sup>191</sup> environmentally-friendly farming, or specific crops.<sup>192</sup> Government funds supporting and encouraging the legal harvesting of produce should be viewed no differently than government funds supporting farmers who choose to grow organically or utilize conservation practices in the production of their crops.<sup>193</sup> Both are results of Congressional legislation, with the IRCA of 1986 enacted to prevent illegal immigrants from obtaining work<sup>194</sup> and the 2008 Farm Bill providing subsidies to growers and producers who specialize their products and production, thereby providing the United States with a safer and more secure agricultural industry.<sup>195</sup> There is precedent for federal expenditures aimed at subsidizing particular agricultural producers, and the CLP program is analogous to past and present subsidy programs.<sup>196</sup>

Another potential legal issue involves the constitutionality of the CLP program's advertising and labeling components. Two agricultural cases establish precedent that the CLP advertising and labeling of products will not interfere with any First Amendment rights.<sup>197</sup> In *Glickman v. Wileman Brothers*, 521 U.S. 457 (1997), the United States Supreme Court ruled that the marketing orders enacted by the Secretary of Agriculture pursuant to the Agricultural Marketing Agreement Act of 1937 ("AMAA") "[imposed] no restraint on the freedom of any producer to communicate any message to any audience."<sup>198</sup> Two years later, in *Gallo*

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<sup>191</sup> See ORGANIC PROVISIONS IN THE 2008 FARM BILL, ORGANIC FARMING RESEARCH FOUND. (May 20, 2008), available at [http://ofrf.org/policy/federal\\_legislation/farm\\_bill/080520\\_update.pdf](http://ofrf.org/policy/federal_legislation/farm_bill/080520_update.pdf).

<sup>192</sup> See e.g., *id.*; Ashley Elles, 2008 Farm Bill Fact Sheet, NAPA FARM BUREAU (Jan. 2009), available at <http://www.napafarmbureau.org/images/FarmBillFactSheet.pdf>.

<sup>193</sup> See, e.g., 2008 NCRS Farm Bill Conservation Programs, NATURAL RES. CONSERVATION SERV. (Dec. 2, 2010), <http://www.nrcs.usda.gov/programs/farmbill/2008/index.html> (last visited Jan. 5, 2011); 2008 Farm Bill Overview, U.S. DEP'T OF AGRIC. ECON. RES. SERV. (Aug. 20, 2008), <http://www.ers.usda.gov/FarmBill/2008/Overview.htm> (last visited Jan. 5, 2011).

<sup>194</sup> See, e.g., *Hoffman Plastic Compounds, Inc. v. NLRB*, 535 U.S. 137, 147, 155 (2002) (Breyer, J., (in dissent) "[T]he general purpose of the [IRCA's] employment prohibition is to diminish the attractive force of employment, which like a "magnet" pulls illegal immigrants toward the United States. H.R.Rep. No. 99-682, pt. 1, p.45 (1986)"); JACK L. RUNYAN, FEDERAL LAWS AND REGULATIONS AFFECTING AGRICULTURAL EMPLOYERS 30 (2000), available at <http://www.ers.usda.gov/publications/ah719/ah719f.pdf>.

<sup>195</sup> See 2008 Farm Bill Overview, *supra* note 193.

<sup>196</sup> See generally JEAN RAWSON, CONG. RESEARCH SERV., SPECIALTY CROPS: 2007 FARM BILL ISSUES CRS3-CRS4 (2008), available at <http://www.nationalaglawcenter.org/assets/crs/RL33520.pdf>.

<sup>197</sup> See, e.g., *Glickman v. Wileman Brothers & Elliot*, 521 U.S. 457, 472-476 (1997); *Gallo Cattle Company v. California Milk Advisory Board*, 185 F.3d 969, 977 (9th Cir. 1999).

<sup>198</sup> *Wileman*, 521 U.S. at 469-470.

v. *California Milk Advisory Board*, the United States Court of Appeals reiterated the Supreme Court ruling in *Wileman*.<sup>199</sup>

In *Gallo*, plaintiff suggested that due to the Real California Cheese® promotional campaign, they were compelled to include the Real California Cheese® seal on their products or risk consumer ostracization.<sup>200</sup> The Court of Appeals dismissed this argument, indicating that the labeling and marketing campaigns did not limit Gallo's First Amendment right to advertising or promote their product as they desired.<sup>201</sup> The court held, "Gallo is free to advertise or otherwise communicate any message that it desires in any manner that it desires to any audience that it desires."<sup>202</sup> Extending *Gallo* and *Wileman* to the CLP program may serve as viable precedent to defeat the argument that there is an inference that a product without a CLP label is inferior and has been harvested with illegal labor.

## VI. ADDITIONAL BENEFITS OF THE CLP

Ending the growers' dependence on cheap, readily-available labor, will require changes in farming practices and in the farming culture itself. After the Bracero program ended, farm worker wages rose sharply, and there was a wave of crop harvest and production mechanization and farm labor union activity.<sup>203</sup> There is no reason to expect that this would not occur today. Technological innovation, spurred by the inability of farmers to depend on low-wage labor, may actually decrease rather than increase agricultural prices.<sup>204</sup> In the 1960s when the government was contemplating ending the Bracero program, growers in California testified that "the use of braceros is absolutely essential to the survival of the tomato industry."<sup>205</sup> Nonetheless, the Bracero program was terminated, and, subsequently, the use of labor-saving machinery in the tomato in-

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<sup>199</sup> See *Gallo*, 185 F.3d at 977-978.

<sup>200</sup> See *id.* at 976 (arguing that without the use of the Real California Cheese® Seal, Gallo will be "indirectly [implying] to consumers [that] its cheese . . . is inferior").

<sup>201</sup> *Id.* at 975-976.

<sup>202</sup> *Id.* at 975.

<sup>203</sup> See, e.g., MARTIN, FARM LABOR SHORTAGES: HOW REAL? WHAT RESPONSE?, *supra* note 66, at 10-11 (pointing out that UC Davis botanists developed "tomatoes that ripened uniformly so they could be harvested in one pass" by machines developed by agricultural engineers); *Braceros: History, Compensation*, 12 RURAL MIGRATION NEWS, no. 2, Apr. 2006, [http://migration.ucdavis.edu/rmn/more.php?id=1112\\_0\\_4\\_0](http://migration.ucdavis.edu/rmn/more.php?id=1112_0_4_0).

<sup>204</sup> See, e.g., MARTIN, FARM LABOR SHORTAGES: HOW REAL? WHAT RESPONSE?, *supra* note 66, at 11; KRİKORIAN, *supra* note 12, at 2.

<sup>205</sup> KRİKORIAN, *supra* note 12, at 2.

dustry increased, which ultimately lead to greater tomato production and lower prices for ketchup and other tomato products.<sup>206</sup>

Perhaps most importantly, implementation of the CLP program would save lives. The CLP will discourage Mexican citizens from attempting to cross the border illegally as fewer agricultural jobs will be available to them.<sup>207</sup> Currently, border crossings are a dangerous and expensive venture with the possibility of death at the hands of smugglers, drug cartels, or exposure.<sup>208</sup> In August 2010, seventy-two people intending to immigrate into the United States were found dead, executed, at a ranch near the U.S.-Mexican border.<sup>209</sup> This is indicative of the dangers that illegal border-crossers face.<sup>210</sup> In fact, roughly 400 illegal immigrants perish every year in deserts while attempting to immigrate.<sup>211</sup> Increased security at the border has not decreased attempts at immigration, but rather increased immigrant reliance on coyotes<sup>212</sup> and smugglers who often rob, injure, or kill would-be immigrants.<sup>213</sup> With potential employment drawing most immigrants into the United States, a program to reduce opportunities for employment of illegal immigrants will likely stem the tide,<sup>214</sup> and provide motivation for those same individuals to pursue a safer, legal path to immigration into the United States.

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<sup>206</sup> *Id.* Mark Krikorian, *To Help Farm Workers, Stop Importing More of Them*, THE CHRISTIAN SCI. MONITOR, July 25, 1995, available at <http://www.cis.org/TemporaryFarmWorkers> (noting that “tomato production quadrupled between 1960 and 1990”).

<sup>207</sup> See *supra* notes 48, 196 and accompanying text.

<sup>208</sup> See, e.g., ANDERSON, *supra* note 39, at 1-4 (reporting that 4,000 immigrant men, women and children have perished since 1998, while attempting to enter into the United States); *Immigrant Deaths in Arizona Desert Soaring in July*, *supra* note 3. See also Patterson, *supra* note 3.

<sup>209</sup> See Patterson, *supra* note 3.

<sup>210</sup> See ANDERSON, *supra* note 39, at 6-10.

<sup>211</sup> See, e.g., *id.* at 1; *Immigrant Deaths in Arizona Desert Soaring in July*, *supra* note 3.

<sup>212</sup> See Mark Saxenmeyer, *Desperate Immigrants Hire Dangerous “Coyotes” to Smuggle Families Across Border*, FOX CHICAGO NEWS, Sept. 13, 2010, [http://www.myfoxchicago.com/dpp/news/special\\_report/human-smuggling-chicago-mexico-20100913](http://www.myfoxchicago.com/dpp/news/special_report/human-smuggling-chicago-mexico-20100913) (defining “coyote” as a term for a human smuggler, commonly one who attempts to smuggle immigrants illegally across the U.S.-Mexico border).

<sup>213</sup> See ANDERSON, *supra* note 39, at 6-10.

<sup>214</sup> See, e.g., *Hoffman Plastic Compounds, Inc. v. NLRB*, 535 U.S. 137, 147, 155 (2002); Steven A Camarota & Karen Jensenius, *A Shifting Tide: Recent Trends in the Illegal Immigrant Population*, CTR. FOR IMMIGR. STUDIES (July 2009), available at <http://www.cis.org/IllegalImmigration-ShiftingTide>.

## VII. CONCLUSION

Immigration reform is one of the most complex and compelling issues facing the United States today, with President Barack Obama, in his January 27, 2010 State of the Union speech, indicating, “we should continue the work of fixing our broken immigration system – to secure our borders, enforce our laws, and ensure that everyone who plays by the rules can contribute to our economy and enrich our nation.”<sup>215</sup> A change in philosophy and thinking that will discourage illegal immigration, reward farm employers who voluntarily comply with federal law prohibiting the hiring of illegal immigrants, and provide U.S. consumers a relevant voice in the matter has all the markings of a strong democratic society.

The CLP program, in conjunction with the enactment of AgJOBS will address the illegal immigration dilemma in such a way as to further the public policies of the United States while concurrently protecting the human rights of all of those currently in the country. A legitimate workforce, as provided by a program like AgJOBS, will reduce the number of undocumented people living in the country, and provide the government with a greater degree of information about the foreign-born people currently living in the United States. Presumably, with less job prospects, there will be fewer attempts at illegal immigration, making border enforcement less draconian and less costly as well, and reducing the deaths associated with illegal border crossings.

The CLP program for reducing and managing illegal immigration into the United States depends upon several groups within the country. The federal government must find a way to provide enough workers to supply farm employers with the labor they need. Consumers must be willing to pay the nominal increase associated with the production of legally produced foods so that farmers and producers can recoup the costs. Farm employers have to change their mindset and their traditional ways of doing business. They must develop production standards and expectations that utilize a legal workforce. And finally, state and federal legislators must look seriously into creative solutions such as the *USDA Certified Legal Producers* program advocated in this Comment in order to meet the changing needs of today’s immigrants, businesses, and citizens. Together, and only together, can these groups make a fundamental and permanent change to the illegal immigration problems that currently divide and threaten the country.

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<sup>215</sup> *Immigration Reform: AgJOBS*, *supra* note 111.