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

I. INTRODUCTION

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

For farmers, the passage of House Bill 6417 threatens to cause a labor shortage. Beginning at Part II, this Comment accounts the historic

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1 U.S. CONST. art IV, §2, cl. 1.
5 Raymond A. Mohl, The Politics of Expulsion: A Short History of Alabama’s Anti-Immigration Law, HB 56. 35 JOURNAL OF AMERICAN ETHNIC HISTORY, n.3, 2016, 42-51. (To illustrate, consider Alabama’s 2011 law, SB 56, the Beason-Hammon Alabama Taxpayer and Citizen Protection Act. SB 56 requires employers throughout the state to use E-Verify. More controversially, SB 56 requires state and local law enforcement officers to inspect immigration documents when under reasonable suspicion that persons at traffic stops are undocumented persons. SB 56 resulted in abandonment of the harvest after undocumented workers abandoned their employment. Ensuing crop losses estimated in the billions of dollars, impacting twenty percent of the state’s domestic product. The constitutionality of SB 56 was affirmed by the United States Supreme Court in Chamber of Commerce of U.S. v. Whiting, 563 U.S. 582, 586 (2011).)
relationship of immigration law and California agriculture, as well as the introduction of House Bill 6417, July 11, 2018. Part III outlines a legal standard regarding the fundamental right to pursue a common calling and whether the right of common calling may be protected against disparate treatment effected by the federal government. Part IV discusses whether farming is cognizable as a common calling, and remarks House Bill 6417’s likely effects, causing labor shortage and unfair competition. Lastly, Part V suggests a better policy to make an authorized workforce, to grant amnesty to undocumented persons and subsidize U.S. worker employment. To conclude, Part VI puts forward considerable doubt whether House Bill 6417 can achieve fulfillment of any rational purpose in light of its likely effects on labor and the resulting shortage.

II. FACTUAL BACKGROUND

In the late 1800s, California agriculture began, as an organized commercial effort, and immigrant laborers were instrumental to the building of the infrastructure necessary for the burgeoning industry, especially the irrigation of the San Joaquin and Imperial Valleys. At the turn of the twentieth century, Congress enacted the first immigration laws, including the Chinese Exclusion Act of 1882 and the Gentleman’s Agreement of 1907. To many immigrants and undocumented persons, the National Origins Act of 1924 - and the establishment of the United States Border Patrol, three months after -
marked the dawning of a draconian age. In the 1930s, law enforcement activities caused the removal of a half-million undocumented persons.

For California’s farmers, the result was labor shortages, which in 1942 led to the enactment of the *bracero* program, from the Spanish term *brazo* for “arm,” a wartime agreement between the United States and Mexican government. The *bracero* program sought to provide farmers with temporary guest workers, employed on a contractual basis, with provisions including housing and prevailing wages. Due to poor working conditions, however, many *bracero* workers abandoned their contracts to seek better employment conditions at their own risk, effecting an upsurge in illegal immigration.

Congress ended the *bracero* program in 1964, in part due to rising illegal immigration, but also due to poor labor conditions for farm laborers. In 1967, Congress amended the Fair Labor Standards Act of 1950 to extend statutory protections to farm laborers, with provisions to protect employment conditions and establish minimum wages.

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

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13 HERNANDEZ, supra note 6, at 70-72; Nicholas P. De Genova, Migrant “Illegality” and Deportability in Everyday Life, 31 ANNU. REV. ANTHROPOL. 419, 433 (2002).
14 De Genova, supra note 13, at 433.
16 Id.; HERNANDEZ, supra note 6, at 110-111.
19 Id.
20 HERNANDEZ, supra note 6, at 214-215.
21 See id. at 214-215, 225; LEO R. CHAVEZ, COVERING IMMIGRATION: POPULAR IMAGES AND POLITICS OF THE NATION 95 (2001); see also Siegel, supra note 9, at 291, 298-300.
22 Siegel, supra note 9, at 291, 298-300.
their employees.23 Also, IRCA made amnesty available to the one million undocumented persons present in the United States on the date of its introduction in 1986.24 If a comparable program were enacted today, nearly eleven million undocumented persons would be eligible to apply for legal permanent residence.25

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

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

24 See Siegel, supra note 9, at 291, 298-300. (Amnesty is a reprieve from deportability. The government forgives an undocumented person’s unlawful presence, allowing the person to apply for documented status. With amnesty, the path to citizenship does not require an undocumented person to remove from the United States as a condition of eligibility.)
27 Siegel, supra note 9, at 291, 298-300.
28 Id.
30 H.R. 6417, 115th Cong., 2d Sess., §202(a) (2018). (“(To amend) Section 274A(b) of the Immigration and Nationality Act (8 U.S.C. 1324a(b) to read as follows: (§§(...)b)(2)(A), (B).”)
31 H.R. 6417, §202(a).
32 Id.
III. LEGAL STANDARD

A. Constitutional Framework

1. The Privileges and Immunities Clause

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

33 U.S. CONST., art IV, §2, cl. 1.
34 Toomer v. Witsell, 334 U.S. 381, 395-96 (citing Paul v. Virginia, 1868 8 Wall. 168 (1868)) (“The primary purpose of this clause, like the clauses between which it is located—those relating to full faith and credit and to interstate extradition of fugitives from justice—was to help fuse into one Nation a collection of independent, sovereign States.”); U.S. CONST., art. IV, §2, cl. 1.
36 Id. (“Some distinctions between residents and nonresidents merely reflect the fact that this is a Nation composed of individual States, and are permitted; other distinctions are prohibited because they hinder the formation, the purpose, or the development of a single Union of those States.”).
37 U.S. CONST. art IV, §2, cl.1; see also Toomer, 334 U.S. at 389; see also Baldwin, 436 U.S. at 383, 388.
2. Federal Activity Effecting Disparate Treatment

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

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

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38 U.S. CONST. amend. XIV, §1.
39 Saenz v. Roe, 526 U.S. 489, 500 (1999) (emphasis added), (the Court held unconstitutional California Health and Welfare Code section 11450.03, a statute restricting availability of California welfare benefits to newly-arrived citizens, in violation of their right to travel. “The ‘right to travel’ … protects the right of a citizen of one State to enter and to leave another State, the right to be treated as a welcome visitor rather than an unfriendly (person) when temporarily present in the second State, and, for those travelers who elect to become permanent residents, the right to be treated like other citizens of that State.”).
40 Bolling v. Sharpe, 347 U.S. 497, 499 (1954). (“In view of our decision that the Constitution prohibits the states from maintaining racially segregated public schools, it would be unthinkable that the same Constitution would impose a lesser duty on the Federal Government.” The United States Supreme Court held that the Equal Protection Clause of the Fourteenth Amendment contains protective components relating to the Due Process Clause of the Fifth Amendment, protecting District of Columbia public school children from racial discrimination effecting by segregation in federal public schools.))
41 Toomer, 334 U.S. at 389; see also Baldwin, 436 U.S. at 383, 388.
3. Common Calling and Disparate Treatment

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

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

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42 *Toomer*, 334 U.S. at 389; *see also* *Baldwin*, 436 U.S. at 383, 388.
43 *Toomer*, 334 U.S. at 396; *see also* *Baldwin*, 436 U.S. at 383, 388.
44 *Toomer*, 334 U.S. at 389. (The nonresident commercial shrimpers did not challenge South Carolina’s preservation provisions, forbidding “trawling for shrimp in the State’s inland waters, which are the habitat of the young shrimp for the first few months of their life.”)
45 *Id.* (The state statute imposed a fee of $25 per shrimp boat owned by resident commercial shrimpers, or $2500 per shrimp boat owned by nonresident commercial shrimpers. The Court awarded injunctive remedies, also baring regulations requiring nonresident commercial shrimpers to “dock, unload, pack and stamp their catch at a South Carolina port,” thus allowing the state to impose on the commercial shrimpers and assess the statutory fees, with consequent fines and possible imprisonment for infraction.)
46 *Id.* at 396 (citing *Ward v. Maryland*, 1870, 12 Wall. 418 (1870); other citations omitted. “(The privileges and Immunities clause) does bar discrimination against citizens of other States where there is no substantial reason for the discrimination
In *Baldwin v. Fish and Game Commission of Montana*, 436 U.S. 371 (1978), the Supreme Court of the United States applied the standard from *Toomer* and held that elk hunting was not related to any protected common calling.\(^47\) Noting that the cost of elk population maintenance is exacted from Montana residents by state taxes, the Court found disparate treatment of nonresidents about license fees to hunt elk were within Montana’s regulatory powers to effect.\(^48\) The Court reasoned that a only a livelihood “bearing upon the vitality of the Nation as a single entity” would qualify as a protected common calling.\(^49\) Elk hunting, in particular, does not so qualify because elk hunting is a leisurely pursuit that is costly in itself, and elk hunting is not an activity undertaken to pursue a livelihood.\(^50\) As the Court also noted, the license fee scheme in Montana did not totally exclude nonresident elk hunters from their pursuit of the leisurely activity.\(^51\)

### B. H.R. 6417 Provisions Summarized

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

\(^{47}\) *Toomer*, 334 U.S. at 389; see also *Baldwin*, 436 U.S. at 383, 388.

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

\(^{49}\) *Id.*

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

\(^{51}\) *Id.*
Verify. Subsequently, Part IV will discuss the extent to which these provisions are likely to cause labor shortage.

1. Hiring Eligible H-2C Workers

i. Contract basis

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

ii. At-will basis

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

54 H.R. 6417, §§103(a), (b).
55 H.R. 6417, §103(a).
56 Id. (“(to amend) Chapter 2 of title II of Immigration and Nationality Act (8 U.S.C. §1181 et seq.) … by inserting after Section 218A: (§218A(b)(5)(B)).”)
57 H.R. 6417, §103(b).
58 Id.
Security within seventy-two hours of commencement or cessation of employment.\textsuperscript{59} Upon the Secretary’s grant of registered agricultural employer status, the farmer may then employ at-will H-2C workers, who have been properly admitted to the United States under an H-2C contract, but only if those workers have fulfilled their obligations to the contract which was the basis for their admission.\textsuperscript{60}

\textit{iii. Abandonment}

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

\textsuperscript{59} Id. (“(to amend) Chapter 2 of title II of Immigration and Nationality Act (8 U.S.C. §1181 et seq.) … by inserting after Section 218B: (§218B(c)).”)

\textsuperscript{60} Id. (“(to amend) Chapter 2 of title II of Immigration and Nationality Act (8 U.S.C. §1181 et seq.) … by inserting after Section 218B: (§218B(a)).”)

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

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

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

3. H-2C Worker Eligibility Requirements

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

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

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

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

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

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

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

69 Id. (“(to amend) Chapter 2 of title II of Immigration and Nationality Act (8 U.S.C. §1181 et seq.) … by inserting after Section 218A: (§218A(n)(2)).”
Naturalization Act of 1996, in order to specify that “no spouse or children of the nonimmigrant may be admitted.”70

4. Penalties

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

5. Mandatory use of E-Verify

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

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70 H.R. 6417, §103(b). (“(to amend) Chapter 2 of title II of Immigration and Nationality Act (8 U.S.C. §1181 et seq.) … by inserting after Section 218B: (§218B(c)).”)
71 H.R. 6417, §103(a). (“(to amend) Chapter 2 of title II of Immigration and Nationality Act (8 U.S.C. §1181 et seq.) … by inserting after Section 218A: (§218A(h)).”)
72 Id. (“(to amend) Chapter 2 of title II of Immigration and Nationality Act (8 U.S.C. §1181 et seq.) … by inserting after Section 218A: (§218A(h)(3)(A)).”)
73 Id.
74 Id. (“(to amend) Chapter 2 of title II of Immigration and Nationality Act (8 U.S.C. §1181 et seq.) … by inserting after Section 218A: (§§218A(h)(2), (3)).”)
75 Id.
76 H.R. 6417, §202(a). (“(to amend) Section 274A(b) of Immigration and Nationality Act (8 U.S.C. §1324a(b)) to read as follows: (§274A(b)(1)(C)(i)(II)).”)
confirmation, non-confirmation, or tentative non-confirmation of the individual’s employment authorization. An initial response of confirmation shows the worker is authorized; non-confirmation shows the worker is not authorized, and must be terminated, unless the farmer admits to unlawful continued employment. If the initial response shows tentative non-confirmation, a secondary confirmation process begins, and allows ten days or more for the individual worker to show authorization.

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

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

IV. ANALYSIS

A. Whether Farming Qualifies as a Common Calling

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

77 Id. (“(to amend) Section 274A(b) of Immigration and Nationality Act (8 U.S.C. §1324a(b)) to read as follows: (§§274A(b)(1)(C)(ii)).”)
78 Id.
79 Id. (“(to amend) Section 274A(b) of Immigration and Nationality Act (8 U.S.C. §1324a(b)) to read as follows: (§274A(b)(1)(C)(ii)).”)
80 H.R. 6417, §212.
81 H.R. 6417, §205. (“(to amend) Section 274A(a)(3) of Immigration and Nationality Act (8 U.S.C. §1324a(a)(3)) to read as follows: (§274A(a)(3)(B)).”)
82 H.R. 6417, §206. (“(to amend) Section 274A(h)(2) of Immigration and Nationality Act (8 U.S.C. §1324(a)(3)(B)) to read as follows: (§274A(h)(2)(B)(ii)).”)
83 Id.
84 Id.
85 Baldwin v. Fish and Game Commission of Montana, 436 U.S. 371, 383, 388 (1978). (“Only with respect to those ‘privileges’ and ‘immunities’ bearing upon the
is such a livelihood, but elk hunting is merely recreation.86 Farming is similar to commercial shrimping, except that farming entails planting seed and harvesting crops, as opposed to using a boat and trawling for shrimp.87 Farming is not similar to elk hunting, nor to recreational activities in general, because farming is conducive to supporting a person’s livelihood.88 Therefore, farming is a common calling within the privileges and immunities clause protection.89 Section B will discuss the extent to which House Bill 6417 effects disparate treatment of farmers.90

**B. H.R. 6417 Provisions and Anticipated Impact**

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

1. *Calendar Requirements and Related Costs*

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

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86 Id.; see also Toomer v. Witsell, 334 U.S. 377, 389 (1948).
87 Toomer, 334 U.S. at 389; see also Baldwin, 436 U.S. at 383, 388.
88 Baldwin, 436 U.S. at 383, 389.
89 Toomer, 334 U.S. at 389; see also Baldwin, 436 U.S. at 383, 388.
90 Toomer, 334 U.S. at 389; see also Baldwin, 436 U.S. at 383, 388.
91 Toomer, 334 U.S. at 389; see also Baldwin, 436 U.S. at 383, 388; see also Harper, *supra* note 29, at 129.
93 H.R. 6417, §103(a). (“(to amend) Chapter 2 of title II of Immigration and Nationality Act (8 U.S.C. §1181 et seq.) … by inserting after §218 the following: (§218A(b).”)
maintaining the posted announcement for at least thirty days.94 Because the Secretary of Homeland Security is allowed to require a period of up to twenty-eight days prior to the need for hire date, a farmer requiring workers to pick and pack during the harvest season will need to solicit United States workers at least fifty-eight days in advance of what may be an unpredictable harvest season.95 The prospect of U.S. workers being interested in and available to make an agreement on these terms is foreseeably unlikely, because the employment contract is temporary in duration and runs with the harvest season.96 Due to this inherent limitation about employment conditions, twenty-eight days of notice to the Secretary of Homeland Security and thirty days of U.S. worker priority recruitment amounts to an untenable burden on farmers.97

2. Audits and Inspections

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

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

95 Id.
96 Id.
97 Id.
98 Id.
99 Id. (“(to amend) Chapter 2 of title II of Immigration and Nationality Act (8 U.S.C. §1181 et seq.) … by inserting after Section 218A: (§218A(d)(1)).”)
100 H.R. 6417, §206. (“(to amend) Section 274A(h)(2) of Immigration and Nationality Act (8 U.S.C. §1324a(h)(2)) to read as follows: (§274A(h)(2)(B)(ii)).”)
101 Feller, supra note 3, at 297-298.
about fraudulent documentation.\textsuperscript{102} Therefore, farmers are likely to suffer disparate treatment, when the law is enforced with disparate zeal from region to region.\textsuperscript{103}

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

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

4. Candidate Undocumented Workers Grounds for Removal

If a properly hired H-2C worker has abandoned his obligation to the contract, then the farmer may petition the Secretary of Homeland Security to waive the grounds of removal for a candidate undocumented worker illegally

\textsuperscript{102} H.R. 6417, §206. (“(to amend) Section 274A(h)(2) of Immigration and Nationality Act (8 U.S.C. §1324a(h)(2)) to read as follows: (§274A(h)(2)(B)(ii)).”)
\textsuperscript{103} Toomer v. Witsell, 334 U.S. 377, 389 (1948) (finding disparate treatment when out-of-state commercial shrimpers were required to pay additional taxes on their catch in South Carolina waters); see also Baldwin v. Fish and Game Commission of Montana, 436 U.S. 371, 383, 388 (1978) (finding elk hunting not to qualify as a protected common calling, despite disparate treatment when out-of-state elk hunters were required to pay higher license fees).
\textsuperscript{104} H.R. 6417, §103(b). (“(to amend) Chapter 2 of title II of Immigration and Nationality Act (8 U.S.C. §1181 et seq.) … by inserting after Section 218B: (§218B(c)).”)
\textsuperscript{105} H.R. 6417, §108.
\textsuperscript{106} Id.
\textsuperscript{107} Id.
\textsuperscript{108} Id.
present in the United States. The Secretary may then authorize that candidate undocumented worker to become an H-2C worker. In order to become eligible for H-2C status, however, that candidate worker will first need to remove himself – as well as any illegally present spouse or children - to his or her home country, where he or she will need to remain for sixty days. By this time, the harvest season may have ended. By requiring the farmer to petition on behalf of the worker, who must subsequently be made unavailable to the farmer, House Bill 6417 burdens farmers. As a result, House Bill 6417 is likely to cause labor shortage and the crops foreseeable will rot.

V. RECOMMENDATION

Demonstrably, House Bill 6417 serves two purposes: one, to deter fraudulent documentation, and two, to ensure farmers employ U.S. workers as top priority. The ends of effecting change in naturally occurring conditions of the labor market, however, would be better effected by proactive means, such as subsidies for farmers to stimulate U.S. worker employment, and a new amnesty program, comparable to IRCA of 1986. Rather than goading a law enforcement race among the state, local, and federal agencies to audit, investigate and collect related fines, a better policy would facilitate U.S. worker employment with subsidies. Rather than impractical petition process in order to hire workers at the discretion and calendar of the Secretary of Homeland Security, a better policy would let undocumented workers who work in agriculture do so lawfully by providing amnesty. At a minimum, a better policy would accommodate temporary

110 Id.
111 Id.
112 Id.
113 Id.
114 Pilkington, supra note 53.
115 Id.
116 See Siegel, supra note 9, at 298-300.
118 Siegel, supra note 9, at 298-300.
VI. CONCLUSION

Mandatory use of E-Verify, enforced by audits and investigations, will curtail fraudulent documentation in farm employment. House Bill 6417’s provisions, however, are likely to cause labor shortage, similar to state hardline regulations, such as Alabama’s HB 56. By creating a right of first refusal among federal, state and local law enforcement agencies, House Bill 6417’s impact on farmers will vary from region to region, either enforced with zeal, or not at all. House Bill 6417 does not facilitate farmers hiring U.S. workers, and offers no practical alternative to hiring available undocumented workers. The untenable requirements of House Bill 6417’s petitions to hire H-2C workers will impart hardship on many farmers who comply. Many farmers will have no alternative at the harvest season but to employ undocumented workers, and House Bill 6417 will likely cause a rise of fraudulent documentation in farm employment, and therefore fail to serve its purpose. House Bill 6417 and the mandatory use of E-Verify foreseeably will cause labor shortage, therefore it should never be enacted, unless it also provides amnesty and subsidies.

AUGUST WOLF PETERSEN

119 HERNANDEZ, supra note 6, at 214-215, 225.
120 Siegel, supra note 9, at 298-300.
121 Harper, supra note 29, at 125-137.
122 Mohl, supra note 5, at 42.
123 Feller, supra note 3, at 297-298.
125 Id.
126 Bosworth, supra note 10.
127 Harper, supra note 29, at 125-137.
128 The author would especially like to thank Professor Gregory Olson, esq. for the mentorship. Also, the author would like to especially give thanks for their proofreading to Juliana Gmur, esq., and Carrie Woolley, esq., of Kings County County Counsel, Assistant County Counsel and Deputy County Counsel, respectively. Thanks and much appreciation to the San Joaquin Agricultural Law Review Volume 28 editors, other staff members, and Professor Jeffery G. Purvis, esq. without whom this comment could never have happened.
LANGUAGE CERTIFICATION: OBTAINING ACCESS TO COMPETENT INTERPRETERS FOR A GROWING INDIGENOUS POPULATION IN THE CENTRAL VALLEY

I. INTRODUCTION

Marlyn Perez, an indigenous worker from Guatemala, describes her experience working in the fields of Florida. She claims her manager forced her and others farm workers to work twelve hour days, without breaks, in the hot Florida sun. The workers were charged for beverages, lunch, and transportation. When Marlyn inquired about her pay, the manager told her there was no negotiating and that she had no rights. Marlyn’s story is not unique. Farm workers are often vulnerable to workplace abuses because of their language barriers and undocumented status.

In 2002, a study found that the United States agricultural industry spent over 18 million dollars in farm worker salaries. California alone employed 1.1 million seasonal farm workers. Of those farm workers, 40 percent worked in the California Central Valley. Farm workers are important in supplying labor and controlling agricultural production costs. Today in California’s Central Valley, one in every four

2 Id.
3 Id.
4 Id.
6 Ramchandani, Supra note 1.
8 Id. at 880.
9 Id.
10 Id. at 891.
farmworkers is of indigenous Mexican origin from the state of Oaxaca. While Oaxacans are not the majority of agricultural workers, their numbers are growing and organizations like California Rural Legal Services and Centro Binacional Para el Desarrollo Indígena Oaxaqueño (CBDIO) are working rapidly to assist this new marginalized group. As a minority group, Oaxacans are vulnerable to discrimination and abuse due to their language barriers.

Language Certification ensures that individuals who speak an indigenous Mexican language have meaningful access to the legal system and an ability to defend their individual rights. In Part I this comment will discuss the issues indigenous farmer workers face in the fields due to their inability to speak Spanish or English. Part II will analyze the constitutional, federal, and state laws that safeguard an individual’s right to obtain a court interpreter. Part III will discuss whether existing laws on interpreters apply to indigenous languages and how rights may be affected when an interpreter is not provided. Lastly, Part IV will issue recommendations on ways to provide competent interpreters for individuals who speak an indigenous Mexican language.

II. FACTUAL BACKGROUND

In general Oaxacans in the United States are located in Oregon and Washington with most being concentrated in the California Central Valley. A study conducted by several organizations found “farmworkers who speak only an Indigenous language are at risk every

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13 See Kristen et al., supra note 5, at 169.
14 See Rebecca Beitsch, How Bad Translation by Court Interpreters Can Turn Misunderstanding into Injustice (PBS television broadcast Aug. 17, 2016.).
15 RICHARD MINES, SANDRA NICHOLS & DAVID RUNSTEN, CAL. ENDOWMENT, FINAL REPORT ON CALIFORNIA’S INDIGENOUS FARMWORKER 18 (2010).
They take safety risks by handling chemicals whose labels they cannot read. Furthermore, they face discrimination and harassment due to their inability to speak Spanish or English. Recently, indigenous Mexicans in Ventura County were forced to work in hazardous air quality that resulted from the California wildfires. The workers stated that they went to work because they did not want to be fired and they were unable to communicate their rights.

However, assisting the growing Oaxacan population can be a challenge. Few people in the Central Valley are fluent in an indigenous Mexican language. Therefore, interpreters who speak the same dialect are difficult to obtain. Individuals who need interpreting services rely on friends or family who can speak Spanish to translate to someone who can then translate to English. However, friends and family are usually not a good source for assistance because they either do not speak Spanish themselves or they may make devastating errors in translation. In a Virginia courtroom a man yelled “I did not rape anybody,” after his interpreter told him he was guilty of “violación” which means rape instead of “infracción” which means infraction. These mistakes are common even among those who have been translating for friends and family in less demanding situations than a courtroom. Other courts are experimenting with

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16 Kara Schilli, Not Everyone Speaks Spanish! The Need for Indigenous Language Interpreters in California’s Agricultural Workforce, UC Davis Western Center for Agricultural Health and Safety, July 19, 2018.
17 Id.
18 Id.
20 Id.
21 CRLA FACTSHEET, supra note 11.
22 Telephone Interview with Yenedit Valencia, Vice President, Centro Binacional para el Desarrollo Indígena Oaxaqueno (Aug. 10, 2018) [hereinafter “Valencia Interview”].
23 Id.
26 Rebecca Beitsch, How bad translation by court interpreters can turn misunderstanding into injustice, PBS, August 17, 2016.
27 Id.
interpreter call centers. However, telephone interpreters often do not speak the correct dialect of the individual needing interpretation services.

The vice president of Centro Binacional Para el Desarrollo Indígena Oaxaqueño (CBDIO), Yenedit Valencia, says language certification ensures individuals who speak an indigenous Mexican language can effectively communicate through a qualified interpreter. Court certified interpreters are tested by the court system to ensure that they can accurately translate from one language to English. When accurate and effective interpreting services are not provided an individual may be at risk of incarceration or is left without a legal remedy for harm they have suffered. Interpreters who are not certified are not tested on their ability to accurately translate communications.

One agency with a team of local indigenous interpreters is Centro Binacional para el Desarrollo Indígena Oaxaqueño (CBDIO). However, when lawyers and agencies seek individuals who speak the indigenous language they do not turn to agencies like CBDIO because the organization cannot promote themselves as having certified interpreters. Certified interpreters are important in safeguarding the rights of individuals who do not speak English. Furthermore, the right to a court interpreter is safeguarded by the Constitution, federal statutes, and state statutes.

III. Legal Authority

A. Constitutional Right to a Court Interpreter

29 Valencia Interview, supra note 22.
30 Id.
33 See JUD. COUNCIL OF CAL., supra note 31.
34 Valencia Interview, supra note 22.
35 Id.
36 Rebecca Beitsch, How bad translation by court interpreters can turn misunderstanding into injustice, PBS, August 17, 2016.
37 See generally, U.S. Const. amend. XIV, §1; U.S. Const. amend. V.
The United States Supreme Court has not recognized an individual’s constitutional right to a court interpreter.\(^{38}\) However, the Court has determined that certain rights may be affected when a person is unable to understand court proceedings.\(^{39}\) Specifically, the Fifth, Sixth, and Fourteenth Amendments of the United States Constitution are used to support the right to a court interpreter.\(^{40}\)

The Fourteenth and Fifth Amendments of the Constitution state that individuals shall not be deprived of life, liberty, or property without due process.\(^{41}\) Due Process is the right of an individual to have an opportunity to provide a meaningful defense.\(^{42}\)

Due Process is fundamental to the criminal defendant who is at risk of losing life or liberty due to incarceration.\(^{43}\) In the case of *U. S. ex rel. Negron v. State of N. Y.*, 434 F.2d 386 (2d Cir. 1970), Rogelio Negron was charged with murder after he allegedly stabbed his friend during a drunken brawl.\(^{44}\) Despite his inability to speak English and to participate in his trial the Court convicted Negron of the charges against him.\(^{45}\) The United States Appellate Court stated “most of the trial must have been a babble of voices” for Rogelio Negron whose primary language was Spanish.\(^{46}\) The Court determined that Rogelio Negron’s due process right was violated because he was a passive observer during his trial that was mainly conducted in English.\(^{47}\) He was unable to assist counsel in his defense, was unable to confront the witnesses against him, and was unable to comprehend the proceedings.\(^{48}\) The Court affirmed the lower court’s decision to

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\(^{40}\) See *U. S. ex rel. Negron*, 434 F.2d at 389; see *M.M.V.*, 455 S.W.3d at 189.


\(^{42}\) *United States v. Juan*, 704 F.3d 1137, 1141 (9th Cir. 2013).


\(^{44}\) *U. S. ex rel. Negron*, 434 F.2d at 386.

\(^{45}\) Id.

\(^{46}\) Id.

\(^{47}\) Id at 388.

\(^{48}\) Id.

\(^{49}\) Id.
provide the defendant with an interpreter and retry him or release him.\textsuperscript{50} Without a court interpreter Rogelio Negron could not effectively understand or engage in his defense leaving him vulnerable to conviction without a fair opportunity to be heard.\textsuperscript{51}

Civil litigants have been provided with fewer protections than the criminal defendant under the Due Process Clause.\textsuperscript{52} The amount of protection provided by the Due Process Clause varies with the circumstances and rights at stake.\textsuperscript{53} While the right to a court interpreter is generally recognized by the court system for the criminal defendant the court does not recognize the same right for the civil litigant.\textsuperscript{54} Unlike the criminal defendant, who is at risk of losing life or liberty in a criminal proceeding, the civil defendant has less at stake.\textsuperscript{55}

The California Supreme Court rejected the notion that a litigant, whose primary language was Spanish, was denied his Due Process rights when the Court rejected his request for an interpreter in a property damage civil suit.\textsuperscript{56} The Court opined that Due Process is violated when there is “no alternative means to secure the relief sought.”\textsuperscript{57} It further stated that a civil litigant can obtain interpreting assistance from relatives or local organizations.\textsuperscript{58} However, obtaining interpreting through a relative or organizations does not always ensure that the individual receives effective and accurate interpreting services.\textsuperscript{59}

Despite the lack of high stakes like those in criminal proceedings, a civil litigant who does not understand the proceedings may have several rights at stake that hinge on the outcome of litigation in parental right proceedings, evictions, and other civil proceedings.\textsuperscript{60} The Court has recognized that Due Process is violated in certain civil cases when the litigant is not provided with an opportunity to provide a

\textsuperscript{50} See Id at 386
\textsuperscript{51} See Id.
\textsuperscript{52} United States v. Cirrincione, 780 F.2d 620, 634 (7th Cir. 1985).
\textsuperscript{55} Flynn v. City of Las Cruces, New Mexico, supra note 42.
\textsuperscript{56} Jara v. Mun. Court, 21 Cal. 3d at 186.
\textsuperscript{57} Id.
\textsuperscript{58} Id.
\textsuperscript{59} Mixteco, Indigenous Language Services, supra note 25.
meaningful defense.\textsuperscript{61} In \textit{In re Doe}, 99 Haw. 522 (2002).\textsuperscript{62} the mother of foster children appealed her case on the basis that the Court failed to provide her with an interpreter throughout the court proceedings. The Court held that parental rights cannot be terminated without a meaningful opportunity to be heard.\textsuperscript{63} The Court recognized the right non-English speaking parents to have an interpreter in family court, although they ultimately found that the Plaintiff in the case was able to understand the proceedings without an interpreter.\textsuperscript{64} Furthermore, in \textit{In re Applied Cleantech, Inc.}, No. CV 12719-VCL, 2017 WL 65427 (Del. Ch. Jan. 5, 2017),\textsuperscript{65} the Court established that an interpreter should be provided for the civil litigant when possible to increase the access to courts for individuals who are not fluent in English.\textsuperscript{66}

Additionally, in criminal cases the Sixth amendment provides the defendant with the right to confront witnesses against him.\textsuperscript{67} The Sixth Amendment protects an individual’s right to be present at trial, the right to understand the testimony of a witness, and an opportunity to cross-examine a witness.\textsuperscript{68} A criminal defendant cannot adequately confront the witnesses against him if the individual is unable to comprehend the proceedings.\textsuperscript{69} In \textit{Garcia v. State}, 149 S.W.3d 135 (Tex. Crim. App. 2004),\textsuperscript{70} the criminal defendant’s interpreter did not interpret the testimony of various witnesses during trial.\textsuperscript{71} The Court held that the defendant’s Sixth Amendment right to confrontation was violated because the defendant was unable to understand the witness’s testimony and the trial was remanded.\textsuperscript{72} Even though the Supreme Court does not recognize a constitutional right to a court interpreter for English Language learners, the federal

\begin{footnotesize}
\begin{itemize}
\item \textsuperscript{62} \textit{In re Doe}, 99 Haw. At 522.
\item \textsuperscript{63} \textit{Id} at 533.
\item \textsuperscript{64} \textit{Id} at 533
\item \textsuperscript{65} \textit{In re Applied Cleantech, Inc.}, supra note 59.
\item \textsuperscript{66} \textit{Id}.
\item \textsuperscript{67} U.S. Const. amend. XIV, §1; U.S. Const. amend. V.
\item \textsuperscript{69} \textit{Garcia v. State}, 149 S.W.3d at 135.
\item \textsuperscript{70} \textit{Id}.
\item \textsuperscript{71} \textit{Id} at 136
\item \textsuperscript{72} \textit{Id} at 145
\end{itemize}
\end{footnotesize}
government and California have implemented statutes to protect an individual’s right to access to the court system.73

B. Federal Rights to Interpretation

Title VII of the Civil Rights Act of 1964 provides “No person in the United States shall, on the ground of race, color, or national origin, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance.”74 The purpose of Title VII is to afford equal protection of the law to minority groups in the United States.75 The Supreme Court held that language was a part of national origin and discrimination based on an inability to speak English violated Title VII.76 Furthermore, Executive Order 13166 (Executive Order) expanded access to federal agencies for individuals who did not speak English.77 Farmworkers who speak an indigenous language cannot obtain meaningful access the court system without an interpreter because they do not speak English.78

An executive order is a “document that the President issues and so designates” without having to go through the normal law-making process.79 This power can be exercised without the authority of the legislature and derives from various articles in the Constitution.80 In 2000, then President Bill Clinton passed the Executive Order to establish better access to assistance to non-English speaking individuals.81 In passing this executive order, former President Clinton sought to make federal agencies more accessible to English Language Learners.82 The Order provides that federal agencies need to
implement a system to provide access to services for individuals who do not speak English.83

Similarly, the Federal Court Interpreters Act of 1978 was passed by Congress to provide guidance to the courts on providing interpreters to ensure the quality of the translation.84 It further solidifies the right to a court certified interpreter by providing that a certified interpreter should be provided in the courtroom unless no certified interpreter is available.85 The Act was meant to protect a defendant’s ability to effectively communicate with his attorney and to understand the court proceedings.86 However, this right has been limited to criminal cases and subject to available funding.87 California law expands on the federal protections in obtaining a court interpreter.88

C. California Laws on Interpretation

The California Constitution incorporates the right of a criminal defendant to be provided with a court interpreter when necessary.89 California acknowledged the growing population of non-English speakers and enacted California Government Code § 68560 to address the issue.90 It established a committee to review the language needs of California citizens and established solutions to provide competent court interpreters.91 California states “it is imperative that courts provide interpreters to all parties who require one.”92 In an effort to provide competent interpreters, California requires that the interpreter be certified, absent a showing of good cause for lack of certification.93 Language certification and registration are examinations that the court provides to determine an individual’s ability to speak English fluently as well as another language.94

83 Exec. Order No. 13166
84 United States v. Johnson, 248 F.3d 655, 661 (7th Cir. 2001).
86 United States v. Johnson, 248 F.3d at 661.
87 § 1827 (West).
90 Cal. Gov't Code § 68560 (West).
91 Id.
93 § 68561(West).
94 See Judicial Council of California, supra note 31.
Unlike the federal government, California requires that court interpreters should also be provided in civil cases.\textsuperscript{95} The Legal Aid Foundation of Los Angeles complained to the Department of Justice after two Korean speaking women were denied court paid interpreters in civil court after they were unable to find family or friends who could assist them with interpreting.\textsuperscript{96} One of the women sought custody of her child while the other sought protection from her sexual assailant.\textsuperscript{97} The Department of Justice investigation concluded that there were significant issues with the courts ability to assess and provide competent interpreters.\textsuperscript{98} Shortly thereafter, California passed Assembly Bill 1657 which created Evidence Code 756.\textsuperscript{99} Assembly Bill 1657 stated that certified interpreters should be provided free of charge in both civil and criminal cases when possible.\textsuperscript{100} Evidence Code 756 provides a list of civil cases in which an interpreter should be provided if funds are available.\textsuperscript{101} The list is ordered from the highest priority to the lowest as follows:

1) Actions or proceedings under the Uniform Parentage Act
2) Actions and proceedings for dissolution or nullity of in which a protective order has been granted or is being sought
3) Actions and proceedings for physical abuse or neglect under the Elder Abuse and Dependent Adult Civil Protection Act
4) Actions and proceedings relating to unlawful detainer.
5) Actions and proceedings to terminate parental rights.
6) Actions and proceedings relating to conservatorship or guardianship
7) Actions and proceedings by a parent to obtain sole legal or physical custody of a child or rights to visitation.
8) All other actions of Elder Abuse and Dependent Adult Civil Protection Act.
9) All other actions and proceedings related to family law.
10) All other civil actions or proceedings.\textsuperscript{102}

\textsuperscript{95} Assembly Bill 1657 Section 1, www.leginfo.legislature.ca.gov (2014).
\textsuperscript{96} Jena MacCabe, \textit{supra} note 87 at 689.
\textsuperscript{97} \textit{Id.}
\textsuperscript{98} \textit{Id.}
\textsuperscript{100} CIVIL PROCEDURE—INTERPRETERS—FEES, 2014 Cal. Legis. Serv. Ch. 721 (A.B. 1657) (WEST).
\textsuperscript{101} Cal. Evid. Code § 756 (West).
\textsuperscript{102} § 756 (West).
Although courts have determined that there are fewer rights at stake for the civil litigant than for a criminal litigant, when farmworkers cannot access the court system they are vulnerable to being taken advantage of especially in the workforce.\textsuperscript{103}

IV. Analysis

\textit{A. Criminal Cases}

The United States Constitution Fourteenth, Fifth and Sixth Amendments provide criminal defendants with the right to confront witnesses and the right to have an opportunity to provide a meaningful defense under the Due Process Clause.\textsuperscript{104} The right to confront a witness includes the right to understand the accusations being made against the defendant and an opportunity to cross examine.\textsuperscript{105} When an individual does not understand the proceedings, they are vulnerable to being incarcerated and deprived of life, liberty, and property without an opportunity to be heard.\textsuperscript{106} If a criminal defendant does not speak English and is not provided with an adequate interpreter they cannot assist counsel in their defense, they cannot understand the charges brought against them, they cannot understand the testimony being offered against them, and they cannot adequately assist with cross-examining a witness.\textsuperscript{107}

In \textit{Garcia v. State}, 149 S.W.3d 135(Tex. Crim. App. 2004),\textsuperscript{108} the defendant’s primary language was Spanish. Jose Garcia was convicted and sentenced to eight years in prison for sexual assault; he appealed for a new trial because he was not provided with an interpreter throughout the trial.\textsuperscript{109} Most of the witnesses in this case testified in English and the defendant could not understand what was being said.\textsuperscript{110} The Court held that the defendant had a constitutional right to confront the witnesses against him and that the defendant was denied

\textsuperscript{103} Flynn v. \textit{City of Las Cruces, New Mexico}, supra note 42 and Elizabeth Kristen, Blanca Banuelos, Daniela Urban, \textit{supra} note 9.
\textsuperscript{104} U.S. Const. amend. XIV, §1.; U.S. Const. amend. V; U.S. Const. amend. VI.
\textsuperscript{105} \textit{Garcia v. State}, 149 S.W.3d at 140.
\textsuperscript{106} \textit{U. S. ex rel. Negron}, 434 F.2d at 386.
\textsuperscript{107} \textit{See U. S. ex rel. Negron}, 434 F.2d at 386 and \textit{Garcia v. State}, 149 S.W.3d at 140.
\textsuperscript{108} \textit{Garcia v. State}, 149 S.W.3d at 142.
\textsuperscript{109} \textit{Id.}
\textsuperscript{110} \textit{Id.}
that right. The case was remanded to the lower court for an assessment of harm where Jose Garcia was ultimately provided with a new trial.

In Oregon, an Oaxacan immigrant was convicted of stabbing a co-worker. The Judge in this case assumed the man spoke Spanish and provided a Spanish interpreter. The man’s conviction was overturned upon learning that the man actually spoke the indigenous language of Mixteco. In both cases, the individuals were deprived of liberty without an opportunity to assist counsel in cross-examining the witnesses at trial and were not provided with an opportunity to provide a meaningful defense.

B. Civil Matters

Additionally, a court interpreter may change the outcome of civil cases where the litigant has certain rights at stake. Within the last few years, sexual harassment issues have been at the forefront of national news. Farm workers are often subject to such harassment that is exasperated by language barriers, cultural barriers, and immigration status. Title VII of the Civil Rights Act of 1964 protects an individual from discrimination based on sex, race, color, and national origin.

Over the years, California has seen an increase in discrimination against indigenous Mexican farmworkers. In 2010, the EEOC filed two lawsuits against big agricultural industries for sexual harassment of their workers. In one of those cases a girl and several men filed suit against Giumarra Vineyards Corporation for harassment they

111 Id.
112 Id at 140
114 Id.
115 Id.
116 See U.S. Const. amend. XIV, § 1. and U.S. Const. amend. V.
117 See In re Doe, 99 Haw. at 533 and Daniel J. Rearick, supra note 60.
118 Elizabeth Kristen, Blanca Banuelos, Daniela Urban, supra note 9 at 175.
119 Id at 175.
121 Richard Mines, Sandra Nichols and David Runsten, supra note 16 at 60.
122 Andrew Sommer, supra note 32.
experienced at the hand of a co-worker.123 All the plaintiffs in the case were Oaxacan.124 A male co-worker made sexual advances at a young teenage girl and when two other workers came to her defense they were all fired.125 The case was eventually settled.126

In Oregon, a company settled a lawsuit when two men filed a discrimination suit based on national origin.127 The men were of Oaxacan origin and were subject to sexual harassment by their co-workers.128 The co-workers would expose themselves to the men and ridiculed them for speaking their native language of Mixtec.129 The harassers would refuse to call the men by their names but instead called them “toad”.130

Similar cases have caught the attention of the Human Rights Watch organization, the Southern Poverty Law Center, and the EEOC.131 Agricultural industries are vulnerable to liability for the actions of their employees in Title VII violation suits.132 Additionally, Title VII seeks to prevent discrimination based on national origin and Oaxacans do not have other remedies for discrimination in the workplace aside from the court system.133 Farmworkers are already vulnerable to workplace abuses.134 One way farmworkers could hold employers accountable for what occurs in the workplace is through the court system.135 Unfortunately, some employers feel like they can take advantage of farmworkers because they are not likely to seek assistance due to the

124 Id.
125 Andrew Sommer, supra note 32.
128 Id.
129 Id.
130 Id.
131 Ariel Ramchandani, There's a Sexual-Harassment Epidemic on America’s Farms, The Atlantic, Jan 29, 2018 and Andrew Sommer, supra note 32.
133 See Elizabeth Kristen, Blanca Banuelos, Daniela Urban, supra note 9 and 42 U.S.C.A. § 2000d (West).
134 See Id at 170.
135 See Id.
language barrier.136 When a court fails to provide an interpreter this issue is further exacerbated.137

V. Recommendation

A. An Attorney’s Duty to their Client.

The first line of defense for a litigant who does not speak English is his attorney.138 A judge has broad discretion to determine whether the litigant needs an interpreter and it is the duty of an attorney to object to a failure of the court to provide an interpreter during the proceedings.139 In the case of Valladares v. United States, 871 F.2d 1564 (11th Cir. 1989), the defendant was on trial for possession and distribution of Marijuana.140 On appeal, the Court held that it did not need to decide whether an interpreter was necessary in the proceeding because there was not an objection during the trial.141 An attorney who seeks to represent an individual who speaks an indigenous Mexican language should advocate for an interpreter or object to the denial of one if it may be of significant importance.142

B. The Certification Process

When certified interpreters are not available the court may fail to provide an interpreter or turn to unqualified family, friends, or organizations for interpretation services.143 For this reason, the lack of certified interpreters is synonymous with a lack of access to interpreters in criminal and civil cases.144 The certification process is a test provided by the California Courts that assesses an individual’s ability to fluently speak a language, understand technical terms, and capability to interpret competently.145 Currently, the examination

136 See Id.
137 See Id.
139 Id.
140 Id.
141 Id.
142 Id.
143 Id.
144 Mixteco, Indigenous Language Services, supra note 25.
Language Certification

consists of a written assessment and an oral assessment.\textsuperscript{147} The most common indigenous Mexican languages, like Mixteco, Triki, and Zapoteco, are not available for certification because they are not written languages.\textsuperscript{148}

For languages that are not written like American Sign Language, the certification process is referred to as a registered language.\textsuperscript{149} Registered languages are not tested for language competency like certified languages are tested.\textsuperscript{150} However, individuals who seek to be interpreters for a registered language must still pass an oral examination.\textsuperscript{151} Currently, languages like Mixteco, Triki, and Zapoteco, are also not available to be registered languages.\textsuperscript{152}

The cost of providing certification tests is offset by the amount of people seeking to become certified interpreters.\textsuperscript{153} However, it is unlikely that there will be enough applicants that speak an indigenous Mexican language to offset the cost of testing.\textsuperscript{154} The cost of certifying a language may be of significant cost.\textsuperscript{155}

An option is to form a coalition with other states to offset the costs of certification testing.\textsuperscript{156} Washington, New Jersey, Oregon and Minnesota have established a national State Court Interpreter Certification Consortium.\textsuperscript{157} The consortium works together to “sharing existing tests, consultative expertise, certification lists, and the costs of developing additional tests.”\textsuperscript{158} While this program is still new, more states have joined the consortium.\textsuperscript{159} Since the Oaxacan population is growing in Oregon and Washington in addition to California, these states can form a coalition to offset the cost of court certification.\textsuperscript{160}

\textsuperscript{147} Judicial Council of California, Court Interpreters Packet, at 6.
\textsuperscript{148} Judicial Council of California, supra note 31 at 3.
\textsuperscript{149} Judicial Council of California, Court Interpreters Packet, at 6.
\textsuperscript{150} Sylvia Tiscareño, Esq., supra note 38 at 24.
\textsuperscript{151} See Judicial Council of California, supra note 31.
\textsuperscript{152} See Judicial Council of California, supra note 31 at 3.
\textsuperscript{153} Sylvia Tiscareño, Esq., supra note 37 at 24.
\textsuperscript{154} Richard Mines, Sandra Nichols and David Runsten, supra note 16 at 60.
\textsuperscript{155} Steven Caylor, Court Advisory Board Takes A Closer Look at Interpreters, 41 Advocate 14, 15 (1998).
\textsuperscript{156} Charles M. Grabau & Llewellyn Joseph Gibbons, supra note 28 at 319.
\textsuperscript{157} Id.
\textsuperscript{158} Steven Caylor, Court Advisory Board Takes A Closer Look at Interpreters, 41 Advocate 14, 15 (1998).
\textsuperscript{159} Charles M. Grabau & Llewellyn Joseph Gibbons, supra note 28 at 319.
\textsuperscript{160} Id.
V. Conclusion

Due to the growing population of Oaxacans in the Central Valley, competent courtroom interpreters are necessary to provide these individuals with access to the court system.\textsuperscript{161} When indigenous Mexicans do not have access to the court system they are left without a remedy to confront the abuses they face in the fields.\textsuperscript{162} Both criminal and civil litigant may be vulnerable to due process violations.\textsuperscript{163} The federal government and California have recognized the importance of access to the legal system for all individuals regardless of national origin.\textsuperscript{164} Federal statutes and California state statutes aim to provide interpreters for individuals who need one whenever possible.\textsuperscript{165} Language certification or registration is the initial step to providing indigenous Mexicans with competent court interpreters.\textsuperscript{166}

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\textsuperscript{161} See Sylvia Tiscareño, Esq., \textit{supra} note at 24.
\textsuperscript{162} See Elizabeth Kristen, Blanca Banuelos, Daniela Urban, \textit{supra} note 9 at 170. \textsuperscript{163} \textit{See U. S. ex rel. Negron}, 434 F.2d at 386.
\textsuperscript{165} \textit{Id}.
\textsuperscript{166} Telephone Interview with Yenedit Valencia, \textit{supra} note 22.