

**Statement of
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**Before the State Affairs Committee
of the Idaho Senate**

Regarding S.B. 1303

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Mr. Chairman and Members of the Committee, I come before you today in my capacity as a Professor of Constitutional Law, Immigration Law, and Legislation at the University of Missouri—Kansas City School of Law. During 2001-2003, I served as Counsel to U.S. Attorney General John Ashcroft at the Department of Justice. In that position, I was the Attorney General’s chief advisor on immigration law and border security. I come before you today to explain the legal environment into which S.B. 1303 fits. My testimony should not be taken to represent the official position of my law school, which does not take positions advocating or opposing pending legislation.

I also come before you as legal counsel who helped draft and defend Arizona’s 2007 Legal Arizona Worker’s Act, which is very similar to the employment provisions in this bill. In September 2008, the Ninth Circuit of the U.S. Court of Appeals rejected every one of the legal challenges brought by opponents of that Act. *Chicanos por la Causa, Inc. v. Napolitano*, 544 F.3d 976 (9th Cir. 2008). That is important, because Idaho is also in the Ninth Circuit, and S.B. 1303 would similarly be upheld if challenged. I was also lead counsel defending the City of Valley Park, Missouri, in a case involving the same legal issues. The City of Valley Park won an across-the-board victory in federal court in that case. *Gray v. Valley Park*, Case No. 4:07CV00881-ERW (E.D. Mo. 2008), *aff’d*, *Gray v. Valley Park* (8th Cir. 2009).

There are many reasons to support the enactment of S.B. 1303. Today I will explain the legal impact of S.B. 1303, focusing primarily on the employer provisions and the public benefits provisions. I am familiar with all of the other provisions in the bill and can state with confidence that are within the state’s authority under principles of federal preemption. I have included with my testimony copies of my recent article in the *Georgetown Immigration Law Journal* explaining the numerous precedents that pave the way for Idaho to enact S.B. 1303.

I. EMPLOYER PROVISIONS

A. Idaho has Clear Legal Authority to Require Employers to Use E-Verify and to Suspend the Licenses of Employers That Knowingly Employ Unauthorized Aliens

The decision of the Ninth Circuit in 2008 regarding the Arizona law was unequivocal. A state has clear constitutional authority to take these actions to discourage the employment of unauthorized aliens and to protect the jobs of American workers and of aliens who follow the law. This decision was in keeping with the guiding U.S. Supreme Court precedent in the area, *De Canas v. Bica*, 424 U.S. 352 (1976), which upheld a California law penalizing the employers of unauthorized aliens.

The decision of the Ninth Circuit also reflects the fact that in 1986 Congress expressly invited states to enact laws suspending the licenses of businesses that employ unauthorized aliens. That federal statute is found at 8 U.S.C. § 1324a(h)(2).

B. The E-Verify System is Extremely Efficient and Accurate

E-Verify an internet-based system that any employer in the United States may utilize to verify whether an individual seeking employment is authorized to work in the United States. Congress mandated its creation in 1996. It was originally known as the Basic Pilot Program. In 2004 Congress reauthorized the Program and expanded it to all fifty states. The system is extremely easy to use and fast; in approximately 93% of cases, the federal government provides an answer verifying an individual’s work authorization electronically within a few seconds. In the remainder of cases, a tentative non-confirmation is issued, and a final answer is provided within a few days, after the potential employee is given an opportunity to provide more information to the federal government. Of those who are work authorized, 98.6% are instantly verified; among U.S. citizens the number

is 99.9%. Currently, more than 188,000 employers are registered and using the system; and that number has been increasing by more than 1,000 per week. The number of individual employees checked through the system is now more than 6 million per year. The level of satisfaction with the program is extraordinary. A 2009 Westat survey of E-Verify users found that 99% of employers are generally satisfied with E-Verify; 95% of employers rated it an effective tool for verifying work authorization; and 95% of employers said the set-up costs associated with the program were no burden or only a minimal burden for their company. Those are extraordinary numbers. I am not aware of any company in the United States that has decided to stop using the program once it started.

Currently, three states require all businesses to use E-Verify. The first was Arizona, followed by Mississippi and South Carolina. A total of 16 states require state agencies and/or recipients of state contracts to use E-Verify. In Idaho, state agencies have been participating in the program since they were required to do so by gubernatorial order in December 2006. In May 2009, Governor Otter signed an executive order requiring all contractors seeking a share of the state's economic stimulus dollars to participate in the program. I am not aware of any difficulties that Idaho's state agencies or contractors have had in complying with these executive orders.

C. Arizona's Experience Demonstrates How Well this Legislation Works

Arizona's Act has proven extremely successful in inducing unauthorized alien workers to leave the state of their own volition. Because illegal aliens know that the E-Verify system makes it impossible to obtain employment with a false social security number or with a counterfeit ID card, many simply leave the state. Newspapers in Arizona reported that thousands of illegal aliens departed the state immediately after the law took effect. Apartment complexes confirmed that thousands of units formerly occupied by aliens went vacant. But perhaps the most significant confirmation that illegal aliens were self-deporting came from the Mexican state of Sonora, to the south of Arizona. In mid-January 2008, Sonora sent a delegation of state legislators to Arizona to complain that too many Mexican citizens were returning to Sonora and that this influx of returning citizens was putting too much stress on Sonora's schools and housing stock. I have attached to my testimony an article that I published in the *Tulsa Journal of Comparative and International Law* explaining why this legislation has been so successful.

Idaho will enjoy similar success in encouraging illegal aliens to leave the state of their own accord. According to extrapolations based on U.S. census data the illegal alien population in Idaho is approximately 40,000 (www.fairus.org). It is generally estimated that 60% of that total, or 24,000 illegal aliens, are in the work force and occupying jobs that should be held by U.S. citizens residing in Idaho, or to aliens who have followed the law. According to the U.S. Bureau of Labor Statistics, as of December 2009, more than 68,000 Idahoans are unemployed. Those Idahoans desperately need work. I respectfully suggest to this committee that those 24,000 jobs should go to the lawful residents of Idaho, not to aliens unlawfully present in the United States.

II. PUBLIC BENEFITS PROVISIONS OF THE "ENFORCEMENT THROUGH ATTRITION ACT"

A. Idaho is Required by Federal Law to Deny Public Benefits to Illegal Aliens

The Enforcement Through Attrition Act portion of S.B. 1303 restricts the provision of state and local public benefits to illegal aliens. However, it is important to understand that *this bill does no more than is already required by federal law*. Under federal law, illegal aliens are *already ineligible* for the state and local public benefits described in this bill. However, Idaho, like numerous other states, has yet to bring itself into compliance with federal law by taking steps to deny public benefits to illegal aliens.

In 1996, Congress passed the Personal Responsibility and Work Opportunity Reconciliation Act (PRWORA), popularly known as the “Welfare Reform Act of 1996.” In that act, Congress included numerous provisions designed to ensure that illegal aliens do not receive public benefits at the federal state or local level. Those provisions are found primarily in 8 U.S.C. § 1621. Specifically, Congress stated that an illegal alien “is not eligible for any State or local public benefit.” 8 U.S.C. § 1621(a). Public benefits are defined under federal law as “any grant, contract, loan, professional license, or commercial license ... any retirement, welfare health, disability, public or assisted housing, postsecondary education, food assistance, unemployment benefit, or any other similar benefit for which payments or assistance are provided to an individual, household, or family eligibility unit by an agency of a State or local government or by appropriated funds of a State or local government.” 8 U.S.C. §1621(c)(1)(A)-(B). Exceptions are made for emergency medical services, emergency disaster relief, and immunizations. 8 U.S.C. § 1621(b).

When it passed the Welfare Reform Act of 1996, Congress expressly spelled out its objectives. 8 U.S.C. § 1601(2) states: “It continues to be the immigration policy of the United States that (a) aliens within the Nation’s borders not depend on public resources to meet their needs, but rather rely on their own capabilities and the resources of their families, their sponsors, and private organizations, and (b) the availability of public benefits not constitute an incentive for immigration to the United States.” A few subsections later in the Code, Congress reiterated its purpose: “***It is a compelling government interest to remove the incentive for illegal immigration provided by the availability of public benefits.***” 8 U.S.C. 1601(6) (emphasis added). Congress was determined to remove the magnetic effect of public benefits in the illegal immigration crisis.

The effect of S.B. 1303 is to ensure that Idaho complies with its obligations under federal law. It simply requires public officials to verify the legal status of those aliens who seek benefits. This can be accomplished easily and in a matter of seconds via internet using the Systematic Alien Verification for Entitlements (SAVE) program operated by the U.S. Department of Homeland Security.

B. The Legal Authority of States to Verify and Report an Alien’s Status

Because immigration is an area of law in which the federal government maintains preemptive authority, Congress was careful to expressly pave the way for states to verify the status of aliens seeking public benefits. Congress gave the states explicit authorization to do so in 8 U.S.C. § 1625: “A State or political subdivision of a State is authorized to require an applicant for State and local public benefits ... to provide proof of eligibility.” States are also authorized to verify an alien’s status with the federal government under 8 U.S.C. § 1373(c).

Congress also provided that states would have a clear legal avenue for reporting to federal authorities illegal immigrants who seek public benefits. Indeed, Congress prohibited states from concealing this information if they discover it. 8 U.S.C. § 1644 states that no government entity may be “in any way restricted, from sending to or receiving from [federal immigration officials] information regarding the immigration status, lawful or unlawful, of an alien in the United States.”

In 2004, the District Court for the Eastern District of Virginia found that a Virginia policy denying postsecondary education benefits to illegal aliens was permissible under federal law. The Virginia policy adopted federal standards for classifying aliens, just as S.B. 1303 does, and therefore it was also on secure constitutional grounds. *Equal Access Education v. Merten*, 305 F. Supp.2d 585, 603 (2004). Nine years earlier, in the case of *LULAC v. Wilson*, the District Court for the Central District of California articulated the same principle. In reviewing a California law denying benefits to illegal aliens that had been passed prior to PRWORA, the Court found that “benefit denial provisions were not an impermissible regulation of immigration and therefore withstand scrutiny under the first *DeCanas* test.” *LULAC v. Wilson*, 908 F.Supp. 755 (C.D. Cal. 1995).

The authority of states to deny public benefits to illegal aliens has been confirmed, and reconfirmed again, by the federal courts. Not surprisingly, numerous states have already taken action to ensure that they are in compliance with federal law by enacting statutes that deny public benefits to illegal aliens, including Arizona, Virginia, Georgia, Oklahoma, Nebraska, and Missouri, among others.

C. Denying Public Benefits to Illegal Aliens Will Save the State a Significant Amount of Money

It is difficult to give a precise estimate of how much money will be saved by denying public benefits to illegal aliens. U.S. Census Bureau Current Population Survey data indicates that two-thirds of illegal aliens in the United States have less than a high-school education, making them among the most likely individuals to seek state benefits. It has been estimated that the fiscal cost imposed by illegal aliens in Idaho exceeds \$200 million per year. Consequently, the fiscal savings resulting from S.B. 1303 are likely to be significant.

III. CONCLUSION

S.B. 1303 is necessary to ensure that Idaho complies with federal law prohibiting states from providing public benefits to illegal aliens. It also contributes to the restoration of the rule of law in immigration. It is no secret that the federal government is having difficulty enforcing our nation's immigration laws. It is therefore important that states work to assist the federal government, rather than impede the federal government, in this effort. S.B. 1303 accomplishes exactly that, making it more difficult to work illegally in Idaho and removing incentives for illegal aliens to remain in Idaho in violation of federal law. There are essentially two great magnets that draw illegal aliens into this country—jobs and public benefits. S.B. 1303 ensures that the power of both is greatly reduced in Idaho.