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## Supply and Demand in the Illegal Employment of Undocumented Workers

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## Supply and Demand in the Illegal Employment of Undocumented Workers

### Cover Page Footnote

Associate Professor of Law, University of North Texas Dallas College of Law; B.A., University of Notre Dame, J.D., Columbia University School of Law, M.I.A., Columbia University School of International and Public Affairs. From 2005 until 2013, the author served as a United States Magistrate Judge for the United States District Court for the Southern District of Texas. The author appreciates the research assistance and support of Professor Stewart Caton and my research assistant on this project, Ashley Pierce, as well as the excellent insights and suggestions by Ingrid Eagly, Denise Gilman, and Christina Masso.

# SUPPLY AND DEMAND IN THE ILLEGAL EMPLOYMENT OF UNDOCUMENTED WORKERS

*Brian Owsley<sup>+</sup>*

*The United States is in a quandary regarding immigration. There are over eleven million undocumented aliens residing in the country with about eight million of them working in the American economy.*

*The federal government has criminalized the illegal entry and the illegal reentry into the United States. Moreover, it has enacted a statute making it illegal to smuggle or harbor aliens. Federal prosecutors across the country have aggressively prosecuted people in violation of these statutes. At the same time, Congress criminalized the illegal employment of undocumented workers, but federal prosecutors rarely ever charge employers with violating this statute.*

*The economic principle of supply and demand applies to the labor market. Undocumented aliens come to the United States seeking jobs because American employers regularly hire them. If such employers felt significant consequences for such hires, they would be less inclined to violate federal law. With fewer employers hiring undocumented workers, there would be less demand. Consequently, aliens would be less likely to take the risks to come to the United States seeking jobs if they were unlikely to gain employment.*

*Ultimately, attacking the immigration on the supply side of the issue has failed. Thus, the article proposes targeting the demand side of the issue to promote immigration reform.*

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INTRODUCTION .....	229
I. THE HISTORY OF IMMIGRATION ENFORCEMENT DOES NOT GENERALLY ADDRESS EMPLOYERS .....	232
II. PRESIDENT TRUMP DISPLAYED SIGNIFICANT ANIMOSITY TOWARD IMMIGRANTS BEFORE AND DURING HIS PRESIDENCY .....	237
A. <i>Trump Derided Immigrants from Latin America</i> .....	237
B. <i>Trump Derided Muslims, Including Immigrants from Predominantly Muslim Countries</i> .....	238
III. CONGRESS ENACTED LEGISLATION ESTABLISHING SEVERAL IMMIGRATION CRIMES .....	240
A. <i>Individuals who Illegally Enter the United States Face a Misdemeanor</i> .....	240
B. <i>Individuals who Illegally Reenter the United States Face a Felony</i> ..	242
C. <i>Anyone who Transports or Smuggles Individuals with No Legal Status to be in the United States Faces a Felony</i> .....	243
D. <i>Employers who Illegally Hire Undocumented Workers for Employment Within the United States Face a Misdemeanor</i> .....	245
E. <i>Federal Criminal Immigration Statutes Generally Preempt State Laws</i> .....	247
IV. FISCAL YEAR 2019 WAS A RECORD-SETTING YEAR FOR FEDERAL CRIMINAL IMMIGRATION PROSECUTIONS .....	250
A. <i>Misdemeanor Prosecutions for Illegal Entry into the United States Have Increased Significantly in Recent Years</i> .....	251
B. <i>Prosecutions for Illegal Reentries into the United States Trended Downward Until a Sharp Increase During the Trump Administration</i> .....	252
C. <i>Prosecutions for Smuggling of Undocumented Individuals in the United States Trended Downward Until a Sharp Increase During the Trump Administration</i> .....	253
D. <i>Prosecutions for Illegal Employment of Undocumented Workers in the United States are Almost Non-Existent</i> .....	255
V. THE FEW PROSECUTIONS FOR ILLEGAL EMPLOYMENT OF UNDOCUMENTED WORKERS REFLECT DISPARATE USAGE OF SECTION 1324A.....	258
A. <i>The Western District of Michigan Does Not Use Section 1324a to Target Employers</i> .....	258
B. <i>The Districts that Prosecute Employers for Illegally Employing Undocumented Workers do so Gingerly</i> .....	259
1. <i>The Northern Mariana Islands</i> .....	259
2. <i>Eastern District of Louisian</i> .....	262
3. <i>The District of Arizona</i> .....	264
4. <i>The District of South Carolina</i> .....	266
5. <i>The District of Kansas</i> .....	267
6. <i>The Southern District of California</i> .....	268

7. <i>The Northern District of Texas</i> .....	269
8. <i>The Middle District of North Carolina</i> .....	270
9. <i>The Eastern District of Pennsylvania</i> .....	270
VI. PRINCIPLES OF SUPPLY AND DEMAND SHOULD BE APPLIED TO THE UNDOCUMENTED WORKER LABOR MARKET .....	271
CONCLUSION.....	274

“People come here to find work. If they can’t find work, they won’t come . . . No one questions that the way to stop illegal immigration is to stop them from getting jobs.”—Peter Nunez of the Center for Immigration Studies<sup>1</sup>

#### INTRODUCTION

If you have eaten fresh produce harvested in the United States, you have likely been the beneficiary of labor by undocumented workers.<sup>2</sup> If you have eaten meat slaughtered and packaged in the United States, you have likely been the beneficiary of labor by undocumented workers.<sup>3</sup> Undocumented workers constitute over a quarter of employees working in agricultural jobs in the American economy.<sup>4</sup>

Indeed, if you have eaten in a restaurant in the United States, you have likely been the beneficiary of an undocumented worker’s labor.<sup>5</sup> Similarly, if you have relied on daycare and other childcare options, you have likely been the beneficiary of labor by undocumented workers.<sup>6</sup> If you have had any

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1. James Doubek, *ICE Targets 7-Eleven Stores in Nationwide Immigration Raids*, NPR (Jan. 11, 2018, 4:25 AM), <https://www.npr.org/sections/thetwo-way/2018/01/11/577271488/ice-targets-7-eleven-stores-in-nationwide-immigration-raids>.

2. Miriam Jordan, *Farmworkers, Mostly Undocumented, Become ‘Essential’ During Pandemic*, N.Y. TIMES (Apr. 2, 2020, 1:54 PM), <https://www.nytimes.com/2020/04/02/us/coronavirus-undocumented-immigrant-farmworkers-agriculture.html>.

3. Eric Schlosser, *Why It’s Immigrants Who Pack Your Meat*, ATLANTIC (Aug. 16, 2019), <https://www.theatlantic.com/ideas/archive/2019/08/trumps-invasion-was-a-corporate-recruitment-drive/596230/>.

4. JEFFREY S. PASSEL & D’VERA COHN, SHARE OF UNAUTHORIZED IMMIGRANT WORKERS IN PRODUCTION, CONSTRUCTION JOBS FALLS SINCE 2007 9 (Pew Rsch. Ctr., 2015), [https://www.pewresearch.org/hispanic/wp-content/uploads/sites/5/2015/03/2015-03-26\\_unauthorized-immigrants-passel-testimony\\_REPORT.pdf](https://www.pewresearch.org/hispanic/wp-content/uploads/sites/5/2015/03/2015-03-26_unauthorized-immigrants-passel-testimony_REPORT.pdf).

5. Amy McCarthy, *Will the Restaurant Industry Survive Stricter Immigration Screenings?*, CNBC (Mar. 10, 2016, 10:11 AM), <https://www.cnbc.com/2016/03/10/will-the-restaurant-industry-survive-stricter-immigration-screenings.html>; accord Esther Tseng, *Undocumented Workers Hold the Restaurant Industry Together. Now, They Stand to Lose the Most*, EATER (May 29, 2020, 9:32 AM), <https://www.eater.com/2020/5/29/21273410/undocumented-workers-coronavirus-risks>; David Yaffe-Bellany, *Hiring Is Very Hard for Restaurants These Days. Now They May Have to Fire*, N.Y. TIMES (Aug. 23, 2019), <https://www.nytimes.com/2019/08/23/business/restaurants-undocumented-immigrants.html>.

6. Leila Schochet, *Trump’s Attack on Immigrants Is Breaking the Backbone of America’s Child Care System*, CTR. FOR AM. PROGRESS (Feb. 5, 2018, 9:01 AM), <https://www.american>

construction done, you have likely been the beneficiary of labor by undocumented workers.<sup>7</sup> Undocumented individuals constitute nine percent of employees in service jobs, such as childcare providers or restaurant workers, and about fourteen percent in construction jobs in the United States economy.<sup>8</sup>

Approximately eleven million undocumented people reside in the United States.<sup>9</sup> Of that number, approximately eight million are in the workforce, comprising about five percent of all employees.<sup>10</sup> Seventy-seven percent of Americans believe that undocumented workers typically work in jobs that Americans do not want.<sup>11</sup> Moreover, most Americans believe that undocumented children brought to the United States should have a path to legal status.<sup>12</sup> Finally, seventy-six percent of Americans feel that undocumented workers are as hardworking and honest as their American counterparts.<sup>13</sup>

Notwithstanding the positive view that most Americans have regarding undocumented workers, immigration has become a hot-button issue in American politics. President Biden sent the U.S. Citizenship Act of 2021 to Congress seeking, in part, to regularize the status of many people who are currently

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[progress.org/issues/early-childhood/news/2018/02/05/445676/trumps-attack-immigrants-breaking-backbone-americas-child-care-system/](https://progress.org/issues/early-childhood/news/2018/02/05/445676/trumps-attack-immigrants-breaking-backbone-americas-child-care-system/).

7. Bruce Buckley & Debra K. Rubin, *What Will the Immigration Muddle Mean for Construction Employers?*, ENG'G NEWS-REC. (Mar. 28, 2018), <https://www.enr.com/articles/44245-what-will-the-immigration-muddle-mean-for-construction-employers>; see also Dave Harmon, *Report: Half of Texas Construction Workers Undocumented*, STATESMAN (Sept. 25, 2018, 10:32 PM), <https://www.statesman.com/article/20130222/NEWS/302229662>.

8. PASSEL & COHN, *supra* note 4, at 9.

9. Mary Jo Dudley, *These U.S. Industries Can't Work Without Illegal Immigrants*, CBS NEWS (Jan. 10, 2019, 3:55 PM), <https://www.cbsnews.com/news/illegal-immigrants-us-jobs-economy-farm-workers-taxes/>.

10. *Id.*; PASSEL & COHN, *supra* note 4, at 5.

11. Jens Manuel Krogstad et al., *A Majority of Americans Say Immigrants Mostly Fill Jobs U.S. Citizens Do Not Want*, PEW RSCH. CTR. (June 10, 2020), <https://www.pewresearch.org/fact-tank/2020/06/10/a-majority-of-americans-say-immigrants-mostly-fill-jobs-u-s-citizens-do-not-want/>; see also, Dudley, *supra* note 9 (“71 percent said they mostly fill jobs that Americans aren’t willing to do.”); Eisha Jain, *Immigration Enforcement and Harboring Doctrine*, 24 GEO. IMMIGR. L.J. 147, 155 (2010) (positing that the large number of undocumented workers in the United States is “indicative of an immigration system which is guided by a deliberate policy choice to tolerate unauthorized presence in return for access to cheap unauthorized labor.”); Gerald P. Lopez, *Don't We Like Them Illegal?*, 45 U.C. DAVIS. L. REV. 1711, 1718 (2012) (“[T]he U.S. and Mexico developed mass Mexican migration, using both legal and illegal systems, in order to respond to the needs and aspirations of their linked political economies. The U.S. has built its prosperity, while Mexico has managed its distress, using these transnational migration systems.”).

12. Jens Manuel Krogstad, *Americans Broadly Support Legal Status for Immigrants Brought to the U.S. Illegally as Children*, PEW RSCH. CTR. (June 17, 2020), <https://www.pewresearch.org/fact-tank/2020/06/17/americans-broadly-support-legal-status-for-immigrants-brought-to-the-u-s-illegally-as-children/>.

13. Dudley, *supra* note 9.

undocumented in the United States as well as to promote necessary immigration that is beneficial to the economy and society as a whole.<sup>14</sup>

Prior to President Biden, the Trump campaign and his subsequent administration established immigration policy as a policy centerpiece. Peter Nunez from the conservative Center for Immigration Studies noted that if there are no jobs, then undocumented workers will not come to the United States for employment.<sup>15</sup> Of course, this approach makes sense intuitively based on the basic economic theory of supply and demand. However, Nunez ignored that the demand is driven by American employers as opposed to undocumented foreign nationals. In other words, if one truly seeks to limit undocumented workers within the United States, then one must limit the demand for undocumented workers created by American employers. If one wants to achieve immigration reform, then employers must be part of the solution.<sup>16</sup> In order to incentivize these employers, there must be consequences to employing undocumented workers. If federal prosecutors vigorously enforce laws criminalizing the employment of undocumented individuals, more employers and their representatives will be interested in pursuing comprehensive reform in a holistic manner.

This article will address the notion of federal criminal immigration law in the United States and the role that supply and demand should play. Specifically, there are federal statutes that address immigration and can be used to redirect the discussion about immigration and its relationship to the job supply.

In Section I, the article discusses the recent history of the government's enforcement of federal immigration laws in the workplace. Specifically, it concentrates on a number of significant raids by United States Immigration and Customs Enforcement ("ICE") during the past few presidential administrations. Section II analyzes the animosity that President Trump had for non-citizens, particularly undocumented ones, before and during his time in the White House.

Section III details four principal criminal offenses regarding immigration. Moreover, it discusses how the federal government occupies the field of immigration such that most state criminal laws concerning immigration are preempted.

In Section IV, the article addresses statistical patterns of federal prosecutions for illegal entry, illegal reentry, and smuggling of undocumented individuals. Because the government does not provide any records regarding illegal

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14. *Fact Sheet: President Biden Sends Immigration Bill to Congress as Part of His Commitment to Modernize our Immigration System*, WHITE HOUSE (Jan. 20, 2021), <https://www.whitehouse.gov/briefing-room/statements-releases/2021/01/20/fact-sheet-president-biden-sends-immigration-bill-to-congress-as-part-of-his-commitment-to-modernize-our-immigration-system/>.

15. Doubek, *supra* note 1.

16. See Jain, *supra* note 11, at 151 ("The U.S. immigration enforcement system also gives significant interior enforcement responsibilities to private parties, particularly employers, who have powerful economic incentives not to report unauthorized workers.").

employment of undocumented workers, the article compiles data from 2014 through 2019 of the few existing cases involving prosecutions for illegally employing undocumented workers.

Section V analyzes these rare prosecutions for illegally employing undocumented workers. In Section VI, the article addresses the applicability of supply and demand principles to the federal statute criminalizing the employment of undocumented workers. Finally, in Section VII, the conclusion proposes some recommendations for utilizing that statute in the context of supply and demand principles. Specifically, if employers feel an equal share of the burdens of the current immigration system, then they would have more incentive to use their influence to fix the system so that it is more equitable for all, including undocumented workers.

#### I. THE HISTORY OF IMMIGRATION ENFORCEMENT DOES NOT GENERALLY ADDRESS EMPLOYERS

Periodically, the federal government will conduct a large immigration raid, rounding up undocumented workers. These raids are designed, in part, “to penalize employers who knowingly hire unauthorized workers as well as to deter employers who are tempted to hire unauthorized workers.”<sup>17</sup> Previously, ICE reported that its “worksite enforcement strategy focuses on the criminal prosecution of employers who knowingly hire illegal workers.”<sup>18</sup> Despite these strong assertions by the principal federal agency enforcing the nation’s criminal immigration law, typically, the enforcement focuses on undocumented workers as opposed to their employers.

The Trump administration engaged in a number of high-profile immigration raids, arresting undocumented individuals in their workplaces. For example, in January 2018, ICE agents conducted an operation targeting ninety-eight 7-Eleven stores in seventeen different states and the District of Columbia, resulting in at least twenty-one arrests.<sup>19</sup> After the 7-Eleven raids, ICE officials predicted that its agents would be conducting similar raids at worksites in the coming year.<sup>20</sup>

Within a few months, ICE agents conducted another large raid at the Southeastern Provision slaughterhouse in Bean Station, Tennessee, arresting

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17. *Labor Violations: Targeting Employers Involved in Criminal Activity and Labor Exploitation*, U.S. CUSTOMS & IMMIGR. ENF’T, (last updated Sept. 9, 2021), <https://www.ice.gov/investigations/worksite>.

18. *Few Prosecuted for Illegal Employment of Immigrants*, TRAC IMMIGR., (May 30, 2019), <https://trac.syr.edu/immigration/reports/559/>.

19. Doubek, *supra* note 1; Corky Siemaszko, *Immigration Agents Raid 7-Eleven Stores Nationwide, Arrest 21 People in Biggest Crackdown of Trump Era*, NBC NEWS (Jan. 10, 2018, 3:32 PM), <https://www.nbcnews.com/news/us-news/immigration-agents-raid-7-eleven-stores-nationwide-arrest-21-people-n836531>.

20. Siemaszko, *supra* note 19; Doubek, *supra* note 1.



almost one hundred undocumented workers.<sup>21</sup> The raid resulted from an investigation into the plant owner's failure to pay taxes for his undocumented employees.<sup>22</sup>

In August 2019, ICE agents raided seven chicken processing plants in Mississippi, arresting 680 undocumented workers.<sup>23</sup> That same day, Mike Hurst, the United States Attorney for the Southern District of Mississippi, indicated that his office would go after employers and employees alike in federal immigration prosecutions:

To those who take advantage of illegal aliens, to those who use illegal aliens for a competitive advantage or to make a quick buck, we have something to say to you. If we find that you have violated federal criminal law, we're coming after you.<sup>24</sup>

To date, the government has largely prosecuted the 680 workers along with a few low-level management officials, but not the upper management or ownership of any of the plants.<sup>25</sup>

Although the Mississippi raids were the largest, there were other significant raids during the Trump administration. For example, a few months before ICE raided the Mississippi chicken plants, ICE raided a technology repair company in a Dallas suburb.<sup>26</sup> Agents arrested 284 employees in what at that time was

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21. Jonathan Blitzer, *In Rural Tennessee, A Big ICE Raid Makes Some Conservative Voters Rethink Trump's Immigration Agenda*, THE NEW YORKER (Apr. 18, 2018), <https://www.newyorker.com/news/dispatch/in-rural-tennessee-a-big-ice-raid-makes-some-conservative-voters-rethink-trumps-immigration-agenda>; *Nearly 100 Detained in ICE Raid at Tennessee Meatpacking Plant*, WATE (Apr. 8, 2018, 3:59 PM), <https://www.wfla.com/news/nearly-100-detained-in-ice-raid-at-tennessee-meatpacking-plant/>.

22. Blitzer, *supra* note 21; Matt Lakin, *Bean Station ICE Raid: Slaughterhouse Owner Gets 18 Months in Prison*, KNOX NEWS (July 31, 2019, 2:38 PM), <https://www.knoxnews.com/story/news/crime/2019/07/31/bean-station-ice-raid-slaughterhouse-owner-18-months-prison-james-brantley-wall-illegal-immigration/1867197001/>.

23. Dianne Gallagher, Catherine E. Shoichet, Madeline Holcombe, *680 Undocumented Workers Arrested in Record-Setting Immigration Sweep on the First Day of School*, CNN (Aug. 9, 2019, 7:12 AM), <https://www.cnn.com/2019/08/08/us/mississippi-immigration-raids-children/index.html>; Henry Grabar, *After ICE*, SLATE (Aug. 18, 2019, 7:00 PM), <https://slate.com/news-and-politics/2019/08/ice-raids-mississippi-chicken-plants-aftermath-children.html>.

24. Alissa Zhu & Maria Clark, *A Year After Mississippi ICE Raids, Chicken Plants Face Few Penalties as Families Suffer*, MISS. CLARION LEDGER (Aug. 7, 2020, 6:00 AM), <https://www.clarionledger.com/in-depth/news/2020/08/07/mississippi-ice-raids-immigrants-struggle-few-penalties-chicken-plants/5407320002/>.

25. Alissa Zhu, *Mississippi ICE Raids: Feds Announce 4 Managers Charged in Chicken Plant Investigations*, MISS. CLARION LEDGER (Aug. 6, 2020), <https://www.clarionledger.com/story/news/2020/08/06/mississippi-ice-raids-feds-announce-indictments-chicken-plant-case/3298916001/>.

26. Stella Chavez et al., *Largest Workplace Immigration Raid in a Decade*, KERA NEWS (Apr. 3, 2019, 11:30 AM), <https://www.keranews.org/news/2019-04-03/ice-arrests-284-workers-in-allen-in-largest-workplace-immigration-raid-in-a-decade>; Charles Scudder, *About 280 Workers Arrested in ICE Raid at Allen Technology Business*, THE DALL. MORNING NEWS (Apr. 3, 2019,

the largest raid in about ten years.<sup>27</sup> The company, CVE Technology Group, which employed about 2,100 people to recycle used electronics and parts, allegedly hired people who had fraudulent identification documents.<sup>28</sup>

In the Trump administration, workplace immigration raids increased dramatically.<sup>29</sup> However, such actions against undocumented individuals did not begin during the Trump administration. During George W. Bush's presidency, ICE conducted large-scale workplace raids, arresting large numbers of undocumented workers.<sup>30</sup> For example, prior to the Mississippi raids, the largest worksite immigration raids happened during the Bush administration, in May 2008, where federal agents arrested almost 400 people in raids at Agriprocessors, Inc. in Postville, Iowa for lacking legal status to be in the United States.<sup>31</sup> In August 2008, ICE agents arrested almost 600 undocumented workers at Howard Industries, a manufacturing plant in Laurel, Mississippi, which fabricated numerous products, including electrical transformers and medical supplies.<sup>32</sup> As agents arrested undocumented workers from the factory, other employees clapped at their removal.<sup>33</sup>

During the Obama administration, large raids on worksites decreased.<sup>34</sup> Indeed, the largest workplace raid during the Obama administration was only a couple of dozen people.<sup>35</sup> Nonetheless, there was a high rate of prosecutions and deportations during Obama's presidency, in part because ICE targeted undocumented workers it deemed to pose a clear risk to United States citizens.<sup>36</sup>

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6:46 PM), <https://www.dallasnews.com/news/immigration/2019/04/03/about-280-workers-arrested-in-ice-raid-at-allen-technology-business/>.

27. Chavez et al., *supra* note 26; Scudder, *supra* note 26.

28. Chavez et al., *supra* note 26.

29. Clark Mindock, *US Workplace Immigration Raids Surge 400% in 2018*, INDEP., (Dec. 12, 2018, 1:50 PM), <https://www.independent.co.uk/news/world/americas/us-politics/ice-immigration-workplace-migrants-undocumented-immigrants-raids-trump-obama-2018-a8678746.html>.

30. Doubek, *supra* note 1.

31. *Iowa Immigration Raid Largest Ever in U.S.*, NBC NEWS (May 12, 2008, 7:12 PM), <https://www.nbcnews.com/id/wbna24583537>; see also Ingrid V. Eagly, *Prosecuting Immigration*, 104 NW. UNIV. L. REV. 1281, 1301–04 (2010) (discussing Postville prosecutions as overzealous).

32. Adam Nossiter, *Nearly 600 Were Arrested in Factory Raid, Officials Say*, N.Y. TIMES (Aug. 26, 2008), <https://www.nytimes.com/2008/08/27/us/27raid.html>; *Feds Detain Nearly 600 in Miss. Plant Raid*, NBC NEWS (Aug. 26, 2008, 4:58 PM), <https://www.nbcnews.com/id/wbna26410407>.

33. *Feds Detain Nearly 600 in Miss. Plant Raid*, *supra* note 32.

34. Courtney Crowder & MacKenzie Elmer, *A Decade After a Massive Raid Nabbed 400 Undocumented Workers, this Tiny Town Fights to Reclaim its Identity*, DES MOINES REG., (May 17, 2018, 7:54 PM), <https://www.desmoinesregister.com/story/news/investigations/2018/05/10/postville-immigration-raid-10-year-anniversary-town-reclaims-identity/587995002/>.

35. Esther Yu Hsi Lee, *The Largest Workplace Raid Under the Obama Administration Just Happened in New York*, THINK PROGRESS, (Oct. 28, 2016, 4:07 PM), <https://archive.thinkprogress.org/workplace-raid-buffalo-69390e0032ba/>; see also Doubek, *supra* note 1.

36. Mindock, *supra* note 29; see also Doubek, *supra* note 1; Zachary B. Wolf, *Yes, Obama Deported More People than Trump but Context is Everything*, CNN (July 13, 2019, 8:13 AM),

Cecilia Muñoz, a former Obama administration domestic policy advisor, explained that in addition to deporting people convicted of serious crimes, the administration also targeted recent arrivals.<sup>37</sup> She further explained that “[i]t is more humane to be removing people who have been here two weeks than it is to be removing people who have been here for 20 years and have families.”<sup>38</sup> The Cato Institute noted that the Obama administration did not focus on deportations of individuals residing in the interior of the country, who typically would not be recent arrivals to the United States.<sup>39</sup> Ultimately, the Obama administration deported about five million people compared to about ten million by the Bush administration and twelve million by the Clinton administration.<sup>40</sup>

Although the government arrests, prosecutes, and removes hundreds of undocumented individuals, seldom have the management officials within the raided companies been arrested or suffered repercussions for employing people with no legal status to work in the United States.<sup>41</sup> A year after the raid on the seven chicken plants in Mississippi, the government indicted four managers who worked at just two of the seven plants involved.<sup>42</sup> None of the plant owners have been charged.<sup>43</sup>

Even when the government prosecutes employers, the consequences appear to be very lenient. For example, in September 2018, James Brantley, the owner of Southeastern Provision slaughterhouse, pled guilty to federal tax evasion, wire fraud, and employment of undocumented workers.<sup>44</sup> However, the prosecution’s filings document Brantley’s failure to pay \$2.5 million in payroll taxes because he used undocumented workers and paid them in cash for twenty years.<sup>45</sup> In addition to a fine of almost \$1.5 million that Brantley paid, he received a sentence of eighteen months in prison.<sup>46</sup>

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<https://www.cnn.com/2019/07/13/politics/obama-trump-deportations-illegal-immigration/index.html>.

37. Wolf *supra* note 36.

38. *Id.*

39. Alex Nowrasteh, *Trump Administration Expands Interior Immigration Enforcement*, CATO INST. (Dec. 5, 2017, 1:15 PM), <https://www.cato.org/blog/trump-administration-expands-interior-immigration-enforcement>; Wolf, *supra* note 36.

40. Muzzafar Chishti et al., *The Obama Record on Deportations: Deporter in Chief or Not?*, MIGRATION POL’Y INST. (Jan. 26, 2017), <https://www.migrationpolicy.org/article/obama-record-deportations-deporter-chief-or-not>; Wolf, *supra* note 36; *see also* Lopez, *supra* note 11, at 1789–92 (discussing immigration policy during the Clinton and Bush administrations).

41. Brandon L. Garrett, *Corporate Crimmigration*, 2021 U. ILL. L. REV. 359, 362 (2021).

42. Zhu & Clark, *supra* note 24.

43. *Id.*

44. Lakin, *supra* note 22; U.S. DEP’T OF JUST., *SOUTHEASTERN PROVISION OWNER JAMES BRANTLEY PLEADS GUILTY TO FEDERAL INFORMATION* (2018).

45. Lakin, *supra* note 22.

46. *Id.*

The 2008 Postville raid led to the arrest of Sholom Rubashkin, who was the CEO of Agriprocessors.<sup>47</sup> Initially, the government arrested him for federal conspiracy charges related to immigration offenses.<sup>48</sup> However, he was eventually arrested for bank fraud related to Agriprocessors' accounts receivable.<sup>49</sup> A jury convicted Rubashkin of eighty-six counts of various financial crimes, including bank fraud, and the court sentenced him to twenty-seven years in prison.<sup>50</sup> After achieving this conviction, the government moved to dismiss the seventy-two charges related to the immigration offenses, which the court granted.<sup>51</sup> In December 2017, President Trump commuted Rubashkin's sentence in his first presidential commutation.<sup>52</sup> Although there were many supporters of the commutation, a former federal prosecutor involved in Rubashkin's prosecution criticized the commutation: "[Rubashkin] couldn't win legally, factually or morally, so he had to win politically."<sup>53</sup> He further questioned the commutation in light of President Trump's stance generally on illegal immigration and undocumented workers.<sup>54</sup> Nonetheless, the commutation by President Trump was consistent with his business practices, as he employed undocumented workers himself in his companies without any consequences.

Despite President Trump's emphasis on a strong stance regarding immigration, he purportedly hired undocumented workers to build his real estate projects. For example, in 1980, when building Trump Tower, one of his signature properties, he used undocumented Polish workers.<sup>55</sup> He also used

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47. Jennifer Ludden, *Kosher Slaughterhouse Former Manager Arrested*, NPR (Oct. 31, 2008, 6:00 AM), <https://www.npr.org/templates/story/story.php?storyId=96369300>.

48. Wayne Drash, *Former Manager of Largest U.S. Kosher Plant Arrested*, CNN (Oct. 30, 2008), <https://www.cnn.com/2008/CRIME/10/30/kosher.plant.arrest/index.html>.

49. *Slaughterhouse Manager Convicted in Fraud Case*, N.Y. TIMES (Nov. 13, 2009), <https://www.nytimes.com/2009/11/13/us/13verdict.html>.

50. *Id.*; Josh Nelson, *Rubashkin Won't Face Immigration Trial*, THE COURIER (Nov. 19, 2009), [https://wfcourier.com/news/local/rubashkin-won-t-face-immigration-trial/article\\_cf2b2a86-d530-11de-95cd-001cc4c03286.html](https://wfcourier.com/news/local/rubashkin-won-t-face-immigration-trial/article_cf2b2a86-d530-11de-95cd-001cc4c03286.html); Matthew Putney, *Trump Commutes Sentence of Kosher Meatpacking Executive Sholom Rubashkin*, NBC NEWS (Dec. 21, 2017, 7:29 AM), <https://www.nbcnews.com/politics/justice-department/trump-commutes-sentence-kosher-meatpacking-executive-sholom-rubashkin-n831741>.

51. Nelson, *supra* note 50.

52. Putney, *supra* note 50.

53. Luke Nozicka, *President Trump Commutes Sentence of Sholom Rubashkin, Ex-Iowa Slaughterhouse Executive*, DES MOINES REG. (Dec. 20, 2017, 8:48 PM), <https://www.desmoinesregister.com/story/news/crime-and-courts/2017/12/20/president-trump-commutes-sentence-sholom-rubashkin-ex-iowa-slaughterhouse-executive/971291001/> (alterations in original).

54. *Id.*

55. Massimo Calabresi, *What Donald Trump Knew About Undocumented Workers at his Signature Tower*, TIME (Aug. 25, 2016, 6:41 AM), <https://time.com/4465744/donald-trump-undocumented-workers/>; Michelle Melnick et al., *Trump Tower Got its Start with Undocumented Foreign Workers*, NBC NEWS (Feb. 26, 2016, 3:16 PM), <https://www.nbcnews.com/news/us-news/donald-says-controversy-over-his-tower-was-trumped-n397821>.

undocumented workers from Costa Rica and other Latin American countries to build Trump National Golf Club Bedminster.<sup>56</sup> Moreover, the Trump Organization employed a group of undocumented workers to do maintenance work at his various golf resorts around the country.<sup>57</sup> As Jorge Castro, a former undocumented worker from Ecuador, explained, while President Trump was seeking to deport undocumented workers, he employed them at his properties, noting that “[i]f you’re a good worker, papers don’t matter.”<sup>58</sup>

## II. PRESIDENT TRUMP DISPLAYED SIGNIFICANT ANIMOSITY TOWARD IMMIGRANTS BEFORE AND DURING HIS PRESIDENCY

Notwithstanding the American economy’s significant reliance on undocumented workers in the workforce, many politicians and law enforcement officials seek to use them as scapegoats to score political points with their constituents. This section will discuss how during his first presidential campaign, then-candidate Trump made comments indicative of his hostility to immigrants. After becoming president, he implemented this hostility in his national policy.

### A. *Trump Derided Immigrants from Latin America*

The Trump administration has made no secret of its disdain for immigrants to the United States. In his 2016 campaign for the presidency, President Trump advocated for preventing migration from the southern border, in part, by building a wall across the entire border with Mexico. On August 16, 2015, then-candidate Trump released his immigration plan, explaining that: “There must be a wall across the southern border . . . Mexico must pay for the wall.”<sup>59</sup> In an August 31, 2016, campaign speech, he promised that “[w]e will build a great wall along the southern border. And Mexico will pay for the wall. One hundred percent. They don’t know it yet but they’re going to pay for it.”<sup>60</sup> At times during the campaign, he essentially advocated for the mass deportation of eleven million undocumented immigrants.<sup>61</sup>

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56. Joshua Partlow et al., *‘My Whole Town Practically Lived There’: From Costa Rica to New Jersey, a Pipeline of Illegal Workers for Trump Goes Back Years*, CHI. TRIB. (Feb. 8, 2019), <https://www.chicagotribune.com/nation-world/ct-undocumented-immigrants-trump-20190208-story.html>.

57. Bess Levin, *Trump Happily Employing Undocumented Workers While ICE Rounds Them Up*, VANITY FAIR, (Aug. 9, 2019), <https://www.vanityfair.com/news/2019/08/trump-organization-undocumented-workers>.

58. *Id.*

59. Nick Corasaniti, *A Look at Trump’s Immigration Plan, Then and Now*, N.Y. TIMES (Aug. 31, 2016), <https://www.nytimes.com/interactive/2016/08/31/us/politics/donald-trump-immigration-changes.html>.

60. *Id.*

61. *Id.*; Tom LoBianco, *Donald Trump Promises ‘Deportation Force’ to Remove 11 Million*, CNN (Nov. 12, 2015, 6:42 AM), <https://www.cnn.com/2015/11/11/politics/donald-trump-deportation-force-debate-immigration/index.html>.

In an infamous statement from President Trump's announcement of his candidacy, he attacked Mexicans entering the United States as rapists and drug dealers:

When Mexico sends its people, they're not sending their best. They're not sending you. They're not sending you. They're sending people that have lots of problems, and they're bringing those problems with us. They're bringing drugs. They're bringing crime. They're rapists. And some, I assume, are good people.<sup>62</sup>

He continued to stand by this statement afterward.<sup>63</sup>

*B. Trump Derided Muslims, Including Immigrants from Predominantly Muslim Countries*

In addition to the attacks on people entering the United States from Latin America and Mexico, Trump campaigned by attacking Muslims as terrorists. He indicated that he would consider shutting down American mosques after a terrorist attack in Paris.<sup>64</sup> Furthermore, he posited creating a registry for all Muslims.<sup>65</sup> In December 2015, following a terrorist attack in San Bernardino, California, by Muslim extremists, he advocated for “a total and complete shutdown of Muslims entering the United States.”<sup>66</sup>

Upon entering office, one of the first orders of business for the Trump administration was to implement travel bans targeting Muslims.<sup>67</sup> Within days of his inauguration, he issued an executive order that was his first travel ban.<sup>68</sup> This order prohibited immigrants and nonimmigrants from Iran, Iraq, Libya, Somalia, Sudan, Syria, and Yemen—notably all predominantly Muslim

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62. Michelle Ye Hee Lee, *Donald Trump's False Comments Connecting Mexican Immigrants and Crime*, WASH. POST (July 8, 2015), <https://www.washingtonpost.com/news/fact-checker/wp/2015/07/08/donald-trumps-false-comments-connecting-mexican-immigrants-and-crime/>.

63. See *id.*; Z. Bryon Wolf, *Trump Basically Called Mexicans Rapists Again*, CNN (Apr. 6, 2018, 1:38 PM), <https://www.cnn.com/2018/04/06/politics/trump-mexico-rapists/index.html>.

64. Gregory Krieg, *Donald Trump: 'Strongly Consider' Shutting Mosques*, CNN (Nov. 16, 2015, 12:11 PM), <https://www.cnn.com/2015/11/16/politics/donald-trump-paris-attacks-close-mosques/index.html>; Jessica Taylor, *Trump Calls For 'Total and Complete Shutdown of Muslims Entering' U.S.*, NPR (Dec. 7, 2015, 5:49 PM), <https://www.npr.org/2015/12/07/458836388/trump-calls-for-total-and-complete-shutdown-of-muslims-entering-u-s>.

65. Taylor, *supra* note 64; Jill Colvin & Catherin Lucey, *Trump Says He Would Implement Muslim Database*, PBS (Nov. 20, 2015, 1:42 PM), <https://www.pbs.org/newshour/politics/trump-says-he-would-implement-muslim-database>.

66. Jenna Johnson & David Weigel, *Donald Trump Calls for 'Total' Ban on Muslims Entering United States*, WASH. POST (Dec. 8, 2015), [https://www.washingtonpost.com/politics/2015/12/07/e56266f6-9d2b-11e5-8728-1af6af208198\\_story.html](https://www.washingtonpost.com/politics/2015/12/07/e56266f6-9d2b-11e5-8728-1af6af208198_story.html); Taylor, *supra* note 64.

67. See Brian L. Owsley, *Is the Supreme Court Irrational: Trump v. Hawaii*, 29 S. CAL. INTERDISC. L. J. 591, 591 (2020).

68. Exec. Order No. 13,769, 82 Fed. Reg. 8,977 (Jan. 27, 2017).

nations—from entering the United States.<sup>69</sup> Several lawsuits challenged this travel ban in federal courts across the country.<sup>70</sup> About six weeks after he issued the executive order, he revoked it.<sup>71</sup>

When President Trump revoked his first travel ban order, he substituted it with the second one. The second travel ban prohibited immigrants and nonimmigrants from Iran, Libya, Somalia, Sudan, Syria, and Yemen—notably all predominantly Muslim nations—from entering the United States.<sup>72</sup> Again, there was significant litigation across the country challenging the second travel ban.<sup>73</sup>

In September 2017—about eight months after President Trump’s inauguration—he issued a third travel ban.<sup>74</sup> In this order, the United States banned immigrants from Chad, Iran, Libya, North Korea, Syria, Venezuela, and Yemen.<sup>75</sup> Among these seven nations, North Korea and Venezuela stand out as countries whose citizens are not predominantly Muslim.<sup>76</sup> Moreover, the list did not include Iraq, Somalia, and Sudan, which were Muslim countries that had been included in previous bans.<sup>77</sup>

President Trump emphasized Latin American immigration as a problem through his campaign as well as during his presidency. Indeed, on one of his last official trips as president, he visited the border wall in Texas along the Rio Grande River, citing the construction of the wall as one of his signature accomplishments.<sup>78</sup> One scholar has noted that the Trump immigration policy had three basic components: a zero-tolerance approach to undocumented individuals entering and residing in the country, increased penalties for people

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69. Exec. Order No. 13,769, 82 Fed. Reg. at 8,978; *see also* 8 U.S.C. § 1182(f) (2019) (explaining relevance); Jack Goodman, *US Travel Ban: Why These Seven Countries?*, BBC (Jan. 30, 2017), <http://www.bbc.com/news/world-us-canada-38798588>.

70. Owsley, *supra* note 67, at 592, 594–95.

71. Exec. Order No. 13,780, 82 Fed. Reg. 13,209, 13,218 (Mar. 6, 2017).

72. Exec. Order No. 13,780, 82 Fed. Reg. at 13,211.

73. Owsley, *supra* note 67, at 596–98.

74. Proclamation No. 9645, 82 Fed. Reg. 45,161 (Sept. 24, 2017).

75. Proclamation No. 9645, 82 Fed. Reg. at 45,163.

76. The restrictions applied to certain Venezuelan governmental officials and their family members. Proclamation No. 9645, 82 Fed. Reg. at 45,166. The third travel ban excluded all citizens from the six other countries. Proclamation No. 9645, 82 Fed. Reg. at 45,165–45,167. Moreover, although the list did not include Somalia, the order also included its citizens among those nationals who were restricted entry as immigrants and had limitations on any entrance as non-immigrants. Proclamation No. 9645, 82 Fed. Reg. at 45,167.

77. Exec. Order No. 13,780, 82 Fed. Reg. at 13,209; Exec. Order No. 13,769, 82 Fed. Reg. at 8,978. *Cf.* Proclamation No. 9645, 82 Fed. Reg.

78. Priscilla Alvarez, *Trump Visits his Border Wall on the Heels of Deadly Capitol Hill Riot*, CNN (Jan. 12, 2021, 6:24 PM), <https://www.cnn.com/2021/01/12/politics/trump-border-wall-capitol-hill/index.html>; John Burnett, *Trump Visits Border Wall to Show Off a Signature Election Promise*, NPR (Jan. 13, 2021, 5:08 AM), <https://www.npr.org/2021/01/13/956315618/trump-visits-border-wall-to-show-off-a-signature-election-promise>.

convicted of illegal reentry, and the forced separation of children from their parents when entering the United States.<sup>79</sup>

### III. CONGRESS ENACTED LEGISLATION ESTABLISHING SEVERAL IMMIGRATION CRIMES

#### *A. Individuals who Illegally Enter the United States Face a Misdemeanor*

In federal criminal law, there are various criminal immigration offenses.<sup>80</sup> Congress first criminalized illegal entry into the United States in 1929 in the Undesirable Alien Act.<sup>81</sup> Specifically, it mandated that “[a]ny alien who hereafter enters the United States at any time or place other than as designated by immigration officials or eludes examination or inspection by immigration officials . . . shall be guilty of a misdemeanor.”<sup>82</sup> Senator Coleman Blease, a former governor of South Carolina and Senator who advocated white supremacy and lynching, authored the Undesirable Aliens Act that created a criminal offense for illegally entering the country.<sup>83</sup>

Based on the offense from the Undesirable Aliens Act, the Immigration and Nationality Act of 1952 subsequently recodified this crime of illegal entry.<sup>84</sup> In the Immigration Act of 1990, Congress also criminalized attempted illegal entry into the United States:

Any alien who (1) enters or *attempts* to enter the United States at any time or place other than as designated by immigration officers, or (2) eludes examination or inspection by immigration officers, or (3) *attempts* to enter or obtains entry to the United States by a willfully false or misleading representation or the willful concealment of a material fact.<sup>85</sup>

Pursuant to subsection 1 of this Act, the typical scenario that led to a conviction for illegal entry based on entering the United States at a place other

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79. See Ingrid V. Eagly, *The Movement to Decriminalize Border Crossing*, 61 B.C. L. REV. 1976, 1982–83, 1986, 1991–92.

80. See Anjana Malhotra, *The Immigrant and Miranda*, 66 SMU L. REV. 277, 284–85 (2013).

81. Undesirable Aliens Act, Pub. L. No. 70-1018, §1(a), 45 Stat. 1551, 1551 (1929).

82. *Id.* § 2; accord *United States v. Gallegos-Aparicio*, No. 19-CR-2637, 2020 U.S. Dist. LEXIS 2233254, at \*4–5 (S.D. Cal. Dec. 11, 2020); see also Eagly, *supra* note 31, at 1297–98 (discussing the Undesirable Aliens Act and its legislative history).

83. Natasha Armpriester, *Trumping Asylum: Criminal Prosecutions for “Illegal” Entry and Reentry Violate the Rights of Asylum Seekers*, 45 HASTINGS CONST. L.Q. 3, 12 (2017); Eagly, *supra* note 79, at 1981.

84. Immigration and Nationality Act of 1952, Pub. L. No. 82-414, § 275, 66 Stat. 163, 229; accord *United States v. Rios-Montano*, No. 19-CR-2123, 2020 U.S. Dist. LEXIS 230122, at \*9 (S.D. Cal. Dec. 8, 2020); Madlin Mekelburg, *Fact-check: When did it become a crime to cross the U.S. border between ports of entry?*, STATESMAN (July 12, 2019, 9:36 AM), <https://www.statesman.com/news/20190712/fact-check-when-did-it-become-crime-to-cross-us-border-between-ports-of-entry>.

85. 8 U.S.C. § 1325(a) (emphases added).



than designated involves a person crossing an international boundary from Mexico into the United States.<sup>86</sup> For example, “a person [may] cross[] the Rio Grande River instead of appearing before a customs officer at a Border Patrol checkpoint.”<sup>87</sup>

The government is not required to prove that the defendant engaged in any “entry” into the country in order for someone to be convicted of subsection 2 of section 1325.<sup>88</sup> Unlike subsection 1, which concerns entrance at places other than official ports of entry, this subsection’s notion of eluding inspection must occur at an official entry point into the United States.<sup>89</sup> The subsection for making false misrepresentations can involve a person presenting counterfeit documents to gain entry into the United States.<sup>90</sup>

Anyone convicted of illegal entry is subject to a maximum of no more than six months in jail,<sup>91</sup> as well as a fine of up to \$5,000.<sup>92</sup> Alternatively, the court could sentence such a defendant to probation with the maximum term set at five years.<sup>93</sup> If someone is convicted of a second offense pursuant to section 1325, then that person may be convicted of a felony with a maximum period of incarceration of no more than two years.<sup>94</sup> Additionally, such a person would face a potential fine of no more than \$250,000.<sup>95</sup>

Section 1325 also contains criminal sanctions for marriage fraud enacted in the Immigration Marriage Fraud Act of 1986: “Any individual who knowingly enters into a marriage for the purpose of evading any provision of the immigration law shall be imprisoned for not more than 5 years, or fined not more than \$250,000, or both.”<sup>96</sup> Congress enacted this statute to protect American citizens and to prevent non-citizens from circumventing the immigration

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86. See, e.g., *United States v. Chang-Rodriguez*, No. 19-PO3264, 2020 U.S. Dist. LEXIS 116133, at \*4 (D.N.M. June 30, 2020). Cf. *United States v. Ayalew*, 563 F. Supp. 2d 409, 414–15 (N.D.N.Y. 2008) (discussing whether probable cause existed for defendant when border sensors triggered).

87. Brian L. Owsley, *Distinguishing Immigration Violations from Criminal Violations: A Discussion Raised by Justice Sonia Sotomayor*, 163 U. PA. L. REV. ONLINE 1, 5 (2014).

88. *United States v. Montes-De Oca*, 820 F. App’x 247, 251 (5th Cir. 2020).

89. *Id.*

90. See Owsley, *supra* note 87, at 5.

91. 8 U.S.C. § 1325(a); accord *United States v. Rodriguez-Gonzales*, 358 F.3d 1156, 1158 (9th Cir. 2004); see also Eagly, *supra* note 31, at 1326 n.267 (discussing petty offenses).

92. 18 U.S.C. § 3571(b)(6) (“[A]n individual who has been found guilty of an offense may be fined not more than . . . for a Class B or C misdemeanor that does not result in death, not more than \$5,000.”); *Gonzales v. City of Peoria*, 722 F.2d 468, 475 (9th Cir. 1983) (“Where there is no evidence of prior illegal entry, a violation of section 1325 is a misdemeanor.”).

93. 18 U.S.C. § 3561(e)(2).

94. 8 U.S.C. § 1325(a); accord *Rodriguez-Gonzales*, 358 F.3d at 1158.

95. 18 U.S.C. § 3571(b)(3) (“[A]n individual who has been found guilty of an offense may be fined not more than . . . for a felony, not more than \$250,000.”).

96. Immigration Fraud Marriage Amendment of 1986, Pub. L. No. 99-639, 100 Stat. 3537 (codified as amended at 8 U.S.C. § 1325(c)).

process.<sup>97</sup> Convictions pursuant to this section often result from sham marriages designed to obtain citizenship for the defendant.<sup>98</sup> Finally, the offense of illegal entry has a five-year statute of limitations, which begins on the date that the person enters the United States.<sup>99</sup> This same period applies in prosecutions for marriage fraud.<sup>100</sup> These offenses with a six-month maximum are increasingly presided over by federal magistrate judges, especially along the nation's southern border.<sup>101</sup>

### *B. Individuals who Illegally Reenter the United States Face a Felony*

In addition to illegal entry, federal law criminalizes illegal reentry by persons who have “been denied admission, excluded, deported, or removed or has departed the United States while an order of exclusion, deportation, or removal is outstanding.”<sup>102</sup> Generally, an individual violates section 1326 if that person “enters, attempts to enter, or is at any time found in, the United States.”<sup>103</sup>

People charged with illegal reentry have already been excluded, deported, or removed from the country in several ways to fit within this statutory language. First, people convicted of illegal entry and then removed following that conviction may be convicted of illegal reentry if they return to the United States and are apprehended. Second, many individuals become eligible for charges of illegal reentry after they have been convicted in state criminal proceedings. For example, an individual who is convicted of a state felony or misdemeanor will be placed in immigration proceedings after completing the state sentence, which in turn leads to removal proceedings.<sup>104</sup> Thus, once such individuals return after being removed, they face an illegal reentry charge. Indeed, persons who have no legal status to be in the United States can be removed after being pulled over by law enforcement for routine traffic stops.<sup>105</sup> Regardless of the consequences

97. Maria Isabel Medina, *The Criminalization of Immigration Law: Employer Sanctions and Marriage Fraud*, 5 GEO. MASON L. REV. 669, 672 (1997).

98. See *United States v. Daniel*, 933 F.3d 370, 377 (5th Cir. 2019); *United States v. Akanni*, 890 F.3d 355, 356–57 (1st Cir. 2018); Medina, *supra* note 97, at 697 (addressing sham marriages).

99. See *United States v. Rincon-Jimenez*, 595 F.2d 1192, 1194 (9th Cir. 1979) (overturning a prosecution for illegal entry because the defendant's entry occurred more than five years before he was charged); *United States v. Cavillo-Rojas*, 510 F. App'x 238, 249 (4th Cir. 2013) (“[A] § 1325(a) offense is completed at the time of the defendant's illegal entry, and the statute of limitations begins running at that point.”); Andrew Tae-Hyun Kim, *Penalizing Presence*, 88 GEO. WASH. L. REV. 76, 138–39 (2020).

100. See *United States v. Ongaga*, 820 F.3d 152, 160 (5th Cir. 2016) (holding that marriage fraud is not an ongoing offense and thus the statute runs from the date of the marriage); *accord Ashraf v. Lynch*, 819 F.3d 1051, 1054 (1st Cir. 2016).

101. Eagly, *supra* note 31, at 1330.

102. 8 U.S.C. § 1326(a)(1).

103. 8 U.S.C. § 1326(a)(2).

104. See *Garrett*, *supra* note 41, at 362 (“[A] criminal arrest, even for routine traffic enforcement, [] may trigger immigration screening” that leads to a person being brought into the immigration system).

105. *Id.*

of the basis for the traffic stop, those people can be removed and then subject to section 1326 if they return to the United States.

Persons convicted of illegal reentry are subject to a maximum period of incarceration of no more than two years.<sup>106</sup> Additionally, such a person would face a potential fine of no more than \$250,000.<sup>107</sup> However, if the defendant is convicted of illegal reentry after being removed based on at least “three or more misdemeanors involving drugs, crimes against the person, or both, or a felony (other than an aggravated felony),” that person faces a sentence of incarceration of up to ten years.<sup>108</sup> Finally, if the conviction for which the defendant is removed is an aggravated felony, then that person faces a maximum of twenty years in prison.<sup>109</sup>

As with the illegal entry offense, the statute of limitations for illegal reentry is also five years.<sup>110</sup> However, unlike the illegal entry offense, the statute of limitations does not begin to run until the defendant is illegally “found” in the United States, that is when law enforcement officials discover the defendant instead of when the defendant actually illegally reentered the country.<sup>111</sup>

In addition to persons whom federal prosecutors can charge for illegally entering and reentering, individuals also can be charged with bringing in and harboring undocumented individuals.<sup>112</sup> Such defendants range from American citizens to permanent residents to undocumented individuals.

### *C. Anyone who Transports or Smuggles Individuals with No Legal Status to be in the United States Faces a Felony*

As with illegal reentry, the potential range of penalties for smuggling undocumented individuals can vary widely depending on the defendant’s circumstances and the specific details of smuggling. Anyone who knowingly or recklessly transports or harbors an undocumented person faces up to five years

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106. 8 U.S.C. § 1326(a).

107. 18 U.S.C. § 3571(b)(3) (“[A]n individual who has been found guilty of an offense may be fined not more than . . . for a felony, not more than \$250,000.”).

108. 8 U.S.C. § 1326(b)(1).

109. 8 U.S.C. § 1326(b)(2).

110. 18 U.S.C. § 3282(a) (“[N]o person shall be prosecuted, tried, or punished for any offense, not capital, unless the indictment is found or the information is instituted within five years next after such offense shall have been committed.”); *accord* *United States v. Corrales-Vazquez*, 931 F.3d 944, 953 (9th Cir. 2019) (discussing *United States v. Rincon-Jimenez*, 595 F.2d 1192 (9th Cir. 1979)); *United States v. Williams*, 733 F.3d 448, 452–53 (2d Cir. 2013) (“Williams’s illegal reentry offense is governed by the five-year statute of limitations for non-capital criminal offenses set forth in 18 U.S.C. § 3282(a).”).

111. *See Corrales-Vazquez*, 931 F.3d at 953–54 (holding “that to ‘elude[] examination or inspection by immigration officers’ in violation of § 1325(a)(2), the alien’s conduct must occur at a designated port of entry that is open for inspection and examination.”) (alterations in original).

112. 8 U.S.C. § 1324(a)(1)(A); *see also* Jain, *supra* note 11, at 157 (discussing the development and the history of the criminalization of harboring).

for *each* person smuggled.<sup>113</sup> If a defendant smuggles three people (which would not be uncommon), then that defendant could be facing potentially up to fifteen years.

However, if the defendant commits smuggling of undocumented individuals with “the purpose of commercial advantage or private financial gain,” the maximum potential penalty is ten years for each smuggled individual.<sup>114</sup> Although smuggling family members is not uncommon, most people engage in this criminal enterprise for financial gain, which makes it easy for the prosecution to establish this purpose based on circumstantial evidence.<sup>115</sup>

If the defendant engages in conduct during the course of smuggling undocumented individuals that “causes serious bodily injury” or places another person’s life in jeopardy, the defendant faces a maximum penalty of twenty years for each person smuggled.<sup>116</sup> This triggering conduct can include traffic accidents resulting in serious injury.<sup>117</sup> Additionally, physical or sexual abuse during the course of the smuggling can constitute a basis for a sentencing enhancement pursuant to this subsection.<sup>118</sup>

Finally, if during the course of smuggling undocumented individuals, a defendant causes the death of another person, the defendant may be sentenced to death or up to life in prison.<sup>119</sup> Tragically, deaths happen in such smuggling operations. After federal agents made it more difficult to enter the United States illegally through easier routes, more undocumented individuals took riskier treks through arid and dangerous terrain.<sup>120</sup> These riskier routes often lead to

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113. 8 U.S.C. § 1324(a)(1)(B)(ii); *accord* United States v. Garza, 587 F.3d 304, 312 (5th Cir. 2009).

114. 8 U.S.C. § 1324(a)(1)(B)(i); *accord* Garza, 587 F.3d at 311–12; United States v. Vargas, 201 F. App’x 708, 709 (11th Cir. 2006) (per curiam).

115. United States v. Ruiz-Hernandez, 890 F.3d 202, 210 (5th Cir. 2018).

116. 8 U.S.C. § 1324(a)(1)(B)(iii); *accord* United States v. Alvarado-Casas, 715 F.3d 945, 950 (5th Cir. 2013) (transporting); United States v. Bonetti, 277 F.3d 441, 451–52 (4th Cir. 2002) (harboring).

117. See Alvarado-Casas, 715 F.3d at 948–49 (“[A] motor vehicle accident in which 17 illegal aliens and the driver [of the] vehicle had gone off an embankment, approximately a 40-foot drop” leading to hospitalization for all of them) (alteration in original); United States v. Mejia-Luna, 562 F.3d 1215, 1217–18 (5th Cir. 2009) (finding serious bodily injury from a roll-over accident that occurred during an attempt to elude law enforcement).

118. See United States v. Garcia De Leon, 137 F. App’x 965, 966 (9th Cir. 2005) (per curiam).

119. 8 U.S.C. § 1324(a)(1)(B)(iv); *accord* United States v. Williams, 449 F.3d 635, 645 (6th Cir. 2006).

120. See Fernanda Echavarri, *2020 Was the Deadliest Year on Record for Migrants Crossing the Arizona Desert*, MOTHER JONES (Dec. 22, 2020), <https://www.motherjones.com/politics/2020/12/record-deaths-migrants-arizona-desert/>; Chase Hunter, *Report: Migrant Deaths in Arizona Desert Have Reached Seven-Year High*, ARIZ. DAILY STAR (Oct. 27, 2020), [https://tucson.com/news/state-and-regional/report-migrant-deaths-in-arizona-desert-have-reached-seven-year-high/article\\_636fd548-d8ff-5906-9fbc-917dabc478b6.html](https://tucson.com/news/state-and-regional/report-migrant-deaths-in-arizona-desert-have-reached-seven-year-high/article_636fd548-d8ff-5906-9fbc-917dabc478b6.html); Daniel Borunda, *Ecuadorian Migrant Dies After Being Found by Border Patrol in Southern New Mexico Desert*, EL PASO TIMES (Aug. 19, 2020, 11:40 PM), <https://www.elpasotimes.com/story/news/local/new-mexico/2020/08/19/ecuador-migrant-dies-after-found-border-patrol-deming-new-mexico-desert/5605302002/>; Brett

migrants' deaths when the smugglers leading groups of undocumented individuals abandon them.<sup>121</sup> Other migrants die when their vehicles suffer rollovers and other accidents, often while being chased by law enforcement officers.<sup>122</sup> Additionally, others die locked inside trucks from heat exhaustion, dehydration, and asphyxiation.<sup>123</sup>

*D. Employers who Illegally Hire Undocumented Workers for Employment Within the United States Face a Misdemeanor*

In 1986, Congress enacted the Immigration Reform and Control Act.<sup>124</sup> Although this enactment largely failed to reduce unauthorized employment of undocumented workers, Congress included it in the Illegal Immigration Reform and Immigrant Responsibility Act of 1996.<sup>125</sup> Thus, in addition to criminalizing illegally entering and reentering the United States as well as smuggling undocumented migrants, Congress established criminal penalties for the employment of undocumented individuals:<sup>126</sup>

It is unlawful for a person or other entity—

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Kelman & Gustavo Solis, *Border Bodies: The Grim Mysteries of Southern California*, DESERT SUN (July 6, 2016, 11:13 AM), <https://www.desertsun.com/story/news/investigations/2016/07/06/border-bodies-california-mexico/85193162/>; Pamela Colloff, *The Desert of the Dead*, TEX. MONTHLY (Nov. 2006), <https://www.texasmonthly.com/politics/the-desert-of-the-dead/>.

121. Kelman & Solis, *supra* note 120.

122. See Nicole Sganga, *At least 10 Killed When Van Carrying Migrants Crashes in Texas*, CBS NEWS (Aug. 5, 2021, 2:43 PM), <https://www.cbsnews.com/news/texas-van-crash-accident-encino-migrants-us-mexico-border/>; Cody King, *Kinney Country Deputies, Border Patrol Searching for Driver Responsible for Fatal Rollover Crash*, KSAT (July 26, 2020, 4:57 PM), <https://www.ksat.com/news/local/2020/07/26/kinney-county-deputies-border-patrol-searching-for-driver-responsible-for-fatal-rollover-crash/>; Jim Parker, *10 Dead or Hurt in El Paso Car Crash After Border Patrol Chase Included Residents of 3 Nations*, KVIA (June 26, 2020, 6:41 PM), <https://kvia.com/traffic/2020/06/26/7-who-died-in-el-paso-car-crash-during-border-patrol-chase-included-residents-of-3-nations/>; David Caltabiano, *New video Shows Deadly Rollover Crash that Killed Five Undocumented Immigrants*, FOX29 (July 1, 2019), <https://foxsanantonio.com/news/local/exclusive-new-video-shows-deadly-rollover-crash-that-killed-five-undocumented-immigrants>.

123. See Holly Yan & Jason Morris, *San Antonio Driver Says he Didn't Know Immigrants Were in Truck*, CNN (July 25, 2017, 12:18 AM), <https://www.cnn.com/2017/07/24/us/san-antonio-trailer-migrants/index.html>; *United States v. Williams*, 610 F.3d 271, 274–76 (5th Cir. 2010).

124. Immigration Reform and Control Act, Pub. L. No. 99-603, 100 Stat. 3359 (1986); see also Angela D. Morrison, *Why Protect Unauthorized Workers? Imperfect Proxies, Unaccountable Employers, and Antidiscrimination Law's Failures*, 72 BAYLOR L. REV. 117, 122 (2020).

125. Illegal Immigration Reform and Immigrant Responsibility Act of 1996, Pub. L. No. 104-208, tit. VIII div. C, 110 Stat. 3009, 3009-546; Medina, *supra* note 97, at 691, 695–96.

126. In conjunction with these new criminal penalties, amnesty was an essential component of the statute's immigration reforms. Kevin R. Johnson, *A Case Study of Color-Blindness: The Racially Disparate Impacts of Arizona's S.B. 1070 and the Failure of Comprehensive Immigration Reform*, 2 U.C. IRVINE L. REV. 313, 336, 340 (2012).

(A) to hire, or to recruit or refer for a fee, for employment in the United States an alien knowing the alien is an unauthorized alien (as defined in subsection (h)(3)) with respect to such employment, or  
(B)(i) to hire for employment in the United States an individual without complying with the requirements of subsection (b) or (ii) if the person or entity is an agricultural association, agricultural employer, or farm labor contractor (as defined in section 1802 of title 29), to hire, or to recruit or refer for a fee, for employment in the United States an individual without complying with the requirements of subsection (b).<sup>127</sup>

Thus, any employer that hires or employs undocumented workers in its workforce faces criminal charges. This statute mandates that employers must comply with a federal employment verification system.<sup>128</sup> Employers must adhere to these requirements for all employees regardless of nationality, and they are subject to civil and criminal sanctions for failure to verify as well as maintain proper records and documentation.<sup>129</sup>

The statute makes any such criminal violations for employing undocumented workers a misdemeanor:

Any person or entity which engages in a pattern or practice of violations of subsection (a)(1)(A) or (a)(2) of this section shall be fined not more than \$3,000 for each unauthorized alien with respect to whom such a violation occurs, imprisoned for not more than six months for the entire pattern or practice, or both, notwithstanding the provisions of any other Federal law relating to fine levels.<sup>130</sup>

Individuals face up to six months in prison and may be fined up to \$3,000 for each undocumented worker they employ. While companies convicted of violating Section 1324a cannot be jailed, they face the same \$3,000 fine. Moreover, civil penalties assessed against employers can be as high as a \$10,000 fine per undocumented worker.<sup>131</sup>

As with the other federal criminal immigration offenses, section 1324a has a five-year statute of limitations.<sup>132</sup> However, when that violation concerns a

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127. 8 U.S.C. § 1324a(a).

128. 8 U.S.C. § 1324a(b); *accord* *Kansas v. Garcia*, 140 S. Ct. 791, 797 (2020); *see also* *Garrett*, *supra* note 41 at 372–79 (discussing the E-Verify system).

129. 8 U.S.C. § 1324a(b)(1) (“The person or entity must attest, under penalty of perjury and on a form designated or established by the Attorney General by regulation, that it has verified that the individual is not an unauthorized alien by examining” the specified documents); 8 U.S.C. § 1324a(e)(4) (outlining civil penalties); 8 U.S.C. § 1324a(f)(1) (outlining criminal penalties); *accord Garcia*, 140 S. Ct. at 797; *Medina*, *supra* note 97, at 681–82.

130. 8 U.S.C. § 1324a(f)(1); *accord* *Chambers of Com. of the U.S. v. Whiting*, 563 U.S. 582, 589 (2011).

131. 8 U.S.C. § 1324a(e)(4); *accord Whiting*, 563 U.S. at 589.

132. *DSL Precision Fab LLC v. U.S. Immigr. & Customs Enf’t*, 867 F.3d 1079, 1085 (9th Cir. 2017) (*per curiam*).

failure to document an employee's status properly, the statute of limitation runs from the time that the problem is corrected or until the employer is no longer required to maintain the documentation.<sup>133</sup>

*E. Federal Criminal Immigration Statutes Generally Preempt State Laws*

Some states have sought to create criminal offenses relating to immigration status.<sup>134</sup> State and local law enforcement in Arizona (and across the country) have the authority to arrest people for violations of federal criminal immigration laws, with the ultimate decision regarding prosecution left to federal prosecutors.<sup>135</sup> However, some of these state efforts have been rejected based on constitutional preemption principles.

The Supreme Court determined that the Immigration and Nationality Act<sup>136</sup> provides “the terms and conditions of admission to the country and the subsequently treatment of aliens lawfully in the country.”<sup>137</sup> In *Hines v. Davidowitz*, the Supreme Court determined that the entire field of immigration will be preempted based on congressional intent.<sup>138</sup> Specifically, Justice Hugo Black writing for the majority, explained “[t]hat the supremacy of the national power in the general field of foreign affairs, including power over immigration, naturalization and deportation, is made clear by the Constitution, was pointed out by the authors of The Federalist in 1787, and has since been given continuous recognition by this Court.”<sup>139</sup>

In 2010, the Arizona State Legislature passed S.B. 1070, which the Governor signed into law.<sup>140</sup> This state statute created two new criminal offenses. Section 3 of the law established a new misdemeanor offense for the failure to apply for

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133. *Id.*

134. See *Garcia*, 140 S. Ct. at 797 (holding that federal immigration law does not preempt Kansas statutes criminalizing identify theft and fraud that are applied to foreign nationals).

135. See Ingrid V. Eagly, *Local Immigration Prosecution: A Study of Arizona Before SB 1070*, 58 UCLA L. REV. 1749, 1777 (2011).

136. 8 U.S.C. § 1101, et seq.

137. *Chambers of Com. of the U.S. v. Whiting*, 563 U.S. 582, 587 (2011).

138. *Hines v. Davidowitz*, 312 U.S. 52, 68, 73–74 (1941).

139. *Id.* at 62; see also *Examining Bd. of Eng'rs, Architects & Surveyors v. Flores de Otero*, 426 U.S. 572, 602 (1976) (“[T]he Court’s constitutional decisions . . . recognize[] the Federal Government’s primary responsibility in the field of immigration and naturalization.”); *DeCanas v. Bica*, 424 U.S. 351, 354 (1976) (“Power to regulate immigration is unquestionably exclusively a federal power.”); *Hampton v. Mow Sun Wong*, 426 U.S. 88, 101 n.21 (1976) (“[T]he authority to control immigration is not only vested solely in the Federal Government, rather than the States, . . . but also that the power over aliens is of a political character and therefore subject only to narrow judicial review.”); *Takahashi v. Fish & Game Comm’n*, 334 U.S. 410, 419 (1948) (“The Federal Government has broad constitutional powers in determining what aliens shall be admitted to the United States, the period they may remain, regulation of their conduct before naturalization, and the terms and conditions of their naturalization.”). *But see Whiting*, 563 U.S. at 587 (holding that The Legal Arizona Worker’s Act was not preempted by federal law).

140. *Arizona v. United States*, 567 U.S. 387, 393 (2012); Eagly, *supra* note 135, at 1755–67 (discussing the history that led to the enactment of SB 1070).

or carry documentation of the person's authority to be within the United States legally.<sup>141</sup> Section 5(C) created another state crime for undocumented individuals seeking, applying for, or engaging in employment.<sup>142</sup>

Moreover, this law provided state law enforcement officials with authority to arrest and investigate the immigration status of persons located within the state.<sup>143</sup> Section 6 of the statute authorized such officers to arrest an individual without a warrant when there is probable cause to believe the person "has committed any public offense that makes the person removable from the United States."<sup>144</sup> Finally, section 2(B) requires that state law enforcement officers who encounter people that create a reasonable suspicion that they are illegally present in the United States must verify their immigration status.<sup>145</sup> Prior to releasing any arrested individuals, state officers must again verify their immigration status.<sup>146</sup> This verification and ultimate state prosecution for immigration offenses often require states to seek assistance from the federal government and utilize its resources.<sup>147</sup>

In response to Arizona's enactment of these laws, the United States filed an action in federal court seeking to enjoin the statute's enforcement before the law could take effect.<sup>148</sup> Arizona characterized its statute as one supporting states' rights and federalism to protect Arizona citizens.<sup>149</sup> The district court did not enjoin the entire act, but it enjoined four provisions that (1) created a state-law crime for being unlawfully present in the United States, (2) created a state-law crime for working or seeking work while not authorized to do so, (3) required state and local officers to verify the citizenship status of anyone who was lawfully arrested or detained, and (4) authorized warrantless arrests of undocumented individuals believed to be removable from the United States.<sup>150</sup>

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141. *Arizona*, 567 U.S. at 393 (citing ARIZ. REV. STAT. ANN. § 13-1509 (2011)).

142. *Id.* at 393-94 (citing ARIZ. REV. STAT. ANN. § 13-2928(C) (2011)).

143. *Id.* at 394.

144. *Id.* (quoting ARIZ. REV. STAT. ANN. § 12-3883(A)(5) (2011)).

145. *Id.* at 411 (quoting ARIZ. REV. STAT. ANN. § 11-1051(B) (2011)).

146. *Id.* at 394 (citing ARIZ. REV. STAT. ANN. § 11-1051(B) (2011)). Congress mandated that The Immigration and Naturalization Service shall respond to an inquiry by a Federal, State, or local government agency, seeking to verify or ascertain the citizenship or immigration status of any individual within the jurisdiction of the agency for any purpose authorized by law, by providing the requested verification or status information.

8 U.S.C. § 1373(c).

147. See Eagly, *supra* note 135, at 1784.

148. *Arizona*, 567 U.S. at 393; see also Lopez, *supra* note 11, at 1804-05 ("President Obama's Department of Justice sued to enjoin the most notorious provisions of S.B. 1070 and then defended the judgment successfully before the Ninth Circuit. Sidestepping substantial evidence of racial profiling and anti-immigrant hysteria, lawyers for the United States relied upon traditionally influential preemption arguments.").

149. See Lopez, *supra* note 11, at 1805.

150. *Arizona*, 567 U.S. at 393-94 (citing *United States v. Arizona*, 703 F. Supp.2d 980, 1008 (D. Ariz. 2010)); see also Kristina M. Campbell, *(Un)Reasonable Suspicion: Racial Profiling in*



The United States Court of Appeal for the Ninth Circuit affirmed the issuance of a preliminary injunction, finding that the United States had a strong likelihood of success based on preemption.<sup>151</sup> Specifically, the appellate court unanimously determined sections 3 and 5(C) were preempted, with the majority reaching the same conclusion regarding sections 6 and 2(B).<sup>152</sup>

Regarding section 3, in *Arizona v. United States*, the Supreme Court held that Arizona's state criminal offense for being unlawfully present in the United States conflicts with the federal registration requirements and enforcement provisions already in place.<sup>153</sup> Federal statutes establish that Congress "occupied the field of alien registration."<sup>154</sup> Indeed, the Arizona legislature implicitly acknowledged this field preemption based on its incorporation of federal law within its state offense.<sup>155</sup> Thus, federal law preempted section 3.

Concerning section 5(C), the Court noted that there is no federal equivalent to the Arizona law barring undocumented workers from seeking or engaging in work.<sup>156</sup> Nonetheless, it determined that the newly created Arizona law barring working or seeking work when one is undocumented was preempted. Specifically, Arizona's method of enforcement interfered with the careful balance Congress established within federal statutes concerning unauthorized employment.<sup>157</sup>

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*Immigration Enforcement After Arizona v. United States*, 3 WAKE FOREST J. L. & POL'Y 367, 371–73 (2013).

151. *Arizona*, 567 U.S. at 394 (citing *United States v. Arizona*, 641 F.3d 339, 366 (9th Cir. 2011)); see also Campbell, *supra* note 150, at 373–75.

152. *Arizona*, 567 U.S. at 394.

153. *Id.* at 403.

154. *Id.* at 401 (internal citations omitted).

155. *Id.* at 400 (quoting ARIZ. REV. STAT. ANN. § 13-1509 (A) (2011)). Specifically, it is a federal offense for non-citizens to fail to possess personal registration documents:

Every alien, eighteen years of age and over, shall at all times carry with him and have in his personal possession any certificate of alien registration or alien registration receipt card issued to him pursuant to subsection (d). Any alien who fails to comply with the provisions of this subsection shall be guilty of a misdemeanor and shall upon conviction for each offense be fined not to exceed \$100 or be imprisoned not more than thirty days, or both.

8 U.S.C. § 1304(e).

Similarly, it is a federal offense for an alien to willfully fail to register:

Any alien required to apply for registration and to be fingerprinted in the United States who willfully fails or refuses to make such application or to be fingerprinted, and any parent or legal guardian required to apply for the registration of any alien who willfully fails or refuses to file application for the registration of such alien shall be guilty of a misdemeanor and shall, upon conviction thereof, be fined not to exceed \$1,000 or be imprisoned not more than six months, or both.

8 U.S.C. § 1306(a).

156. *Arizona*, 567 U.S. at 403.

157. *Id.* at 406.

Next, the Court addressed section 6 in *Arizona*.<sup>158</sup> It also found that warrantless arrests of individuals believed to be removable were preempted because it usurped the federal government's authority to exercise discretion in the removal process.<sup>159</sup> Thus, Arizona's statute created an obstacle to carrying out the purposes and objectives of federal immigration laws.<sup>160</sup>

Finally, in addressing the Arizona statute, the Court rejected the federal preemption concerns for section 2(B).<sup>161</sup> The provision has three limitations that protect individual rights: a detainee is presumed not to be an undocumented individual if producing a valid Arizona driver's license; an officer may not consider race, color, or national origin during a check; and the check must be implemented consistent with federal law.<sup>162</sup> Instead, this provision merely allows state law enforcement officials to communicate with the federal ICE office during otherwise lawful arrests.<sup>163</sup> This decision did not foreclose any future constitutional challenges to the law on an "as applied" basis.<sup>164</sup> However, verifying the citizenship status of anyone who was arrested or detained was not deemed unconstitutional in this facial challenge.<sup>165</sup>

Thus, the Supreme Court in *Arizona* reiterated the long-held rule that immigration is a field that the federal government fully occupies. Arizona's attempts to criminalize matters related to immigration were preempted. Indeed, this preemption is consistent with the practical realities of Arizona's prosecutions of its state immigration offenses: Arizona prosecutors needed the cooperation and assistance of federal officials to meet their burden at trial.<sup>166</sup>

#### IV. FISCAL YEAR 2019 WAS A RECORD-SETTING YEAR FOR FEDERAL CRIMINAL IMMIGRATION PROSECUTIONS

The United States has been prosecuting federal criminal offenses for almost a century. During that time, various administrations took various approaches towards enforcing these laws. However, the 2019 fiscal year was a record-setting year for such prosecutions. In the fiscal year that ended on September 30, 2019, the United States filed 30,665 criminal cases regarding some federal immigration offenses handled by United States District Judges.<sup>167</sup> Among that number, there were a total of 31,933 defendants charged with some federal

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158. *Id.* at 407–10.

159. *Id.* at 408–10.

160. *Id.* at 410 (citing *Hines v. Davidowitz*, 312 U.S. 52, 67 (1941)).

161. *Id.* at 415.

162. *Id.* at 411.

163. *Id.* at 411–12 ("Consultation between federal and state officials is an important feature of the immigration system.").

164. Campbell, *supra* note 150, at 369–70.

165. *Arizona*, 567 U.S. at 415.

166. See Eagly, *supra* note 135, at 1784–90.

167. U.S. DEP'T OF JUST., UNITED STATES ATTORNEYS' ANNUAL STATISTICAL REPORT FISCAL YEAR 2019 11 tbl. 3A, <https://www.justice.gov/usao/page/file/1285951/download>.

criminal immigration offense, and 29,116 defendants were found guilty or pled guilty.<sup>168</sup> The United States dismissed the charges against 1,075 defendants, while only 19 defendants were found not guilty.<sup>169</sup>

Moreover, federal magistrate judges handle almost all of the illegal entry charges as petty offenses. The United States filed 80,917 criminal cases before magistrate judges concerning 81,134 criminal defendants pleading guilty.<sup>170</sup> Not all of these cases will involve illegal entry charges as federal magistrate judges handle a variety of other petty offenses.<sup>171</sup> Only about 30 of the defendants were acquitted as not guilty, while 6,338 cases were dismissed.<sup>172</sup>

*A. Misdemeanor Prosecutions for Illegal Entry into the United States Have Increased Significantly in Recent Years*

From fiscal years 2004 through 2007, based on records from the United States Department of Justice, the United States prosecuted almost 16,000 undocumented individuals per year for the charge of illegal entry pursuant to section 1325 with the annual ranges of 15,461, 15,316, 16,153, and 16,747, respectively.<sup>173</sup> However, in the last year of the George W. Bush administration, the number of prosecutions for illegal entry rose to 50,804.<sup>174</sup>

Over the eight years of the Obama administration, the United States prosecuted, on average, over 55,600 undocumented individuals for illegal entry per year.<sup>175</sup> The high was 65,597 people in the fiscal year 2013, and the low was 45,915 people in the fiscal year 2016.<sup>176</sup>

In the first year of the Trump administration, the United States prosecuted only 36,649 people in the fiscal year 2017, but that increased to a record level of 68,470 individuals in the fiscal year 2018.<sup>177</sup> The United States increased this record level by 18.1% in the fiscal year 2019 to 80,886 people.<sup>178</sup>

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168. *Id.*

169. *Id.*

170. *Id.* at 10 tbl. 2B.

171. See generally Brian L. Owsley, *Issues Concerning Charges for Driving While Intoxicated in Texas Federal Courts*, 42 ST. MARY'S L.J. 411 (2011) (discussing DWI petty offenses on both military bases as well as other federal property).

172. U.S. DEP'T OF JUST., *supra* note 167, at 10 tbl. 2B.

173. U.S. DEP'T OF JUST., No. 19-1, 115, DEPARTMENT OF JUSTICE PROSECUTED A RECORD-BREAKING NUMBER OF IMMIGRATION-RELATED CASES IN FISCAL YEAR 2019 (Oct. 17, 2019).

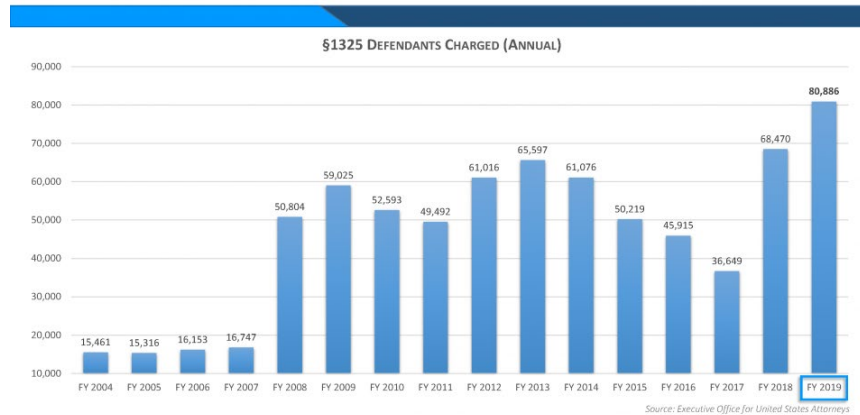
174. *Id.*

175. *Id.*

176. *Id.*

177. *Id.*

178. *Id.*



*B. Prosecutions for Illegal Reentries into the United States Trended Downward Until a Sharp Increase During the Trump Administration*

These overall trends generally replicated themselves again regarding prosecutions for illegal reentries pursuant to section 1326.<sup>179</sup> During the Bush administration, the United States prosecuted 11,690, 12,051, 12,480, and 12,881 individuals for illegal reentry respectively between fiscal years 2004 and 2007, which was an average of about 12,275 prosecutions per year.<sup>180</sup> Again, in the last year of the Bush administration, there was a significant increase of prosecutions of individuals for illegal reentry to 16,327.<sup>181</sup> This accounted for a 26.8% increase in the last year of the Bush administration over the previous year.<sup>182</sup>

During the Obama administration, the United States averaged almost 21,000 prosecutions of undocumented migrants for illegal reentry per year.<sup>183</sup> The high number of prosecutions during this time was 24,676 in 2010.<sup>184</sup> The low number of prosecutions was during its last year in 2016, with 17,612 prosecutions charged.<sup>185</sup>

179. *Id.*

180. *Id.*

181. *Id.*

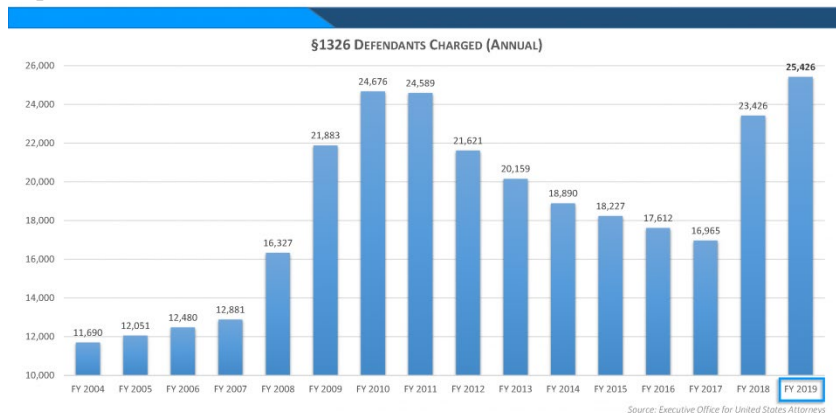
182. *Id.*

183. *Id.*

184. *Id.* The United States Courts indicated that 23,211 prosecutions were charged against individuals for illegal reentry into the country. U.S. DIST. CTS., CRIMINAL DEFENDANTS COMMENCED, BY OFFENSE, DURING THE 12-MONTH PERIODS ENDING SEPTEMBER 30, 2010 THROUGH 2014 4, tbl. D-2, [https://www.uscourts.gov/sites/default/files/statistics\\_import\\_dir/D02DSep14.pdf](https://www.uscourts.gov/sites/default/files/statistics_import_dir/D02DSep14.pdf).

185. U.S. DEP'T OF JUST., *supra* note 173.

During the Trump administration's first fiscal year in 2017, its total number of prosecutions for illegal reentry was only 16,965, which was lower than any of the totals during the Obama administration and only slightly higher than the 2008 totals for the Bush administration.<sup>186</sup> In the fiscal year 2018, the number of such prosecutions increased to 23,426 undocumented individuals, which was a 38.1% increase from the previous year.<sup>187</sup> In the fiscal year 2019, the number of such prosecutions increased to 25,426 undocumented individuals, which was an 8.5% increase from the previous year and a high over the previous fifteen-year period.<sup>188</sup>



### *C. Prosecutions for Smuggling of Undocumented Individuals in the United States Trended Downward Until a Sharp Increase During the Trump Administration*

In the fiscal year 2004, the United States prosecuted 3,488 individuals for smuggling undocumented individuals pursuant to section 1324 during the Bush administration.<sup>189</sup> These defendants could be United States citizens, permanent residents, or undocumented individuals.<sup>190</sup> In the fiscal year 2005, the number

186. *Id.* The United States Courts indicated that 16,554 prosecutions were charged against individuals for illegal reentry into the country. U.S. DIST. CTS., CRIMINAL DEFENDANTS COMMENCED, BY OFFENSE, DURING THE 12-MONTH PERIODS ENDING SEPTEMBER 30, 2015 THROUGH 2019 3, tbl. D-2, [https://www.uscourts.gov/sites/default/files/data\\_tables/jb\\_d2\\_0930.2019.pdf](https://www.uscourts.gov/sites/default/files/data_tables/jb_d2_0930.2019.pdf).

187. U.S. DEP'T OF JUST., *supra* note 173. The United States Courts indicated that 23,250 prosecutions were charged against individuals for illegal reentry into the country. U.S. DIST. CTS., *supra* note 186, at 3, tbl. D-2.

188. U.S. DEP'T OF JUST., *supra* note 173. The United States Courts indicated that 25,667 prosecutions were charged against individuals for illegal reentry into the country. U.S. DIST. CTS., *supra* note 186, at 3, tbl. D-2.

189. U.S. DEP'T OF JUST., *supra* note 173.

190. *See id.*

of prosecutions increased to 3,770 persons.<sup>191</sup> In the fiscal year 2006, the United States had its highest total prosecutions during the Bush administration for such smuggling, reaching 4,172 before tapering off to 4,078 and 4,045 respectively in the next two years.<sup>192</sup>

Starting in the fiscal year 2009, the prosecutions for smuggling undocumented individuals generally diminished compared to the Bush administration.<sup>193</sup> The numbers of prosecutions averaged just over 3,000 per year during the Obama presidency.<sup>194</sup> The highest number of prosecutions was 3,466 individuals in the fiscal year 2009, and the lowest number was 2,762 prosecutions in the fiscal year 2014.<sup>195</sup>

In the first fiscal year of the Trump administration, the United States prosecuted 3,310 people for smuggling undocumented individuals.<sup>196</sup> That increased in the fiscal year 2018 to 3,724 prosecutions.<sup>197</sup> Finally, in the fiscal year 2019, the United States prosecuted a record of 4,297 individuals, which constituted an increase of 15.4% over the previous year.<sup>198</sup>



191. *Id.*

192. *Id.*

193. *Id.*

194. *Id.*

195. *Id.*

196. *Id.* The United States Courts indicated that 3,191 prosecutions were charged against individuals for smuggling undocumented individuals. U.S. DIST. CTS., *supra* note 186, at 3, tbl. D-2.

197. U.S. DEP'T OF JUST., *supra* note 173. The United States Courts indicated that 3,702 prosecutions were charged against individuals for smuggling undocumented individuals. U.S. DIST. CTS., *supra* note 186, at 3, tbl. D-2.

198. U.S. DEP'T OF JUST., *supra* note 173. The United States Courts indicated that 4,541 prosecutions were charged against individuals for smuggling undocumented individuals. U.S. DIST. CTS., *supra* note 186, at 3, tbl. D-2.

*D. Prosecutions for Illegal Employment of Undocumented Workers in the United States are Almost Non-Existent*

During this fifteen-year period, the United States is seemingly engaged in rigorous prosecutions for illegal entry, illegal reentry, and smuggling of undocumented migrants. However, the Department of Justice does not track prosecutions for violations established when employers illegally hire undocumented workers.<sup>199</sup> Similarly, the federal courts do not provide data on such prosecutions of employers in their annual reports.<sup>200</sup> Moreover, research indicates that the United States prosecutes very few cases pursuant to 8 U.S.C. section 1324a.<sup>201</sup> This rate of prosecution is extremely low in light of the prosecution for other federal criminal offenses, as well as the fact that of the roughly eleven million undocumented people residing in the United States, about eight million of them are estimated to be in the American workforce.

In a study of data regarding prosecutions for a one-year period from April 2018 to March 2019, there were only eleven prosecutions of individuals and none of companies.<sup>202</sup> During this same one-year period, the report indicated that the United States prosecuted 85,727 individuals for illegal entry, 34,617 individuals for illegal reentry, and 4,733 individuals for smuggling of undocumented individuals.<sup>203</sup> Historically, the reported prosecutions rarely exceeded fifteen per year, reaching a high of twenty during the Bush administration in 2005 as well as the first year of the Obama administration.<sup>204</sup>

An analysis of docket sheets that contained a charge for section 1324a between the calendar years of 2014 and 2019 revealed that the United States initiated 107 prosecutions for section 1324a of both employers and individuals alleged to have employed undocumented workers.<sup>205</sup> During a roughly comparable six-year period, the United States prosecuted 343,215 individuals pursuant to section 1325 for illegal reentry.<sup>206</sup>

The federal courts consist of ninety-four judicial districts, but only a handful of those courts saw a charge for the illegal employment of an undocumented worker during this period. The 107 actions were spread around roughly twenty different districts. The largest number in any district was sixty-one cases in the Western District of Michigan, which accounted for over half of these cases.<sup>207</sup>

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199. Cf. U.S. DEP'T OF JUST., *supra* note 173.

200. Cf. U.S. DIST. CTS., *supra* note 186, at 3, tbl. D-2.

201. TRAC IMMIGR., *supra* note 18; Annie Smith, *The Underprosecution of Labor Trafficking*, 72 S.C. L. REV. 477, 501–02 (2020).

202. TRAC IMMIGR., *supra* note 18; *see also* Garrett, *supra* note 41, at 378–80.

203. TRAC IMMIGR., *supra* note 18.

204. *Id.*; Smith, *supra* note 201, at 501 n.150.

205. *See infra* notes 207–227 and accompanying text.

206. U.S. DEP'T OF JUST., *supra* note 173.

207. *United States v. Camel-Chilel*, No. 1:15-CR-00065 (W.D. Mich. Aug. 25, 2015); *United States v. Quartey-Papafio*, No. 1:16-CR-00219 (W.D. Mich. dismissed Apr. 18, 2017); *United States v. Serrano-Aguilar*, No. 1:16-CR-00221 (W.D. Mich. Jan. 10, 2017); *United States v.*

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Sontay-Vicente, No. 1:14-CR-00057 (W.D. Mich. May 3, 2016); *United States v. Valencia*, No. 1:19-CR-00148 (W.D. Mich. Nov. 15, 2019); *United States v. Abac-Az*, No. 1:14-CR-00058 (W.D. Mich. Aug. 8, 2014); *United States v. Abac-Velasquez*, No. 1:14-CR-00056 (W.D. Mich. June 30, 2014); *United States v. Aguilar*, No. 1:16-CR-00181 (W.D. Mich. Apr. 13, 2017); *United States v. Aguilar-Escobedo*, No. 1:14-CR-00188 (W.D. Mich. Feb. 11, 2015); *United States v. Aguilar-Garcia*, No. 1:16-CR-00055 (W.D. Mich. Aug. 26, 2016); *United States v. Agustin-Agustin*, No. 1:14-CR-00186 (W.D. Mich. filed Oct. 16, 2014); *United States v. Alamilla*, No. 1:16-CR-00030 (W.D. Mich. Nov. 16, 2016); *United States v. Alkhulaif*, No. 1:14-CR-00194 (W.D. Mich. Mar. 16, 2015); *United States v. Alvarado-Ayala*, No. 1:14-CR-00222 (W.D. Mich. May 4, 2015); *United States v. Amaya-Suarez*, No. 1:19-CR-00026 (W.D. Mich. June 5, 2019); *United States v. Arcos-Mayorga*, No. 1:16-CR-00234 (W.D. Mich. Jan. 17, 2017); *United States v. Avila-Gonzalez*, No. 1:15-CR-00011 (W.D. Mich. July 16, 2015); *United States v. Banda-Ramirez*, No. 1:14-CR-00207 (W.D. Mich. Feb. 23, 2015); *United States v. Cardenas-Villarruel*, No. 1:16-CR-00181 (W.D. Mich. Apr. 25, 2016); *United States v. Castro-Vail*, No. 1:19-CR-00091 (W.D. Mich. Sept. 9, 2019); *United States v. Cerecedo-Hernandez*, No. 1:16-CR-00202 (W.D. Mich. Mar. 28, 2017); *United States v. Church*, No. 1:17-CR-00101 (W.D. Mich. May 25, 2017); *United States v. De La Cruz*, No. 1:16-CR-00016 (W.D. Mich. Dec. 8, 2016); *United States v. Deleon-Lopez*, No. 1:17-CR-00246 (W.D. Mich. Apr. 11, 2018); *United States v. Domingo-Jimenez*, No. 1:17-CR-00247 (W.D. Mich. Mar. 30, 2018); *United States v. Galicia-Pedroza*, No. 1:16-CR-00066 (W.D. Mich. Aug. 31, 2016); *United States v. Gembe*, No. 1:15-CR-00013, 2015 U.S. Dist. LEXIS 46781, at \*1 (W.D. Mich. Apr. 10, 2015); *United States v. Gomez-Vasquez*, No. 1:17-CR-00063 (W.D. Mich. Aug. 10, 2017); *United States v. Gonzalez-Silva*, No. 1:17-CR-00048 (W.D. Mich. Aug. 9, 2017); *United States v. Gordillo-Perez*, No. 1:14-CR-00037 (W.D. Mich. July 3, 2014); *United States v. Guerra-Basurto*, No. 1:18-CR-00136 (W.D. Mich. Nov. 5, 2018); *United States v. Hernandez-Cortes*, No. 1:16-CR-00143 (W.D. Mich. July 20, 2017); *United States v. Hernandez-Rios*, No. 1:15-CR-00167 (W.D. Mich. Jan. 26, 2016); *United States v. Jimenez-Garcia*, No. 1:18-CR-00240 (W.D. Mich. Apr. 1, 2019); *United States v. Jimenez-Mendez*, No. 1:17-CR-00240 (W.D. Mich. Apr. 13, 2018); *United States v. Lopez-Benavides*, No. 1:16-CR-00031 (W.D. Mich. Aug. 29, 2016); *United States v. Maciel-Garcia*, No. 2:17-CR-00002 (W.D. Mich. June 20, 2017); *United States v. Martinez-Garcia*, No. 1:14-CR-00217 (W.D. Mich. May 6, 2015); *United States v. Martinez-Pineda*, No. 1:15-CR-00043 (W.D. Mich. Oct. 13, 2015); *United States v. Morales-Sales*, No. 1:18-CR-00261 (W.D. Mich. June 3, 2019); *United States v. Moran-Villalobos*, No. 1:16-CR-00080 (W.D. Mich. July 19, 2016); *United States v. Oliveros*, No. 1:16-CR-00020 (W.D. Mich. June 20, 2016); *United States v. Perez-Cipriano*, No. 1:14-CR-00241 (W.D. Mich. Apr. 27, 2015); *United States v. Ramirez-Saucedo*, No. 1:15-CR-00014 (W.D. Mich. May 27, 2015); *United States v. Ramirez-Vazquez*, No. 1:19-CR-00139 (W.D. Mich. July 23, 2019); *United States v. Roblero-Mendez*, No. 1:14-CR-00189 (W.D. Mich. Feb. 18, 2015); *United States v. Ruiz-Chacaj*, No. 1:19-CR-00174 (W.D. Mich. Sept. 13, 2019); *United States v. Ruiz-Martinez*, No. 1:17-CR-00071 (W.D. Mich. Aug. 9, 2017); *United States v. Salcedo-Lopez*, No. 1:15-CR-00064 (W.D. Mich. Jan. 14, 2016); *United States v. Santos-Deleon*, No. 1:15-CR-00060 (W.D. Mich. Aug. 17, 2015); *United States v. Sardeneta-Rodriguez*, No. 1:19-CR-00073 (W.D. Mich. Aug. 30, 2019); *United States v. Sevilla-Carcamo*, No. 1:18-CR-00102 (W.D. Mich. Oct. 5, 2018); *United States v. Sotelo-Delgado*, No. 1:15-CR-00039 (W.D. Mich. July 9, 2015); *United States v. Sauzo-Cruz*, No. 1:14-CR-00132 (W.D. Mich. Nov. 17, 2014); *United States v. Tenorio-Hernandez*, No. 1:15-CR-00144 (W.D. Mich. Jan. 25, 2016); *United States v. Torres-Hernandez*, No. 1:16-CR-00182 (W.D. Mich. Apr. 18, 2017); *United States v. Valenzuela-Garcia*, No. 1:16-CR-00049 (W.D. Mich. May 23, 2016); *United States v. Vazquez-Castro*, No. 1:14-CR-00221 (W.D. Mich. May 5, 2015); *United States v. Zarate*, No. 1:18-CR-00155 (W.D. Mich. Oct. 5, 2018); *United States v. Zarraga-Martinez*, No. 1:18-CR-00190 (W.D. Mich. Nov. 27, 2018); *United States v. Ruiz*, No. 1:14-CR-00226 (W.D. Mich. Apr. 16, 2015).



The United States District Court for the Northern Mariana Islands had the second-highest number of cases, with a total of nine.<sup>208</sup> The Eastern District of Louisiana had six cases,<sup>209</sup> and the District of Arizona had four cases.<sup>210</sup> Next, the District of Kansas<sup>211</sup> and the District of South Carolina<sup>212</sup> each had three cases each during this period. The Southern District of California,<sup>213</sup> the District of Maryland,<sup>214</sup> the District of Minnesota,<sup>215</sup> the District of Nebraska,<sup>216</sup> and the Northern District of Texas<sup>217</sup> each had two cases during this period. There is one case each from the Eastern District of California,<sup>218</sup> the Central District of Illinois,<sup>219</sup> the Northern District of Iowa,<sup>220</sup> the District of Maine,<sup>221</sup> the District

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208. *United States v. Ruan*, No. 1:17-CR-00004 (D. N. Mar. I. filed Mar. 31, 2017); *United States v. Wu*, No. 1:18-CR-00008 (D. N. Mar. I. filed Mar. 27, 2018); *United States v. Zhao*, No. 1:17-CR-00016 (D. N. Mar. I. Sept. 28, 2017); *United States v. Guo*, No. 1:17-CR-00008 (D. N. Mar. I. dismissed May 29, 2018); *United States v. Lu*, No. 1:17-CR-00007 (D. N. Mar. I. filed Apr. 3, 2017); *United States v. Ma*, No. 1:17-CR-00006 (D. N. Mar. I. dismissed Feb. 1, 2018); *United States v. Ma*, No. 1:17-CR-00017 (D. N. Mar. I. Oct. 11, 2017); *United States v. Qi*, No. 1:17-CR-00009 (D. N. Mar. I. filed Apr. 5, 2017); *United States v. Sun*, No. 1:17-CR-00018 (D. N. Mar. I. May 21, 2018).

209. *Factual Basis*, *United States v. Hollywood East*, No. 2:16-cr-00220 (E.D. La. June 21, 2017), ECF No. 50 (showing that while the defendants plead guilty to alternative charges, the government had sufficient factual basis to charge illegal unemployment); *United States v. N & F Logistics, Inc.*, No. 2:19-cr-00076 (E.D. La. Nov. 19, 2019); *United States v. Osaka Thai Corp.*, No. 2:14-cr-00119 (E.D. La. Dec. 10, 2014); *United States v. Santangelo*, No. 2:14-cr-00119 (E.D. La. filed Oct. 8, 2014); *United States v. Thai Thai, LLC*, No. 2:19-cr-00009 (E.D. La. Apr. 17, 2019); *United States v. Zhao*, No. 2:15-cr-00278 (E.D. La. May 19, 2016).

210. *United States v. Watson-Osuna*, No. 4:18-cr-02000 (D. Ariz. July 21, 2019); *United States v. Casiano*, No. 2:15-cr-06568 (D. Ariz. Jan. 13, 2016); *United States v. Rivera*, No. 4:18-cr-01785 (D. Ariz. May 6, 2019); *United States v. Valley View Bldg. Servs., LLC*, No. 2:15-po-00105 (D. Ariz. June 19, 2015).

211. *United States v. Le Grande Tetons, LLC*, No. 6:15-cr-10144 (D. Kan. Sept. 21, 2015); *United States v. Keaton*, No. 2:16-cr-20051 (D. Kan. May 22, 2017); *United States v. Countess*, No. 2:16-cr-20097 (D. Kan. July 31, 2018).

212. *United States v. HW Group, LLC*, No. 3:16-po-00002 (D.S.C. Mar. 28, 2016); *United States v. Leon*, No. 3:15-cr-00009 (D.S.C. Feb. 22, 2016); *United States v. Mejia*, No. 3:15-po-00005 (D.S.C. Feb. 22, 2016).

213. *United States v. Javdani*, No. 3:14-cr-02181 (S.D. Cal. Oct. 24, 2014); *United States v. Servi-Tek, Inc.*, No. 3:16-cr-01483 (S.D. Cal. July 12, 2016).

214. *United States v. Valle*, No. 8:15-cr-00668 (D. Md. Feb. 2, 2016); *United States v. Vincent*, No. 8:14-cr-00450 (D. Md. Jan. 5, 2015).

215. *United States v. Escoto*, No. 0:16-cr-00213 (D. Minn. June 22, 2017); *United States v. Villapando*, No. 0:16-cr-00324 (D. Minn. Aug. 7, 2017).

216. *United States v. Delgado*, No. 4:18-cr-03088 (D. Neb. June 30, 2020); *United States v. Younes*, No. 8:16-cr-00004 (D. Neb. Feb. 9, 2016).

217. *United States v. Chhuon*, No. 1:19-cr-00112, (N.D. Tex. Aug. 25, 2020); *United States v. Hall*, No. 3:19-cr-00639 (N.D. Tex. Sept. 4, 2020).

218. *United States v. Rodrigues*, No. 2:17-mj-00089 (E.D. Cal. July 25, 2017).

219. *United States v. Gire*, No. 2:16-cr-20044 (C.D. Ill. Jan. 31, 2018).

220. *United States v. Manzano-Huerta*, No. 1:14-mj-00052, 2014 U.S. Dist. LEXIS 65755, at \*1 (N.D. Iowa May 13, 2014).

221. *United States v. Fuentes*, No. 2:14-cr-00047 (D. Me. Oct. 20, 2014).

of Massachusetts,<sup>222</sup> the Western District of New York,<sup>223</sup> the Middle District of North Carolina,<sup>224</sup> the Northern District of Ohio,<sup>225</sup> the Eastern District of Pennsylvania,<sup>226</sup> the Middle District of Tennessee,<sup>227</sup> and the Western District of Virginia.<sup>228</sup>

While Illinois and New York each had a case, California had a total of three cases, and Texas had only two cases, there were no cases from the large metropolitan areas of Chicago, New York City, San Francisco, Detroit, Seattle, Houston, or San Antonio during this period. Along with federal districts with diverse populations, in Florida, there was not a single case filed for illegal employment of an undocumented worker during this period in any of its three judicial districts.

#### V. THE FEW PROSECUTIONS FOR ILLEGAL EMPLOYMENT OF UNDOCUMENTED WORKERS REFLECT DISPARATE USAGE OF SECTION 1324A

Even though the case law is relatively sparse, some patterns have formed. The jurisdiction with the largest number of prosecutions uses section 1324a to target undocumented workers as opposed to employers. Moreover, defendants convicted of such violations rarely receive any jail time for such convictions but instead receive fines and probation.

##### *A. The Western District of Michigan Does Not Use Section 1324a to Target Employers*

In the Western District of Michigan, which accounted for almost half of the 107 total prosecutions from April 2018 to March 2019, the charge of illegal employment of an undocumented worker typically was combined with felony charges.<sup>229</sup> Of all of the cases filed in the Western District of Michigan, none of them filed charges against any employers. Instead, they all targeted individuals who had no legal status to be in the United States.

In addition to charges for illegal reentry into the United States, the federal prosecutors in that district also charged individuals with violations of illegally using a Social Security number.<sup>230</sup> The government also charged some

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222. United States v. Tutunjian, No. 1:16-cr-10225 (D. Mass. Dec. 23, 2016).

223. United States v. Mucino, No. 1:18-cr-00053 (W.D.N.Y. Feb. 15, 2019).

224. United States v. Triangle Grading & Paving, Inc., No. 1:14-cr-00264 (M.D.N.C. Nov. 3, 2014).

225. United States v. Ramirez-Rocha, No. 3:15-mj-08000 (N.D. Ohio Dec. 21, 2015).

226. United States v. Asplundh Tree Experts Co., No. 2:17-cr-00492 (E.D. Pa. Sept. 28, 2017).

227. United States v. Alejos, No. 3:18-cr-00081 (M.D. Tenn. Aug. 9, 2018).

228. United States v. Alvarado McTague, No. 5:14-cr-00055, 2017 U.S. Dist. LEXIS 68598, at \*26–27 (W.D. Va. Apr. 10, 2017).

229. See *supra* note 207 and accompanying text.

230. See 42 U.S.C. § 408(a)(7)(B); see, e.g., Indictment, United States v. Cerecedo-Hernandez, No. 1:16-CR-00202 (W.D. Mich. Mar. 28, 2017), ECF No. 1; Indictment, United States v. Gomez-Vasquez, No. 1:17-CR-00063 (W.D. Mich. Aug. 10, 2017), ECF No. 1.

defendants with knowingly making a false claim of American citizenship in order to benefit themselves.<sup>231</sup>

Most of these charges involved a combination of section 1324a and the federal statute criminalizing fraud or misuse of visas and permits.<sup>232</sup> The government indicted people for knowingly possessing documents in violations of section 1546(a) in conjunction with the employment verification system outlined in section 1324a(b)(1)(B), which addresses the documents that are acceptable for employers to use to verify identity as well as employment status.<sup>233</sup> In some of these prosecutions, the defendant is convicted of this charge, and in others, the charge is dismissed based on a guilty plea to another felony.

In other cases, the prosecutors in the Western District of Michigan also charge some individuals with violations of section 1546(a) in conjunction with the employment verification system outlined in section 1324a(b)(1)(B), which criminalized the knowing use of false identification documents.<sup>234</sup>

It is unclear whether, as a statutory matter, the citation to section 1324a(b)(1)(B) is necessary. However, it is abundantly clear that of all prosecutions in the Western District of Michigan, none of them target an employer for illegally employing an undocumented worker. Instead, they all charge the undocumented workers with federal offenses.

### *B. The Districts that Prosecute Employers for Illegally Employing Undocumented Workers do so Gingerly*

#### *1. The Northern Mariana Islands*

In the Northern Mariana Islands, the United States charged several individuals with illegally employing over 180 undocumented workers who came to the island from China as tourists but overstayed their visas to work on the construction of a casino.<sup>235</sup> In one criminal prosecution, Yuqing Zhao, a project manager with MCC International, was involved in the casino construction

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231. See 18 U.S.C. § 1015(e); see, e.g., Indictment, United States v. Gembe, No. 1:19-CR-00013 (W.D. Mich. July 6, 2015), ECF No. 1; Indictment, United States v. Ramirez-Saucedo, No. 1:15-CR-00014 (W.D. Mich. May 27, 2015), ECF No. 1.

232. 8 U.S.C. § 1324a; 18 U.S.C. § 1546.

233. See, e.g., Indictment, United States v. Sardeneta-Rodriguez, No. 1:19-CR-00073 (W.D. Mich. Aug. 30, 2019), ECF No. 1; Indictment, United States v. Serrano-Aguilar, No. 1:16-CR-00221 (W.D. Mich. Jan. 1, 2017), ECF No. 12; Indictment, United States v. Amaya-Suarez, No. 1:19-CR-00026 (W.D. Mich. June 5, 2019), ECF No. 1.

234. See, e.g., Indictment, United States v. Aguilar-Garcia, No. 1:16-CR-00055 (W.D. Mich. Aug. 26, 2016), ECF No. 1; Indictment, United States v. Oliveros, No. 1:16-CR-00020 (W.D. Mich. June 20, 2016), ECF No. 1; see also Indictment, United States v. Cardenas-Villarruel, No. 1:16-CR-00181 (W.D. Mich. June 20, 2016), ECF No. 1 (charging section 1324a in connection with 18 U.S.C. § 1546(b), which charge the general use of identification documents under section 1546(a)).

235. Ferdie De La Torre, *Project Manager of MCC Int'l Gets Prison Term*, SAIPAN TRIB. (Sept. 26, 2017), <https://www.saipantribune.com/index.php/project-manager-mcc-intl-gets-prison-term/>.

project, pled guilty to illegally employing undocumented workers.<sup>236</sup> In a plea deal, Zhao received a six-month prison sentence with credit for twelve days that he had already served.<sup>237</sup>

In another related prosecution, Wencai Guo, a Beilida Overseas supervisor, pled guilty to smuggling undocumented individuals, and the government dismissed the charge of illegally employing undocumented migrants to work on the construction site.<sup>238</sup> The district judge sentenced Guo to eighteen months in jail, a fine of \$5,000, and other special assessments.<sup>239</sup>

Like Guo, Xiufang Qi worked for Beilida Overseas and was also charged with both smuggling undocumented individuals and illegally employing undocumented workers.<sup>240</sup> After she pled guilty to the smuggling charge, the district judge sentenced her to eight months in jail, a \$4,000 fine, and a \$100 special assessment for her role in supervising over one-hundred undocumented workers.<sup>241</sup> Moreover, as a Chinese national, once she served her sentence, she was subject to deportation.<sup>242</sup>

Hongwei Ma, another Beilida Overseas employee, was charged with illegally employing undocumented workers in two separate prosecutions.<sup>243</sup> In accordance with a plea agreement, the district judge sentenced Ma to six months

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236. *Id.*; Amended Judgment, *United States v. Zhao*, No. 1:17-CR-00016 (D. N. Mar. I. Sept. 28, 2017), ECF No. 11.

237. De la Torre, *supra* note 235.

238. Criminal Complaint at 3–7, *United States v. Guo*, No. 1:17-CR-00008 (D. N. Mar. I. dismissed May 29, 2018), ECF No. 1; Bryan Manabat, *Guilty Plea in Use of Illegal Workers at Casino Job Site*, GUAM DAILY POST (Oct. 4, 2017), [https://www.postguam.com/news/cnmi/guilty-plea-in-use-of-illegal-workers-at-casino-job/article\\_1ee378a4-a7eb-11e7-bb6f-dba15b0cd87.html](https://www.postguam.com/news/cnmi/guilty-plea-in-use-of-illegal-workers-at-casino-job/article_1ee378a4-a7eb-11e7-bb6f-dba15b0cd87.html).

239. U.S. DEP'T OF JUST., WENCAI GUO SENTENCED FOR HARBORING ILLEGAL ALIENS (2018); Jasmine Stole Weiss, *Man Sentenced to 18 Months for Harboring Aliens*, PAC. DAILY NEWS (May 18, 2018), <https://www.guampdn.com/story/news/2018/05/18/man-sentenced-18-months-harboring-aliens/622219002/>.

240. Criminal Complaint at 5, *United States v. Qi*, No. 1:17-cr-0009 (D. N. Mar. I. filed Apr. 5, 2017), ECF No. 1.

241. Ferdie De La Torre, *Ex-Beilida Staff Sentenced to 239 Days of Time Served*, SAIPAN TRIB. (June 4, 2018), <https://www.saipantribune.com/index.php/ex-beilida-staff-sentenced-to-239-days-of-time-served-2/>; Alana Chargualaf, *Woman Sentenced in Illegal Foreign Worker Case*, GUAM DAILY POST (June 5, 2018), [https://www.postguam.com/news/local/woman-sentenced-in-illegal-foreign-worker-case/article\\_1c149ecc-67ae-11e8-aa53-ff1db8afc5ce.html](https://www.postguam.com/news/local/woman-sentenced-in-illegal-foreign-worker-case/article_1c149ecc-67ae-11e8-aa53-ff1db8afc5ce.html); Jasmine Stole Weiss, *Xiufang Qi who Supervised Illegal Workers at Saipan Casino Sentenced*, PAC. DAILY NEWS (June 4, 2018), [https://www.postguam.com/news/local/woman-sentenced-in-illegal-foreign-worker-case/article\\_1c149ecc-67ae-11e8-aa53-ff1db8afc5ce.html](https://www.postguam.com/news/local/woman-sentenced-in-illegal-foreign-worker-case/article_1c149ecc-67ae-11e8-aa53-ff1db8afc5ce.html).

242. De La Torre, *supra* note 241; Weiss, *supra* note 241.

243. Criminal Complaint at 6–7, *United States v. Ma*, No. 1:17-CR-00006 (D. N. Mar. I. dismissed Feb. 1, 2018), ECF No. 1; Information, *United States v. Ma*, No. 1:17-CR-00017 (D. N. Mar. I. Dec. 11, 2017), ECF No. 1; *see also* Chargualaf, *supra* note 241.

in jail and a \$10 special assessment.<sup>244</sup> The United States moved to dismiss the other pending criminal complaint,<sup>245</sup> which the district judge granted.<sup>246</sup>

The United States also charged Hui Lu, the owner of Beilida Overseas, with illegally employing undocumented workers.<sup>247</sup> To date, Lu, a Chinese national, is still at large and has not been prosecuted for this charge.<sup>248</sup>

In *United States v. Wu*, the government issued a superseding indictment against Liwen Wu, Jianmin Xu, and Yan Shi containing seventy-one total counts, including thirty-two counts of illegally employing undocumented workers.<sup>249</sup> These charges stemmed from the construction of a casino in Saipan by Imperial Pacific International.<sup>250</sup> Wu, a Taiwanese national, and Xu, a Chinese national, were senior executives for Imperial Pacific International, while Shi, a Chinese national, was a project supervisor for MCC International Saipan.<sup>251</sup> Imperial Pacific International “contracted with several Chinese construction companies” to build the casino.<sup>252</sup> During the course of this construction, the superseding indictment alleges that Wu and Xu pressured MCC to use undocumented workers to build the casino faster.<sup>253</sup> The undocumented workers received advice, counseling them to enter the Northern Mariana Islands on tourist visas before working on the construction project.<sup>254</sup>

In *United States v. Sun*, the United States charged Sen Sun with three counts of smuggling undocumented individuals, illegally employing undocumented workers, and money laundering.<sup>255</sup> Sun, a Chinese national, entered Saipan on a tourist visa before overstaying it to run a birthing center where he employed undocumented workers as caregivers.<sup>256</sup> In accordance with a plea agreement,

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244. Minute Entry at 3–4, *Ma*, No 1:17-CR-00006, ECF No. 3.

245. United States’ Motion to Dismiss, *Ma*, No 1:17-CR-00006, ECF No. 2.

246. Order Granting United States’ Motion to Dismiss, *Ma*, No 1:17-CR-00006, ECF No. 3.

247. Criminal Complaint at 4–5, *United States v. Lu*, No. 1:17-CR-00007 (D. N. Mar. I. Apr. 3, 2017), ECF No. 1.

248. Criminal Complaint at 4, *Lu*, No. 1:17-CR-00007, ECF No. 1; De La Torre, *supra* note 241.

249. Superseding Indictment, *United States v. Wu*, No. 1:18-CR-0008 (D. N. Mar. I. filed Mar. 27, 2018), ECF No. 7; *see also* Ferdie De La Torre, *IPI Questions Why Manglona is Handling Suit Against it*, SAIPAN TRIB. (Aug. 10, 2020), <https://www.saipantribune.com/index.php/ipi-questions-why-manglona-is-handling-civil-suit-against-it/>.

250. Superseding Indictment at 5, *Wu*, No. 1:18-CR-0008.

251. Superseding Indictment at 3, *Wu*, No. 1:18-CR-0008.

252. Superseding Indictment at 5, *Wu*, No. 1:18-CR-0008.

253. Superseding Indictment at 5, *Wu*, No. 1:18-CR-0008.

254. Superseding Indictment at 2, 6–8, *Wu*, No. 1:18-CR-0008.

255. Indictment at 3–4, *United States v. Sun*, No. 1:17-CR-00018 (D. N. Mar. I. May 21, 2018); Ferdie De La Torre, *Prosecution: Witness in Sun’s Case Has No Visa*, SAIPAN TRIB. (Dec. 7, 2017), <https://www.saipantribune.com/index.php/prosecution-witness-suns-case-no-visa/>.

256. U.S. DEP’T OF JUST., SEN SUN SENTENCED FOR HARBORING ILLEGAL ALIENS (2018); Jerick Sablan, *Sen Sun Sentenced in Illegal Birth Tourism Scheme*, PAC. DAILY NEWS (May 21, 2018), <https://www.guampdn.com/story/news/2018/05/21/sen-sun-sentenced-illegal-birth-tourism-scheme/627777002/>.

he pled guilty to the smuggling charge, and the other counts were dismissed.<sup>257</sup> The district judge sentenced him to a year and a day in jail, a \$1,000 fine, and a \$100 special assessment.<sup>258</sup> Additionally, the court ordered that he forfeit \$31,960 as proceeds derived from his criminal conduct.<sup>259</sup>

## 2. Eastern District of Louisiana

In the Eastern District of Louisiana, the United States Attorney targeted businesses. For example, in *United States v. Osaka Thai Corp.*, the United States Attorney prosecuted restaurants Osaka Japanese Restaurant and Shinto Japanese for a conspiracy to engage in smuggling undocumented individuals, resulting in guilty pleas.<sup>260</sup> Additionally, Tony Nguyen, the owner of these two restaurants, pled guilty to the illegal employment of undocumented workers.<sup>261</sup> Collectively, the three defendants agreed to forfeit \$250,000 along with a sentence of a three-year probation.<sup>262</sup>

Similarly, in *United States v. Hollywood East*, the United States Attorney prosecuted restaurants East Buffet and Grand Buffet for smuggling undocumented migrants, resulting in a sentence of five-years probation and a \$35,000 fine because the restaurants were providing housing for undocumented workers at the restaurants.<sup>263</sup> Additionally, the three owners of these restaurants pled guilty to the illegal employment of undocumented workers.<sup>264</sup> They each received two years of probation and a \$5,000 fine.<sup>265</sup>

In *United States v. Thai Thai, LLC*, the United States Attorney charged the restaurant Sticky Rice Thai Cuisine with smuggling undocumented migrants while charging its owner, Somphon Chiwabandit, with illegal employment of

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257. Plea Agreement at 1–2, *Sun*, No. 1:17-CR-00018, ECF No. 22; Minute Entry at 3, *Sun*, No. 1:17-CR-00018, ECF No. 35; *see also* U.S. DEP'T OF JUST., *supra* note 256; Sablan, *supra* note 256.

258. Judgment in a Criminal Case, *Sun*, No. 1:17-CR-00018, ECF No. 36; U.S. DEP'T OF JUST., *supra* note 256; Sablan, *supra* note 256.

259. Final Order of Forfeiture, *Sun*, No. 1:17-CR-00018, ECF No. 38. Other sources list the amount of forfeiture was \$33,960. U.S. DEP'T OF JUST., *supra* note 256; Sablan, *supra* note 256.

260. Factual Basis at 1, *United States v. Osaka Thai Corp.*, 2:14-cr-00119 (E.D. La. Dec. 10, 2014), ECF No. 32; U.S. DEP'T OF JUST., ST. TAMMANY RESTAURANTS AND OWNER SENTENCED FOR EMPLOYING ILLEGAL ALIENS (2014).

261. Factual Basis at 2–3, *Osaka Thai Corp.*, No. 2:14-cr-00119; U.S. DEP'T OF JUST., *supra* note 260.

262. Judgment in a Criminal Case, *Osaka Thai Corp.*, No. 2:14-cr-00119, ECF No. 55; U.S. DEP'T OF JUST., *supra* note 260.

263. Amended Judgment in a Criminal Case, *United States v. Hollywood East*, No. 2:16-CR-00220 (E.D. La. June 21, 2017), ECF No. 82–83; U.S. DEP'T OF JUST., RESTAURANTS SENTENCED FOR ILLEGAL HARBORING OF ALIENS; OWNERS SENTENCED FOR UNLAWFUL EMPLOYMENT (2017).

264. Minute Entry, *Hollywood East*, No. 2:16-CR-00220, ECF No. 44.

265. U.S. DEP'T OF JUST., *supra* note 263.

undocumented workers.<sup>266</sup> Based on this information, the district court judge sentenced the restaurant to one year of probation, a \$400 special assessment, and a forfeiture of \$24,640.<sup>267</sup> The judge sentenced the owner to time served as he had already been in custody for four months and a \$100 special assessment.<sup>268</sup> Moreover, ICE took the owner into its custody after the sentencing for removal proceedings as he entered the United States seven years previously on a business visa and overstayed his business visa.<sup>269</sup>

In *United States v. Zhao*, investigators with the United States Department of Labor opened an investigation into concerns that the La Jumbo China Buffet was not properly paying its employees.<sup>270</sup> Based on this investigation, the government charged Ke Lian Zhao with illegally employing undocumented workers at his restaurant.<sup>271</sup> Furthermore, it charged the restaurant with knowingly making materially false statements to federal agents<sup>272</sup> with the Department of Labor and the Department of Homeland Security.<sup>273</sup> Both the owner and the restaurant pled guilty to these charges, receiving one year of probation, as well as a \$100 special assessment and \$400 special assessment, respectively.<sup>274</sup> Moreover, the owner was ordered to pay \$52,305.75 in restitution to victims he underpaid in violation of minimum wage and overtime pay laws.<sup>275</sup>

The United States Attorney prosecuted another employer in the Eastern District of Louisiana for a violation of section 1324a. In *United States v. N & F Logistics, Inc.*, the company pled guilty, acknowledging that it hired an undocumented worker and knew that this person was not lawfully authorized to

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266. Bill of Information for Harboring Aliens and Unlawful Employment of Aliens, *United States v. Thai Thai, LLC*, No. 2:19-cr-00009 (E.D. La. Apr. 17, 2019), ECF No. 19; U.S. DEP'T OF JUST., RESTAURANT AND OWNER CHARGED WITH HARBORING AND EMPLOYING ILLEGAL ALIENS (2019).

267. Judgment in a Criminal Case, *Thai Thai, LLC*, No. 2:19-cr-00009, ECF No. 44; U.S. DEP'T OF JUST., RESTAURANT AND OWNER CHARGED WITH HARBORING AND EMPLOYING ILLEGAL ALIENS (2017).

268. Judgment in a Criminal Case, *Thai Thai, LLC*, No. 2:19-cr-00009, ECF No. 45; U.S. DEP'T OF JUST., *supra* note 267.

269. U.S. DEP'T OF JUST., *supra* note 267.

270. U.S. DEP'T JUST., NEW ORLEANS MAN AND HIS RESTAURANT SENTENCED FOR EMPLOYING UNAUTHORIZED ALIENS AND MAKING FALSE STATEMENTS (2016).

271. Bill of Information for Employment of Unlawful Aliens and False Statements, *United States v. Zhao*, No. 2:15-cr-00278 (E.D. La. May 19, 2016), ECF No. 1; U.S. DEP'T OF JUST., *supra* note 270.

272. See 18 U.S.C. § 1001(a)(2).

273. Bill of Information for Employment of Unlawful Aliens and False Statements, *Zhao*, No. 2:15-cr-00278, ECF No. 1; U.S. DEP'T OF JUST., *supra* note 270.

274. Judgment in Criminal Case, *Zhao*, No. 2:15-cr-00278, ECF No. 36–37; U.S. DEP'T OF JUST., *supra* note 270.

275. Judgment in Criminal Case, *Zhao*, No. 2:15-cr-00278, ECF No. 36; U.S. DEP'T OF JUST., *supra* note 270.

work in the United States.<sup>276</sup> The district judge sentenced the company to three years of probation, a \$50 special assessment, a \$3,000 fine, and restitution in the amount of \$4,812.50.<sup>277</sup> This employment appears to be a pattern at N&F Logistics. In 2007, ICE agents raided N&F Logistic buildings in New Orleans, arresting thirty-eight people from China, Guatemala, Honduras, and Mexico.<sup>278</sup>

In *United States v. Santangelo*, the criminal complaint charged Johnnie Santangelo with both smuggling undocumented individuals and illegally employing undocumented workers; the complaint also charged his co-defendant, Ober Farfan Bravo, with illegally employing undocumented workers.<sup>279</sup> These defendants came to light after a homicide investigation on the mushroom farm where they illegally employed undocumented workers.<sup>280</sup> After Santangelo pled guilty to illegally employing undocumented workers, the federal prosecutors in New Orleans dropped the smuggling charges against him.<sup>281</sup> Bravo also pled guilty to illegally employing undocumented workers.<sup>282</sup> The district judge sentenced Santangelo to one year of probation and a \$10 special assessment<sup>283</sup> and Bravo to time served as well as a \$10 special assessment.<sup>284</sup>

### 3. *The District of Arizona*

In the District of Arizona, the United States prosecuted employers. In *United States v. Rivera*, the defendant, who owned L&R Trucking and Sunset Trucking, was charged with illegally employing undocumented workers as well as smuggling undocumented migrants.<sup>285</sup> In a plea agreement, Luis Rivera pled guilty to the charge of illegally employing undocumented workers, and the government dismissed the smuggling charges.<sup>286</sup> The magistrate judge

276. Minute Entry, *United States v. N & F Logistics, Inc.*, No. 2:19-cr-00076 (E.D. La. Nov. 19, 2019), ECF No. 13; Factual Basis, *N & F Logistics, Inc.*, No. 2:19-cr-00076, ECF No. 14.

277. Judgment in Criminal Case, *N & F Logistics, Inc.*, No. 2:19-cr-00076, ECF No. 26.

278. Richard Rainey, *Federal Agents Arrest 38 Foreigners – 33 Men, 5 Women Nabbed in Elmwood*, TIMES-PICAYUNE, May 18, 2007.

279. Complaint at 1, 10, *United States v. Santangelo*, No. 2:14-cr-00119 (E.D. La. filed Oct. 8, 2014), ECF No. 1.

280. Factual Basis at 2–3, *Santangelo*, No. 2:14-cr-00254, ECF No. 39; Steve Hardy, *Slaying Leads Federal Investigators to Tangipahoa Mushroom Farm*, THE ADVOC. (Oct. 31, 2014, 9:35 AM), [https://www.theadvocate.com/baton\\_rouge/news/communities/article\\_44d3efad-82bb-5c74-b7db-b834932baf0d.html](https://www.theadvocate.com/baton_rouge/news/communities/article_44d3efad-82bb-5c74-b7db-b834932baf0d.html).

281. Plea Agreement at 1, *Santangelo*, No. 2:14-cr-00254, ECF No. 37; see also U.S. DEP'T OF JUST., TWO PLEA GUILTY TO THE UNLAWFUL EMPLOYMENT OF ALIENS (2014).

282. U.S. DEP'T OF JUST., *supra* note 281.

283. Judgment in a Criminal Case, *Santangelo*, No. 2:14-cr-00254, ECF No. 52.

284. Judgment in a Criminal Case, *Santangelo*, No. 2:14-cr-00254, ECF No. 50.

285. Indictment at 1, 5, *United States v. Rivera*, No. 4:18-cr-01785 (D. Ariz. May 6, 2019), ECF No. 3; Jonathan Clark, *Feds Accuse Local Truck Firms of Using Drivers Illegally*, NOGALES INT'L (Oct. 24, 2018), [https://www.nogalesinternational.com/news/feds-accuse-local-truck-firms-of-using-drivers-illegally/article\\_799b5250-d7c2-11e8-a293-4736957ff036.html](https://www.nogalesinternational.com/news/feds-accuse-local-truck-firms-of-using-drivers-illegally/article_799b5250-d7c2-11e8-a293-4736957ff036.html).

286. Amended Plea Agreement at 1, *Rivera*, No. 4:18-cr-01785, ECF No. 36; *Truck Operator Sentenced for Using Unauthorized Drivers*, NOGALES INT'L (Apr. 19, 2019),



sentenced Rivera to no time in jail or probation, but instead issued a final order of forfeiture alone with a fine of \$10,000.<sup>287</sup> Pursuant to the plea agreement, “Rivera agreed to forfeit two Freightligner [sic] tractors with a combined estimated value of \$40,000 to be credited against his fine.”<sup>288</sup>

In a case related to *Rivera*, the government charged Jimmy Watson-Osuna, Sr. with illegally employing undocumented workers as well as smuggling undocumented individuals through JSJ Enterprise, his trucking company.<sup>289</sup> Pursuant to a plea agreement, like *Rivera*, Watson pled guilty to the charge of illegally employing undocumented workers, and the government dismissed eight felony counts for smuggling charges.<sup>290</sup> Unlike in *Rivera*, a different magistrate judge sentenced Watson to a year of probation.<sup>291</sup> Watson also ultimately was ordered to “pay \$20,000 and forfeit a 2000 Freightligner [sic] tractor along with a 1998 semi-trailer.”<sup>292</sup>

In *United States v. Valley View Building Services, LLC*, Arizona federal prosecutors charged the construction cleanup company and Jaime Votaw with illegally employing undocumented workers.<sup>293</sup> Votaw and her company pled guilty pursuant to a plea agreement.<sup>294</sup> The district judge sentenced both defendants to five years of probation and a forfeiture of \$250,000 with \$50,000 paid at sentencing and the remaining balance paid in equal monthly installments during the period of probation.<sup>295</sup> Ultimately, the district judge granted a request to end the term of probation early for both defendants.<sup>296</sup>

In its fourth prosecution during this period, the government charged Hugh Albert Casiano with illegally employing undocumented workers at a company

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[https://www.nogalesinternational.com/news/truck-operator-sentenced-for-using-unauthorized-drivers/article\\_a14ba42c-66d2-11e9-a260-2b1869822b94.html](https://www.nogalesinternational.com/news/truck-operator-sentenced-for-using-unauthorized-drivers/article_a14ba42c-66d2-11e9-a260-2b1869822b94.html) [hereinafter NOGALES INT’L].

287. Judgment at 1, *Rivera*, No. 4:18-cr-01785, ECF No. 38.

288. NOGALES INT’L, *supra* note 286.

289. Indictment at 1, *United States v. Watson-Osuna*, No. 4:18-cr-02000 (D. Ariz. July 21, 2019), ECF No. 3; Clark, *supra* note 285.

290. Amended Plea Agreement at 1, *Watson-Osuna*, No. 4:18-cr-02000, ECF No. 45; NOGALES INT’L, *supra* note 286.

291. Amended Judgment at 1, *Watson-Osuna*, No. 4:18-cr-02000, ECF No. 48; NOGALES INT’L, *supra* note 286.

292. NOGALES INT’L, *supra* note 286.

293. Information at 1, *United States v. Valley View Bldg. Servs., LLC*, 2:15-po-00105 (D. Ariz. June 19, 2015), ECF No. 1.

294. Judgment in a Criminal Case at 1, *Valley View Bldg. Servs., LLC*, 2:15-po-00105, ECF No. 18; Sarah Jarvis, *Phoenix-Area Business gets Probation over Illegal Workers*, ARIZ. REPUBLIC (June 15, 2015, 5:32 PM), <https://www.azcentral.com/story/news/local/phoenix/2015/06/17/southwest-business-owner-gets-probation-for-hiring-undocumented-immigrants-abrk/28890945/>.

295. Judgment in a Criminal Case at 1, *Valley View Bldg. Servs., LLC*, 2:15-po-00105, ECF No. 18; Jarvis, *supra* note 294.

296. Order, *Valley View Bldg. Servs., LLC*, 2:15-po-00105, ECF No. 20; *see also* Jarvis, *supra* note 294.

called Tintnet LLC that provided tinting of car windows.<sup>297</sup> After he pled guilty, the magistrate judge sentenced him to one year of probation, a \$10 special assessment, and a fine of \$36,000.<sup>298</sup>

#### 4. *The District of South Carolina*

In the District of South Carolina, federal prosecutors charged HW Group, LLC for illegally employing over 300 undocumented workers in its farming operation.<sup>299</sup> After pleading guilty, the district judge sentenced the corporation to four years of probation, a \$50 special assessment, and a \$1,000,000 fine.<sup>300</sup> In a related case, the United States prosecuted Sary Mejia and Lazaro Mejia for assisting the farm in hiring undocumented workers.<sup>301</sup> The district judge sentenced Mejia both to one year of probation and a \$10 special assessment.<sup>302</sup> Federal prosecutors recommended against prison terms because the Mejias provided the tip that led federal officials to discover the undocumented workers at the farm.<sup>303</sup>

In *United States v. Leon*, the United States Attorney for the District of South Carolina prosecuted Gregorio Leon, the owner of a Mexican restaurant, for illegally employing over sixty undocumented workers.<sup>304</sup> The district judge sentenced Leon to one year of probation, a \$10 special assessment, and a fine of \$180,000.<sup>305</sup> The same United States Attorney who advocated leniency for the Mejias also did so for Leon because he cooperated in the prosecution of a county sheriff who took money from Leon to release his undocumented workers.<sup>306</sup>

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297. Plea Agreement at 1, 6–7, *United States v. Casiano*, 2:15-cr-06568 (D. Ariz. Jan. 13, 2016), ECF No. 7.

298. Judgment of Probation at 2, *Casiano*, 2:15-cr-06568, ECF No. 8.

299. Information, *United States v. HW Grp., LLC*, No. 3:16-po-00002 (D.S.C. Mar. 28, 2016), ECF No. 1; John Monk & Tim Flach, *South Carolina Farm Fined for Illegal Hiring of Migrant Workers*, CHARLOTTE OBSERVER (Mar. 28, 2016), <https://infoweb-newsbank.com.libproxy.library.unt.edu/apps/news/document-view?p=AWNB&docref=news/15C3E826EBC46438>.

300. Judgment at 1–2, 4, *HW Grp., LLC*, No. 3:16-po-00002, ECF No. 14; Monk & Flach, *supra* note 299.

301. Information, *United States v. Mejia*, No. 3:15-po-00005 (D.S.C. Feb. 22, 2016), ECF No. 2; Monk & Flach, *supra* note 299; John Monk, *Farm Allegedly Employed Illegal Immigrant Workers*, THE STATE (Nov. 20, 2015), <https://infoweb-newsbank-com.libproxy.library.unt.edu/apps/news/document-view?p=AWNB&docref=news/1593B2A1D2E7F358>.

302. Amended Judgment at 1–3, *Mejia*, No. 3:15-po-00005, ECF No. 47; Monk, *supra* note 301.

303. Monk, *supra* note 301.

304. Information, *United States v. Leon*, No. 3:15-po-00009 (D.S.C. Feb. 22, 2016), ECF No. 1; Meg Kinnard, *Columbia Restaurateur Admits he Hired People in U.S. Illegally*, AIKEN STANDARD (Nov. 18, 2015), [https://www.postandcourier.com/aikenstandard/news/columbia-restaurateur-admits-he-hired-people-in-u-s-illegally/article\\_19be823a-d45b-5fcb-af0d-e1f47a58bfff.html](https://www.postandcourier.com/aikenstandard/news/columbia-restaurateur-admits-he-hired-people-in-u-s-illegally/article_19be823a-d45b-5fcb-af0d-e1f47a58bfff.html).

305. Judgment at 1–3, *Leon*, No. 3:15-cr-00009, ECF No. 24; Kinnard, *supra* note 304.

306. Monk, *supra* note 301; Kinnard, *supra* note 304.

Leon also received five years of probation in state court related to a public corruption case involving the county sheriff.<sup>307</sup>

### 5. *The District of Kansas*

In the District of Kansas, federal prosecutors charged two separate businesses. First, the United States Attorney charged Le Grande Tetons, LLC with illegally employing undocumented workers.<sup>308</sup> A Department of Homeland Security audit revealed that a Twin Peaks restaurant franchise, which was owned by Le Grande Tetons, LLC, was employing about twenty undocumented workers.<sup>309</sup> Although the restaurant manager agreed to terminate these workers, the restaurant rehired many of these workers after a few months.<sup>310</sup> After the corporation pled guilty, pursuant to a plea agreement, the magistrate judge sentenced the corporation to a \$50,000 fine and a \$50 special assessment.<sup>311</sup>

In *United States v. Keaton*, the United States Attorney for the District of Kansas also indicted several defendants at Century Roofing with forced labor<sup>312</sup> and smuggling undocumented individuals.<sup>313</sup> The federal prosecutor charged Graziano Cornolo with illegally employing undocumented workers as well as these other felony charges.<sup>314</sup> After Cornolo pled guilty to section 1324a, the felony charges were dismissed.<sup>315</sup> The district judge sentenced Cornolo to a year of unsupervised probation as well as a \$10 special assessment.<sup>316</sup> Moreover, he forfeited \$800,000 as well as a \$500,000 interest that he had in Century

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307. Rachel Myers Lowe, *Lexington Restaurant Owner Pleads Guilty to Hiring Undocumented Workers*, THE STATE (Nov. 18, 2015, 5:10 PM), <https://www.thestate.com/article45383679.html>.

308. Information at 1, *United States v. Le Grande Tetons, LLC*, No. 6:15-cr-10144 (D. Kan. Sept. 21, 2015), ECF No. 1; Amy Renee Leiker, *Former Twin Peaks Owner Pleads Guilty to Hiring Illegal Workers*, WICHITA EAGLE (Sept. 17, 2015, 11:41 AM), <https://www.kansas.com/news/local/crime/article35604441.html>.

309. U.S. DEP'T OF JUST., TWIN PEAKS COMPANY PLEADS GUILTY TO HIRING UNAUTHORIZED WORKERS (2015); Leiker, *supra* note 308.

310. U.S. DEP'T JUST., *supra* note 309; *see also* Leiker, *supra* note 308.

311. Judgment at 1–2, *Le Grande Tetons, LLC*, No. 6:15-cr-10144, ECF No. 6; U.S. DEP'T JUST., *supra* note 309.

312. *See* 18 U.S.C. § 1589(a)–(b).

313. Sealed Indictment at 1–2, *United States v. Keaton*, No. 2:16-cr-20051 (D. Kan. May 22, 2017), ECF No. 1; *Longtime KC Roofing Company is Accused of Forced Labor, Kickbacks*, KAN. CITY BUS. J. (June 15, 2016, 8:35 AM), [https://www.bizjournals.com/kansascity/blog/morning\\_call/2016/06/longtime-kc-roofing-company-is-accused-of-forced.html](https://www.bizjournals.com/kansascity/blog/morning_call/2016/06/longtime-kc-roofing-company-is-accused-of-forced.html).

314. Superseding Information, *Keaton*, No. 2:16-cr-20051, ECF No. 65; U.S. DEP'T OF JUST., FORMER ROOFING COMPANY EXECUTIVE SENTENCED TO PRISON IN ALIEN EMPLOYMENT CASE (2017); Andrew Vaupel, *Longtime Roofing Company Owner will Hang his Shingle in Prison*, KAN. CITY BUS. J. (May 23, 2017, 7:42 AM), <https://www.bizjournals.com/kansascity/news/2017/05/23/century-roofing-tommy-keaton-prison-sentence.html>.

315. Minute Entry, *Keaton*, No. 2:16-cr-20051, ECF No. 67.

316. Judgment in a Criminal Case at 2, 4, *Keaton*, No. 2:16-cr-20051, ECF No. 72; U.S. DEP'T OF JUST., *supra* note 314.

Roofing.<sup>317</sup> Tommy Keaton, an executive at Century Roofing, received a sentence of twelve months and a day for the felony offense of harboring undocumented individuals to work on various roofing projects.<sup>318</sup>

#### 6. *The Southern District of California*

In the Southern District of California, the Office of the United States Attorney prosecuted two businesses and their owners for the employment of undocumented workers. In one case, federal prosecutors charged Servi-Tek, Inc. and Kurt Lester, one of its owners, for illegally employing undocumented workers for its janitorial services.<sup>319</sup> Both defendants pled guilty to the charge pursuant to the plea agreements with the government.<sup>320</sup> The magistrate judge sentenced Servi-Tek to one year of probation, a \$10 special assessment, and a fine of \$20,000.<sup>321</sup> He sentenced Lester to six months of unsupervised probation and a \$10 special assessment.<sup>322</sup>

Additionally, the San Diego federal prosecutor charged Javid Javidani with illegally employing undocumented workers through Healthcare Plus, LLC, which he owned.<sup>323</sup> After pleading guilty, the district judge sentenced Javidani to two years of probation and a \$100 special assessment.<sup>324</sup> Contemporaneous to the charge against Javidani, the United States also charged Healthcare Plus, LLC with structuring transactions to evade reporting requirements involving financial institutions<sup>325</sup> as well as smuggling undocumented individuals.<sup>326</sup> As the managing member of Healthcare Plus, Javidani pled guilty on its behalf.<sup>327</sup> The district judge sentenced Healthcare Plus to two years of probation and a \$100 special assessment for each of the two counts.<sup>328</sup> Moreover, Healthcare Plus forfeited \$556,000 to the government.<sup>329</sup>

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317. Preliminary Order of Forfeiture, *Keaton*, No. 2:16-cr-20051, ECF No. 76; U.S. DEP'T OF JUST., *supra* note 314; Vaupel, *supra* note 314.

318. Vaupel, *supra* note 314.

319. Information, *United States v. Servi-Tek, Inc.*, No. 3:16-cr-01483 (S.D. Cal. July 12, 2016), ECF No. 1; *see also Our Team*, SERVI-TEK (last visited Oct. 13, 2021), <https://servi-tek.net/our-team/>; *About Us*, SERVI-TEK (last visited Oct. 1, 2021), <https://servi-tek.net/our-company-servi-tek/>.

320. Minute Entry, *Servi-Tek, Inc.*, No. 3:16-cr-01483, ECF No. 2.

321. Amendment Judgment at 1–2, 4, *Servi-Tek, Inc.*, No. 3:16-cr-01483, ECF No. 11.

322. Amended Judgment at 1–2, *Servi-Tek, Inc.*, No. 3:16-cr-01483, ECF No. 9.

323. Misdemeanor Information, *United States v. Javidani*, No. 3:14-cr-02181 (S.D. Cal. Oct. 24, 2014), ECF No. 1; Transcript at 15, *United States v. Healthcare Plus, LLC*, No. 3:14-cr-02180 (S.D. Cal. Oct. 24, 2014), ECF No. 21.

324. Judgment at 1, *United States v. Javidani*, No. 3:14-cr-02181 (S.D. Cal. Oct. 24, 2014).

325. *See* 31 U.S.C. § 5324(a)(3).

326. Information at 1–2, *Healthcare Plus, LLC*, No. 3:14-cr-02180, ECF No. 1.

327. Transcript at 24, *Healthcare Plus, LLC*, No. 3:14-cr-02180, ECF No. 21.

328. Judgment at 1–2, *Healthcare Plus, LLC*, No. 3:14-cr-02180, ECF No. 17.

329. Amended Order of Criminal Forfeiture, *Healthcare Plus, LLC*, No. 3:14-cr-02180, ECF No. 20.

### 7. The Northern District of Texas

In the Northern District of Texas, the federal government prosecuted two businesses and their owners for the employment of undocumented workers. In one prosecution, the United States Attorney charged Carl Hall, David Bloxom, and Ronald Hamm, the three co-owners of Speed Fab-Crete, for illegally employing undocumented workers.<sup>330</sup> The information also charged Robert James, the company's chief financial officer, as well as Mark Sevier, the owner of Take Charge Staffing, a temporary agency used by Speed Fab-Crete.<sup>331</sup> The district judge sentenced Hall to six months, Hamm and Sevier to four months, James to three months, and Bloxom to two months in jail.<sup>332</sup> Each defendant also received either a \$10 or \$100 special assessment and a \$69,000 fine.<sup>333</sup> In accordance with a non-prosecution agreement, Speed Fab-Crete agreed to forfeit \$3 million to the government for its role in illegally hiring undocumented workers.<sup>334</sup>

In Abilene, Texas, federal prosecutors indicted Vuom Chhuon for smuggling undocumented individuals and employing undocumented workers at a restaurant that he owned in Spring, Texas.<sup>335</sup> The district judge sentenced him to twelve months for smuggling and three months for illegally employing undocumented workers to be served consecutively as well as \$110 in special assessments and a \$100,000 fine.<sup>336</sup>

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330. Information at 1–2, *United States v. Hall*, No. 3:19-cr-00639 (N.D. Tex. Sept. 4, 2020), ECF No. 1; U.S. IMMIGR. & CUSTOMS ENF'T, NORTH TEXAS CONSTRUCTION COMPANY CFO SENTENCED FOR ROLE IN SCHEME TO EMPLOY ILLEGAL ALIENS (2020); *Company Agrees to Pay Government \$3 Million After Illegally Employing Undocumented Workers*, CBS DFW (Jan. 27, 2020, 12:32 PM), <https://dfw.cbslocal.com/2020/01/27/speed-fab-crete-pays-3m/>.

331. Information at 1–2, *Hall*, No. 3:19-cr-00639, ECF No.; U.S. IMMIGR. & CUSTOMS ENF'T, *supra* note 330; *Company Agrees to Pay Government \$3 Million After Illegally Employing Undocumented Workers*, *supra* note 330.

332. Judgment at 1–2, *Hall*, No. 3:19-cr-00639, ECF No. 141 (judgment as to Hall); Judgment at 1–2, *Hall*, No. 3:19-cr-00639, ECF No. 134 (judgment as to Hamm); Judgment at 1–2, *Hall*, No. 3:19-cr-00639, ECF No. 135 (judgment as to Sevier); Judgment at 1–2, *Hall*, No. 3:19-cr-00639, ECF No. 121 (judgment as to James); Judgment at 1–2, *Hall*, No. 3:19-cr-00639, ECF No. 154 (judgment as to Bloxom).

333. Judgment at 6, *Hall*, No. 3:19-cr-00639, ECF No. 141 (judgment as to Hall); Judgment at 6, *Hall*, No. 3:19-cr-00639, ECF No. 134 (judgment as to Hamm); Judgment at 6, *Hall*, No. 3:19-cr-00639, ECF No. 135 (judgment as to Sevier); Judgment at 5, *Hall*, No. 3:19-cr-00639, ECF No. 121 (judgment as to James); Judgment at 6, *Hall*, No. 3:19-cr-00639, ECF No. 154 (judgment as to Bloxom).

334. U.S. IMMIGR. & CUSTOMS ENF'T, *supra* note 330; *Company Agrees to Pay Government \$3 Million After Illegally Employing Undocumented Workers*, *supra* note 330.

335. Indictment at 1–2, *United States v. Chhuon*, No. 1:19-cr-00112 (N.D. Tex. Oct. 15, 2020), ECF No. 3; U.S. DEP'T OF JUSTICE, BIG SPRING RESTAURATEUR SENTENCED TO 15 MONTHS FOR ILLEGALLY EMPLOYING UNDOCUMENTED WORKERS, (2020).

336. Judgment at 2, 4, *Chhuon*, No. 1:19-cr-00112, ECF No. 39; U.S. DEP'T JUSTICE, *supra* note 335.

### 8. *The Middle District of North Carolina*

In the Middle District of North Carolina, federal prosecutors charged a company with illegally employing seven undocumented workers on its projects.<sup>337</sup> In accordance with an amended plea agreement, Triangle Grading and Paving pled guilty.<sup>338</sup> The magistrate judge sentenced the company to two years of probation and a \$50 special assessment.<sup>339</sup> Moreover, consistent with the amended plea agreement, the company forfeited \$1,500,000 as the amount of proceeds that the company obtained based on this criminal violation.<sup>340</sup> In exchange for agreeing to forfeit this amount, the Department of Homeland Security agreed to forgo seeking civil penalties from the company.<sup>341</sup>

### 9. *The Eastern District of Pennsylvania*

In the Eastern District of Pennsylvania, the United States Attorney only prosecuted one case, but it was a very large one in terms of costs to the employer and its management. In *United States v. Asplundh Tree Experts Company*, federal prosecutors charged a company with illegally employing over 100 undocumented workers to clear brush and trees from gas and power lines.<sup>342</sup> Asplundh Tree Experts Company, which is privately owned by one of the wealthiest families in the United States, pled guilty to this charge.<sup>343</sup> The district judge ordered that the company pay a record-setting \$80 million forfeiture reflecting the amount of proceeds that it earned by illegally employing undocumented workers.<sup>344</sup> In addition to this criminal forfeiture, the company agreed to pay a civil penalty of \$15 million.<sup>345</sup>

Along with Asplundh Tree Experts Company, three employees were charged with visa fraud and conspiracy to commit visa fraud related to the illegal

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337. Factual Basis for a Guilty Plea at 1–2, *United States v. Triangle Grading & Paving, Inc.*, No. 1:14-cr-00264 (M.D.N.C. Nov. 3, 2014), ECF No. 3.

338. Factual Basis for a Guilty Plea at 1–2, *Triangle Grading & Paving, Inc.*, No. 1:14-cr-00264, ECF No. 3.

339. Judgment at 2, 4, *Triangle Grading & Paving, Inc.*, No. 1:14-cr-00264, ECF No. 15.

340. Order of Forfeiture at 1, *Triangle Grading & Paving, Inc.*, No. 1:14-cr-00264, ECF No. 15-1; Randell Kerr, *Paving Firm to Plead Guilty to Hiring People in the US Illegally*, WRAL (July 10, 2014, 4:10 PM), <https://www.wral.com/paving-firm-to-plead-guilty-to-hiring-people-in-us-illegally/13802728/>.

341. Kerr, *supra* note 340.

342. Information at 1–4, *United States v. Asplundh Tree Experts Co.*, No. 2:17-cr-00492 (E.D. Pa. Sept. 28, 2017), ECF No. 1; Claire Sasko, *Asplundh Tree Company to Pay \$95 Million in Undocumented Workers Case*, PHILA. MAG. (Sept. 28, 2017, 3:05 PM), <https://www.phillymag.com/news/2017/09/28/asplundh-guilty-undocumented-workers/>.

343. Minute Entry, *Asplundh Tree Experts Co.*, No. 2:17-cr-00492, ECF No. 4; U.S. DEP'T OF JUST., *ASPLUNDH TREE EXPERTS, CO. PLEADS GUILTY TO UNLAWFUL EMPLOYMENT OF ALIENS* (2017); Sasko, *supra* note 342.

344. Order of Forfeiture at 1–2, *Asplundh Tree Experts Co.*, No. 2:17-cr-00492, ECF No. 11; U.S. DEP'T OF JUST., *supra* note 343; Sasko, *supra* note 342.

345. U.S. DEP'T OF JUST., *supra* note 343; Sasko, *supra* note 342.

employment of these undocumented workers.<sup>346</sup> After Larry Gauger, a vice president, and Jude Solis and Juan Rodriguez, two supervisors, pled guilty, the district judge sentenced Gauger to five years of probation, a \$500,000 fine, and a \$200 special assessment.<sup>347</sup> The record established that he “knew that the dismissed employees within his region were being rehired under different and false names and false identity documentation and encouraged his supervisors and general foreman to continue this practice.”<sup>348</sup> Rodriguez also received five years of probation and a \$200 special assessment like Gauger, but only a \$4,000 fine.<sup>349</sup> The judge sentenced Solis to three years of probation, a \$2,000 fine, and a \$200 special assessment.<sup>350</sup>

Although the Asplundh Tree Experts Company is an outlier insofar as the amount of money the company paid, it provides some insights as to how the federal government has prosecuted section 1324a. Notwithstanding that the government does not prosecute such cases often, the pattern is that typically companies and owners or upper management will pay fines instead of significant (if any) jail time.

#### VI. PRINCIPLES OF SUPPLY AND DEMAND SHOULD BE APPLIED TO THE UNDOCUMENTED WORKER LABOR MARKET

There is no reason to doubt that the labor market for undocumented workers functions like any other labor market based on supply and demand economics.<sup>351</sup> These workers find jobs across the country and in various occupations. Based on the economics, unscrupulous employers take advantage of these workers and exploit their status to drive down wages.<sup>352</sup> For example, Dr. George Borjas, an economist at the Harvard Kennedy School, testified regarding the effect of

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346. Information at 1–6, *United States v. Gauger*, No. 2:17-cr-00083 (E.D. Pa. Oct. 18, 2017), ECF No. 1; Information at 1–6, *United States v. Solis*, No. 2:17-cr-00084 (E.D. Pa. Oct. 20, 2017), ECF No. 1; Information at 1–6, *United States v. Rodriguez*, No. 2:17-cr-00085 (E.D. Pa. Oct. 18, 2017), ECF No. 1; see also Victor Fiorillo, *Asplundh Tree Execs Charged with Running Undocumented Workers Scheme*, PHILA. MAG. (Feb. 15, 2017, 4:15 PM), <https://www.phillymag.com/news/2017/02/15/asplundh-undocumented-workers/>.

347. Judgment at 2, 5, *Gauger*, No. 2:17-cr-00083, ECF No. 24; Chris Palmer & Jane M. Von Bergen, *Montco-based Asplundh Admits Hiring Undocumented Immigrants, Agrees to Pay \$95 Million*, PHILA. INQUIRER (Sept. 28, 2017), <https://www.inquirer.com/philly/news/crime/asplundh-tree-guilty-undocumented-immigrants-95-million-20170928.html>; Garrett, *supra* note 41, at 383.

348. Palmer & Von Bergen, *supra* note 347.

349. Judgment at 2, 5, *Rodriguez*, No. 2:17-cr-00085, ECF No. 31.

350. Judgment at 2, 5, *Solis*, No. 2:17-cr-00084, ECF No. 24.

351. See generally Henry N. Butler & Keith W. Chauvin, *Economic Analysis of Labor Markets: A Framework for Analyzing Employment Issues*, 8 KAN. J. L. & PUB. POL'Y 1 (1999); see also *Hall v. Thomas*, 753 F. Supp. 2d 1113, 1128 (N.D. Ala. 2010) (addressing the application “foundational economic principles of supply and demand in a competitive market” to the poultry industry).

352. See Tisha R. Tallman, *Liberty, Justice, and Equality: An Examination of Past, Present, and Proposed Immigration Policy Reform Legislation*, 30 N.C. J. INT'L L. & COM. REG. 869, 879–80 (2005).

undocumented workers on wages in the poultry industry, explaining “that wages paid by Pilgrim’s Pride to the Plaintiffs were depressed as a result of Defendant’s alleged practice of employing legally ineligible workers.”<sup>353</sup> Some people analyzing the effect that undocumented workers have on labor markets have concluded that they negatively impact the wages of American low-skill workers.<sup>354</sup> Indeed, President Trump espouses such views on the competition posed by immigrants.<sup>355</sup> Of course, some scholars question Borjas’ conclusions, determining that the effect of immigrants on wages for low-skilled American workers is very small, if it exists at all.<sup>356</sup>

In a report produced by the United States Commission on Civil Rights, it found that “[i]llegal immigration to the United States in recent decades has tended to increase the supply of low-skilled, low-wage labor available in the U.S. labor market.”<sup>357</sup> In discussing the labor supply in the American labor market, one economist explained that “[t]he labor supply of undocumented men and women is less responsive to wage changes than that of legal immigrants, which in turn is less responsive than that of native persons.”<sup>358</sup>

When undocumented workers are compared with documented workers while controlling for factors such as education and skill level, undocumented workers earn less for the same work.<sup>359</sup> One possible explanation for this disparity is that undocumented workers have weaker bargaining positions with employers because of their legal status.<sup>360</sup>

Some federal prosecutors have noted the advantages that employers seek to obtain in hiring undocumented workers. In prosecuting the Asplundh Tree Experts, the government noted that the company’s business model was designed to maximize productivity and profits.<sup>361</sup> In South Carolina, the United States Attorney declared that the \$1 million fine levied against HW Group constituted

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353. *Hall*, 753 F. Supp. 2d at 1128.

354. U.S. COMM’N OF CIV. RTS., *THE IMPACT OF ILLEGAL IMMIGRATION ON THE WAGES AND EMPLOYMENT OPPORTUNITIES OF BLACK WORKERS* 3 (2008), [https://www.usccr.gov/pubs/docs/IllegImmig\\_10-14-10\\_430pm.pdf](https://www.usccr.gov/pubs/docs/IllegImmig_10-14-10_430pm.pdf).

355. Alan de Brauw, *Does Immigration Reduce Wages?*, 37 CATO J. 473, 473 (2017).

356. *See generally id.*; *see also* Gordon G. Hanson, *The Economics and Policy of Illegal Immigration in the United States*, MIGRATION POL’Y INST., Dec. 2009, at 9–13.

357. U.S. COMM’N OF CIV. RTS., *supra* note 354, at 3.

358. George J. Borjas, *The Labor Supply of Undocumented Immigrants* 5 (Nat’l Bureau of Econ. Rsch., Working Paper No. 22102, Mar. 2016).

359. *See* Francisc Ortega & Amy Hsin, *Occupational Barriers and the Labor Market Penalty from Lack of Legal Status*, I Z A INST. OF LAB. ECONS., July 2018, at 19; *see also* Amy Hsin & Francisc Ortega, *What Explains the Wages of Undocumented Workers?*, ECONOFACT (July 24, 2019), <https://econofact.org/what-explains-the-wages-of-undocumented-workers>.

360. Amy Hsin & Francisc Ortega, *What Explains the Wages of Undocumented Workers?*, ECONOFACT (July 24, 2019), <https://econofact.org/what-explains-the-wages-of-undocumented-workers>.

361. U.S. DEP’T OF JUST., *supra* note 343.



“a shift in thinking about illegal immigration.”<sup>362</sup> He further noted that “[f]or the longest time, the belief was that the sole solution to illegal immigration was to round up the illegals,” but that “[n]ow we will also be holding responsible those who hire the illegals.”<sup>363</sup>

Similarly, in Kansas, the United States Attorney explained that demand was driving the American immigration problem: “In my view and I think in the view of many people, employers who are knowingly hiring undocumented workers are a big reason for our nation’s struggle with unlawful immigration . . . Put simply, if nobody’s hiring, nobody’s coming.”<sup>364</sup> He further indicated that he hoped the current prosecution would be a warning to other employers to avoid illegally employing undocumented workers.<sup>365</sup> As a whole, these federal prosecutors implicitly acknowledge that Congress enacted section 1324a as a tool in the government’s arsenal concerning illegal immigration. Moreover, they appreciate how businesses operate to make a profit, and such prosecutions can adversely affect that goal.

Other federal officials have also pointed out the connection between employers willing to employ undocumented workers illegally and the number of undocumented workers. In a statement regarding the Asplundh Tree Experts prosecution, ICE Acting Director Thomas Homan explained that:

[t]oday’s judgment sends a strong, clear message to employers who scheme to hire and retain a workforce of illegal immigrants: we will find you and hold you accountable. Violators who manipulate hiring laws are a pull factor for illegal immigration, and we will continue to take action to remove this magnet.<sup>366</sup>

Similarly, in fining HW Group \$1 million, District Judge “Anderson described the fine as ‘enough to sting or hurt, and also get the attention of others who might be included to commit similar offenses and yet not wreak economic bankruptcy on the corporation.’”<sup>367</sup>

With more frequent and rigorous prosecution by federal officials of employers, the government can influence the flow of immigration into the country. If American employers are dissuaded from employing undocumented workers, then foreign nationals would have less incentive to come here because it would no longer provide an economically viable way to support themselves or their families.

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362. Monk & Flach, *supra* note 299.

363. *Id.*

364. Elle Moxley, *Kansas Contractors who Paid Undocumented Workers Face Federal Charges*, KCUR (Mar. 19, 2015, 3:54 PM), <https://www.kcur.org/community/2015-03-19/kansas-contractors-who-paid-undocumented-workers-face-federal-charges>.

365. *Id.*

366. U.S. DEP’T OF JUST., *supra* note 343.

367. Monk & Flach, *supra* note 299.

## CONCLUSION

It appears that economists and law enforcement officials agree that reducing the demand for undocumented workers will reduce the supply of such workers seeking to enter the country. Thus, instead of simply targeting undocumented workers through criminal prosecution, the federal government must increase its prosecution of businesses that illegally employ undocumented workers.<sup>368</sup>

My goal is not to attack employers who happen to use undocumented workers. It is difficult to imagine the American economy functioning effectively with the loss of eight million workers due to their immigration status. Such a loss would be problematic for the American economy.<sup>369</sup> Instead, I seek to incentivize the nation's employers to become part of the solution in working towards immigration reform. As one scholar described the current system: "employers are technically forbidden from hiring unauthorized workers, [but] as a practical matter, fines for hiring unauthorized workers are relatively minor and rarely imposed."<sup>370</sup> As long as employers can use undocumented workers without much, if any, consequences, they do not have any reason to reform the current system.

There are some approaches that can enhance section 1324a and its effect. First, Congress can amend the statute. Currently, the fine for both individuals and companies that violate section 1324a is only \$3,000 per undocumented worker. That fine should be increased to at least \$5,000 per worker when punishing individuals. For companies, the fine should be increased to at least \$10,000 for each worker. Alternatively, the fines could be dependent on the size of the company in terms of assets and annual revenue such that the largest employers would pay the largest fine per undocumented worker.<sup>371</sup>

Currently, section 1324a is a misdemeanor with a maximum potential of six months in jail for a violation. Congress should amend this term of imprisonment to make it a felony instead of a misdemeanor with a maximum term of five years. Such a potential penalty would demonstrate the gravity with which the federal government has for such criminal convictions. By and large, federal judges have failed to sentence defendants convicted of only illegally employing undocumented workers to jail time. Indeed, with the exception of *United States v. Hall* in the Northern District of Texas, judges have not sentenced any

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368. *But see* Garrett, *supra* note 41, at 364 (declining to take a position on whether it is good to target corporations' shortcomings in screening employees).

369. This loss of 8 million workers would exacerbate an already existing shortage in the American labor market when there are 10.1 million job openings with only 8.7 million people officially unemployed. Lucia Mutikani, *U.S. Job Growth Seen Slowing in August as Delta Variant Curbs Services Demand*, REUTERS (Sept. 3, 2021, 7:25 AM), <https://www.reuters.com/world/us/us-job-growth-seen-slowing-august-delta-variant-curbs-services-demand-2021-09-03/>.

370. Jain, *supra* note 11, at 151.

371. Title VII of the Civil Rights Act of 1964 provides limitations on damages based on the size of the company determined by the number of employees. Thus, a company that has over five hundred employees has the largest potential limit. 42 U.S.C. § 1981a(b)(3).

individuals to jail sentences for defendants convicted only of a section 1324a violation. Changing the offense to a felony would increase the likelihood of jail time for individuals, which would enhance the deterrent effect.

In the end, such reforms of section 1324a will have little effect unless federal prosecutors are willing to utilize the statute. It stands to reason that if there are eight million undocumented individuals working in the American economy, there are a significant number of potential prosecutions. With only about 107 prosecutions in a six-year period, that is a very small number, especially when sixty-one of the cases were in the Western District of Michigan, which did not use the statute to prosecute employers. On the other hand, during that same time, the federal government across the country prosecuted over 340,000 individuals for illegal entry and over 120,000 people for illegal reentry. No doubt many of those defendants were working somewhere within the United States, and the federal government could have pursued an investigation and charges against their employers.

If employers and company management officials faced greater penalties and increased prosecutions, then they would be less likely to hire people without proper documents to demonstrate that they could legally work within the United States. This decision to forego hiring undocumented workers would necessitate employers seeking to hire individuals authorized to do the work. Employers may have to pay such workers more to entice them to do some of these onerous jobs. Additionally, such enforcement may push employers to pressure congressional members to pass immigration reform. Such pressure could provide an opportunity for bipartisan reform with members of both parties advocating for changes.

