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Effects of Senate Bill 4 on Wage-Theft: Why All Workers Are at Risk in Low-Income Occupations

Daniella Salas-Chacon
St. Mary's University School of Law

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**EFFECTS OF SENATE BILL 4 ON WAGE-THEFT:
WHY ALL WORKERS ARE AT RISK
IN LOW-INCOME OCCUPATIONS**

DANIELLA SALAS-CHACON*

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I. INTRODUCTION

Rosa worked for her employer for less than six months before she was fired.¹ The employment description advertised for a nanny, but after just two days on the job, her employer increased her responsibilities beyond caring for his three daughters. In addition to caring for the girls, Rosa was the driver and housekeeper for the entire family. Her hours were long and some of her shifts extended overnight. Rosa was never compensated for her out-of-pocket expenses: driving her own vehicle to take the girls to their various after-school commitments; spending her own money to buy the girls dinner; and spending her own money to purchase cleaning supplies to clean her employer's house. In fact, her employer never paid her at all for the last two weeks of employment, which included well over eighty hours of work.

In June of 2017, Rosa's employer fired her for asking him to reimburse her for her out-of-pocket expenses incurred while on the job. Not only did he fire her and refuse to reimburse her, he outright refused to honor his responsibility as an employer to pay his employee. Rosa did not waste any time in seeking legal aid. Although she took a brave step in securing help, she stopped pursuing recourse shortly after beginning the intake process. "I do not want to get the police involved." She admitted she feared deportation. Her employer had already threatened to call immigration officials if she insisted on recovering her wages.

Rosa's experience of wage-theft is similar to that of most wage-theft victims: employees are confronted with employers that retaliate upon demand for payment.² There are various avenues employees in Rosa's

* St. Mary's University School of Law, Candidate for Juris Doctor, May 2019; University of Dallas, B.A., Political Philosophy and Spanish, May 2015. I would like to thank the Workers Defense Project for their advocacy and efforts to help low-income employees of Texas recover stolen wages. You taught me the mechanics, value, and power behind community organizing. Special thanks to my parents for their unconditional love and support. My parents immigrated to the United States over twenty-five years ago. Since, my mother has cleaned houses for a living and my father works as a painter in the construction industry, and I am proud of these humble roots. Finally, I dedicate this Comment to all the men and women who build our homes; clean our schools; pick, cook, and serve our food; and labor in all low-income occupations: "There must be something wrong with work, otherwise the rich would have taken it already." —Mario "Cantinflas" Moreno

1. Rosa's name has been changed to protect her identity.

2. See NIK THEODORE ET AL., WORKERS DEF. PROJECT, BUILD A BETTER SOUTH 13 (2017), <http://www.workersdefense.org/wp-content/uploads/2017/05/Build-a-Better-South-Full-Report-Digital.pdf> [<https://perma.cc/JG68-KE3X>] [hereinafter THEODORE ET AL., BUILD A BETTER SOUTH] (finding that several workers experienced retaliation in the form of getting laid-off,

situation can take to recover their stolen wages, including filing wage claims with the Wage and Hour Division (WHD) of the Department of Labor (DOL)³ or the Texas Workforce Commission (TWC).⁴ Additionally, law enforcement has the authority to arrest employers that commit wage-theft without inquiring into the employee's legal status.⁵ However, with the enactment of anti-immigration laws like Texas Senate Bill 4 (S.B. 4), less wage-theft victims are willing to speak out against employers that refuse to pay earned wages.⁶

In May of 2017, Governor Greg Abbot signed S.B. 4, more commonly known as the "Show Me Your Papers" law.⁷ Thousands of members from the community, half a dozen local governments, various community organizations, and even law enforcement officials protested against S.B. 4, arguing the new law would make their cities more dangerous.⁸ They

reassignment, or with the threat of calling immigration officials if an attempt is made to recover stolen wages).

3. *Wage and Hour Division Mission Statement*, WAGE & HOUR DIV., <https://www.dol.gov/whd/about/mission/whdmis.htm> [<https://perma.cc/9S8Y-C7G2>] (last visited April 11, 2018) [hereinafter WAGE & HOUR DIV., *Mission Statement*].

4. TEX. LAB. CODE ANN. § 61.051 (2016) (providing employees subject to wage-theft with administrative remedies). *See also Employee Rights and Laws*, TEX. WORKFORCE COMM'N, <http://www.twc.state.tx.us/jobseekers/employee-rights-laws> [<https://perma.cc/EQF3-DRP6>] (last updated Apr. 19, 2017) [hereinafter TEX. WORKFORCE COMM'N, *Employee Rights and Laws*].

5. TEX. PENAL CODE ANN. § 31.04 (2016); *see also* Stephen Lee, *Policing Wage Theft in the Day Labor Market*, 4 U.C. IRVINE L. REV. 655, 665 (2014) (arguing police officers have complete discretion in how they police; they have authority to either adopt policies that enforce criminalization of wage-theft or avoid enforcing immigration laws altogether).

6. *See* Lee, *supra* note 5 (explaining the pressure from federal government to enforce immigration laws combined with police departments' willingness to comply has created a general mistrust in police among the immigrant community, preventing undocumented workers from reporting wage theft); *see also* Yomara Lopez, *Empleadores Usan la Amenaza de la Deportación Para No Pagar Salarios*, TELEMUNDO (Aug. 16, 2017), <http://telemundoaustin.com/news/local/empleadores-usan-la-amenaza-de-la-deportacin-para-no-pagar-salarios> [<https://perma.cc/KW6L-KZTT>] (interviewing an undocumented construction worker in Texas who declined to call the police after his employer threatened to lock him in the warehouse and call immigration officials if the worker tried to recover a month's worth of stolen wages).

7. S.B. 4, 85th Leg. Sess. (Tex. 2017); Michael Barajas, *Gov. Abbott Gleeefully Signs "Show Me Your Papers" Bill Into Law*, SAN ANTONIO CURRENT (May 8, 2017), <https://www.sacurrent.com/the-daily/archives/2017/05/08/gov-abbott-gleefully-signs-show-me-your-papers-bill-into-law> [<https://perma.cc/Z92C-H84D>] (describing Governor Abbott's demeanor as gleeful in the five minute live Facebook video stream where he publicly signed S.B. 4).

8. *See* Elvia Limón & Robert Wilonsky, *Dallas Joins Fight Against Sanctuary Cities Bill*, DALL. MORNING NEWS, <https://www.dallasnews.com/news/dallas/2017/06/07/protesters-takesanctuary-cities-law-fight-dallas-city-hall> [<https://perma.cc/88AK-M5BJ>] (last updated June 7, 2017) (summarizing the Dallas County Sherriff Department's argument that S.B. 4 would create

argued S.B. 4 discouraged undocumented immigrants from reporting crime and participating in active investigations out of fear of being deported.⁹ In *City of El Cenizo v. Texas*,¹⁰ six major cities, four counties, six non-profit organizations, and six other plaintiffs in their official capacity filed suit against Governor Greg Abbott, the State of Texas, and other defendants, claiming S.B. 4 is unconstitutional.¹¹

On August 30th, two days before S.B. 4 was due to take effect, Chief Judge Orlando Garcia for the United States District Court for the Western District of Texas blocked portions of S.B. 4 with a preliminary injunction.¹² The United States Court of Appeals for the Fifth Circuit has since reviewed the District Court's decision.¹³ In their September 2017 opinion, the Fifth Circuit largely denied defendants' request, only staying two of the five provisions of the injunction, but ultimately left the most controversial provision of the law intact.¹⁴ Indeed, while many celebrated the outcome, police officers are still legally permitted to ask for proof of an individual's legal status.¹⁵ Most recently, the Fifth

fear in the community and lead to an increase in unreported crimes); see also Renée Feltz, *Texas Police Say "Show Me Your Papers" Law is Damaging Public Safety – Before Even Taking Effect*, INTERCEPT (Aug. 3, 2017), <https://theintercept.com/2017/08/03/texas-police-say-sb4-is-damaging-public-safety-before-even-taking-effect/> [<https://perma.cc/5ET5-7NRD>] (describing the Houston Police Department's argument that S.B. 4 will increase crime rates because undocumented immigrants will refuse to aid in police investigations by serving as trial witnesses; legal immigrants will avoid contacting the police to protect undocumented family and friends; and fewer Hispanics, in general, will report crime to avoid potential harassment by the police).

9. See Limón & Wilonsky, *supra* note 8 (citing Executive Chief Deputy's, Jesse Flores argument that the vulnerability of the undocumented community has increased because of S.B. 4—especially for women and children—because undocumented immigrants are less likely to report crimes out of fear of deportation).

10. 264 F. Supp. 3d 744 (W.D. Tex. 2017) *granting stay in part*, 2017 WL 4250186 (5th Cir. 2017).

11. *City of El Cenizo v. Texas*, 264 F. Supp. 3d 744 (W.D. Tex. 2017) *granting stay in part*, 2017 WL 4250186 (5th Cir. 2017).

12. *Id.* The original injunction prevented the state from enforcing § 752.053(b)(3) which prohibits local entities from limiting or prohibiting persons with the authority to effect immigration from assisting immigration officials; § 752.053(a)(1) which prohibits the endorsement of policies that limit enforcement of immigration laws; § 752.053(a)(1) and § 752.053(a)(2)'s provisions prohibiting the adoption of policies that limit the enforcement of immigration laws; and § 2.251(a)(1) which requires the fulfillment of any immigration retainer request sent to them by Immigration and Customs Enforcement (ICE)).

13. *City of El Cenizo v. Texas*, No. 17-50762, 2017 WL 4250186 (5th Cir. Sept. 25, 2017).

14. *Id.*

15. *City of El Cenizo*, 264 F. Supp. 3d at 808–09.

Circuit's May 2018 opinion held that with one exception, § 752.053(a)(1), S.B. 4 in its entirety is constitutional.¹⁶

One argument supporters of S.B. 4 advanced was that if there are less undocumented immigrants in the United States as a result of the local policy in enforcing immigration laws, there will be less crime.¹⁷ Among the crimes usually hypothesized in this argument are homicide, sexual assaults, and burglaries.¹⁸ While the potential of these crimes demands attention, S.B. 4 supporters fail to recognize the negative effect S.B. 4 will have on one crime that is already underreported: wage-theft in low-income occupations.¹⁹

Wage-theft persists in Texas because employers anticipate most of their low-wage, undocumented workers are unlikely to report wage-theft to local, state, or federal agencies.²⁰ State and federal agencies have implemented policies that clarify undocumented workers are legally entitled to the same wage protections as documented workers.²¹ However anti-immigration laws make it easier for employers to abuse

16. *City of El Cenizo v. Texas*, 890 F.3d 164, 173 (5th Cir. May 8, 2018).

17. *See* Defendants' Response to Applications for Preliminary Injunctions at 2, 73, *City of El Cenizo v. Texas*, 264 F. Supp. 3d 744 (W.D. Tex. 2017) (No. SA17-CV-404-OLG) (blaming the threat of crime on law enforcement's failure to collaborate with immigration officials on deporting undocumented immigrants).

18. *See Id.* at 2, (estimating over 220,000 undocumented immigrants have been charged with 1,196 homicides, 6,274 sexual assaults, and 16,996 burglaries in the past six years).

19. THEODORE ET AL., *BUILD A BETTER SOUTH*, *supra* note 2, at 12. *See also* Julien Ross, *A Fair Day's Pay: The Problem of Unpaid Workers in Central Texas*, 10 TEX. HISP. J. L. & POL'Y 117, 126 (2004) (warning that wage theft statistics can also be skewed by undocumented employees that do not report wage claims because they fear deportation).

20. *See* Janice Fine & Gregory Lyon, *Segmentation and the Role of Labor Standards Enforcement in Immigration Reform*, 5 J. ON MIGRATION & HUM. SEC. 431, 432 (2017) (reporting industries with the most wage theft violations nationwide are heavily populated by immigrant employees); *see also* ANN BEESON ET AL., *IMMIGRANTS DRIVE THE TEXAS ECONOMY: ECONOMIC BENEFITS OF IMMIGRANTS TO TEXAS* 9 (Sept. 17, 2014), http://forabettertexas.org/images/EO_2014_09_PP_Immigration.pdf [<https://perma.cc/QV8H-KY22>] (emphasizing immigrant workers far outnumber native workers across industries in Texas including construction trades, material handlers, food service, housekeeping, agriculture, and child care).

21. *See Employment Rights of Undocumented Workers*, TEX. L. HELP 3, <https://texaslawhelp.org/printpdf/1807> [<https://perma.cc/Q9ZF-7TED>] (last visited Mar. 12, 2018) (noting undocumented workers are covered by the Texas Payday Law); *see also Fact Sheet #48, WAGE & HOUR DIV.*, <https://www.dol.gov/whd/regs/compliance/whdfs48.pdf> [<https://perma.cc/47CR-2PLA>] (last updated July 2008) [hereinafter *WAGE & HOUR DIV., Fact Sheet #48*] (clarifying the DOL will enforce the Fair Labor Standards Act (FLSA), which requires employers to pay covered employees the federal minimum wage and time and a half for overtime hours, despite the employees' immigration status).

their employees by stealing their wages and harder for labor agencies to resolve the issue of wage-theft.²² Assuming workers know the DOL or TWC were created to protect their labor rights,²³ they still face many barriers in trying to recover lost wages when seeking assistance from either agency.²⁴ In a workforce where the employer-employee relationship already suffers from a substantive power imbalance, labor agencies' ability to protect workers from wage-theft is further reduced while S.B. 4 remains in effect.²⁵

Immigration laws significantly impact workplace conditions in low-wage occupations.²⁶ While demand for skilled labor is increasing,²⁷ anti-immigration legislation is also negatively effecting undocumented immigrants, native, and naturalized workers in the workplace.²⁸ The

22. See Lee, *supra* note 5, at 665 (using Arizona as an example for how a state's anti-immigration laws can facilitate wage-theft and how the enlisting of local authorities to enforce immigration laws created an environment of mistrust, thus isolating immigrants); see also Eric Cortellesa, *How Trump Made Wage Theft Routine*, AM. PROSPECT (June 5, 2017), <http://prospect.org/article/how-trump-made-wage-theft-routine> [<https://perma.cc/2R2M-CFDA>] (blaming the Trump Administration's anti-immigrant rhetoric for the restored fear in undocumented workers reporting wage-theft); see also Lopez, *supra* note 6 (quoting a community organizer estimating that over 50% of construction workers in Texas are undocumented and employers exploit this to avoid having to pay employees).

23. See AMY PRICE ET AL., WORKERS DEF. PROJECT, BUILD A BETTER TEXAS 29 (2013), http://www.workersdefense.org/Build%20a%20Better%20Texas_FINAL.pdf [<https://perma.cc/96WY-BKWQ>] (estimating over half of employees in Texas' construction industry have never heard of the DOL or TWC).

24. Rita J. Verga, *An Advocate's Toolkit: Using Criminal "Theft of Service" Laws to Enforce Workers' Right to be Paid*, 8 N.Y. CITY L. REV. 283, 286–89 (2005); see also Lee, *supra* note 5, at 657 (describing existing federal and state channels for filing wage claims as confusing).

25. See Verga, *supra* note 24, at 286–89 (arguing federal and state wage protection laws lack enforcement); THEODORE ET AL., BUILD A BETTER SOUTH, *supra* note 2, at 13 (listing obstacles in recovering wages, like lengthy proceedings, cost, and difficulties in collecting actual wages).

26. See Fine & Lyon, *supra* note 20, at 431–32 (suggesting that protecting immigrant rights in the workplace creates an even playing field for all workers because it undercuts employers' incentives to exploit workers—whether undocumented, native, or naturalized).

27. See U.S. CHAMBER COM., IMMIGRATION MYTHS AND FACTS (Apr. 14, 2016), https://www.uschamber.com/sites/default/files/documents/files/022851_mythsfacts_2016_report_final.pdf [<https://perma.cc/YR56-J3X2>] (indicating the addition of immigrant workers to labor market stimulates investment into the economy, thus increasing the demand for labor).

28. See BBVA RES., MEXICO MIGRATION OUTLOOK, 10–11 (Nov. 2010), https://www.bbva.com/KETD/fbin/mult/1011_MigrationOutlookMexico_04_tcm348-234630.pdf?ts=1372011 [<https://perma.cc/FTU5-A67J>] (attributing the cause of Mexican migration to the United States to the U.S. economy's demand for cheap labor); Erick C. Laque, *Immigration Law and Policy: Before and After September 11, 2001*, 10 SOC. SCI. J. 25, 25 (2010).

solution is to reform the structure of labor agencies to better enforce labor laws, and to reform immigration laws resulting in a path toward permanent legal status. Without a permanent solution to the worker's immigration status, employees like Rosa will remain vulnerable to the threat of deportation in trying to recover lost wages.

II. WAGE-THEFT AND ANTI-IMMIGRANT LEGISLATION

A. *The Department of Labor and the Texas Workforce Commission Protect Low-Income Workers from Wage-Theft*

Wage-theft is the nonpayment of hours worked,²⁹ including failure to pay the minimum wage,³⁰ overtime,³¹ work completed, the amount promised, or failing to pay the worker at all.³² Wage-theft can also take the form of paying an employee with a bad check³³ or taking illegal deductions from wages rightfully earned.³⁴ Wage-theft is a crime for which employers can be arrested and receive criminal penalties ranging from a \$500 fine to prison time.³⁵ The Theft of Service Act permits Texas law enforcement to investigate wage-theft claims.³⁶ The State can charge employers with theft of service if the employer intentionally or knowingly agrees to pay for a service, but fails to pay once the service is rendered.³⁷

29. See 29 U.S.C. § 203(o) (2016) (establishing that hours worked will be used to measure minimum wage and overtime). See also PRICE ET AL., *supra* note 23, at 3 (defining wage-theft); THEODORE ET AL., BUILD A BETTER SOUTH, *supra* note 2, at 12 (defining wage-theft).

30. 29 U.S.C. § 206(a)(1)(C) (2016) (setting federal minimum wage at \$7.25 an hour); see also Texas Minimum Wage Act, TEX. LAB. CODE ANN. § 65.051 (2016) (requiring employees receive the federal minimum wage).

31. 29 U.S.C. § 207(a)(1)(C) (2016) (defining overtime compensation).

32. See TEX. PENAL CODE ANN. § 31.04(a)(4) (2016) (defining the crime of theft of service as failure to pay in full); see also TEX. PENAL CODE ANN. § 31.04(d-1)(2) (2016) (noting that making a partial payment of wages is not a defense to negate theft of service).

33. TEX. PENAL CODE ANN. § 31.06(a) (2016) (defining theft by check as the issuing of a check for the payment of a service despite not having sufficient funds).

34. See TEX. LAB. CODE ANN. § 61.018 (2016) (limiting the only instances under which deductions can be made, including when it is ordered by a court of jurisdiction, authorized by state or federal law, or the employee has provided written authorization to the employee to deduct from the wages for lawful purposes).

35. TEX. PENAL CODE ANN. § 31.04(e) (2016) (categorizing offenses ranging from a Class C misdemeanor to a first-degree felony).

36. *Id.*

37. *Id.*

Throughout the country, low-income occupations are riddled with the problem of wage-theft.³⁸ Some of the most common high-violation, low-income industries include construction, restaurants, small home-care facilities, retail, daycare, landscaping, agriculture, food manufacturing, poultry processing, and building services like janitorial and custodial employment.³⁹ Historically, these industries were the main source of income for middle class families.⁴⁰ Prior to the turn of the century, skilled employment in low-wage occupations was perceived as a “bad” job.⁴¹ These industries suffer from a wide range of negative working conditions that discourage younger generations from seeking

38. See ANNETTE BERNHARDT ET AL., *BROKEN LAWS, UNPROTECTED WORKERS 2* (2009), <https://www.labor.ucla.edu/publication/broken-laws-unprotected-workers/> [https://perma.cc/9T47-UDNM] (reporting on recent working conditions in 28 low-income occupations in Chicago, Los Angeles, and New York, including restaurants, hotels, private households, apparel and textile manufacturing, retail, and drug stores where 26% of workers surveyed were not paid minimum wage and 76% were not paid overtime); see also BLS REPORTS, *CHARACTERISTICS OF MINIMUM WAGE WORKERS, 2016*, U.S. BUREAU LAB. STAT. 8 tbl.3 (Apr. 2017), <https://www.bls.gov/opub/reports/minimum-wage/2016/pdf/home.pdf> [https://perma.cc/P7VP-T5F5] (highlighting Texas as having the largest number of workers paid below the minimum hourly wage).

39. See Fine & Lyon, *supra* note 20, at 432 (drawing a correlation between high-violation industries and those that are most heavily populated with immigrant workers); DAVID WEIL ET AL., *IMPROVING WORKPLACE CONDITIONS THROUGH STRATEGIC ENFORCEMENT 2* fig.A.1 (May 2010), <https://www.dol.gov/whd/resources/strategicEnforcement.pdf> [https://perma.cc/Y43F-5QQ9] (listing these industries as “priority industries” where the WHD and DOL should focus their efforts to enforce compliance with wage laws); BLS REPORTS, *supra* note 38 (listing industries with most frequent minimum wage hourly rate, indicating the restaurant and retail industries had the most minimum wage violations in 2016).

40. See THEODORE ET AL., *BUILD A BETTER SOUTH*, *supra* note 2, at 15 (describing how construction jobs used to be “good” blue-collar jobs when formal training programs educated workers and opportunities for advancement in the industry were plentiful); see also ROBERT I. LERMAN & STEFANIE R. SCHMIDT, *URBAN INST. FOR U.S. DEP’T LABOR, AN OVERVIEW OF ECONOMIC, SOCIAL, AND DEMOGRAPHIC TRENDS AFFECTING THE US LABOR MARKET 79* (Aug. 1999), <https://www.dol.gov/oasam/programs/history/herman/reports/futurework/conference/trends/trends.pdf> [https://perma.cc/Y82Z-SNH2] (dating labor shortages in low-income occupations as early as the 1970s, growing rapidly into the early 1990s, and stabilizing thereafter as workers returned to similarly-skilled occupations).

41. See generally Chinhui Juhn et al., *Wage Inequality and the Rise in Returns to Skill*, 101 J. POL. ECON. 410, 411–12 (1993) (proposing wage trends follow industrial trends favoring high-skilled employees); see also THEODORE ET AL., *BUILD A BETTER SOUTH*, *supra* note 2, at 2 (explaining a relatively recent decrease in middle-wage jobs led to an increase in wage disparity between low-income and high-income jobs); Stephen Moore, *The Great Worker Shortage*, FORBES (Mar. 31, 2015), <https://www.forbes.com/sites/stevemoore/2015/03/31/not-hard-at-work-hardly-working/#4cbb030ba62e> [https://perma.cc/952Z-AKMT] (listing one cause of labor shortages is a lack of skilled employees ready to work; many believe blue-collar jobs do not lead to middle class income).

employment, including health and safety violations that create a dangerous working environment, lack of employment benefits, and few opportunities for advancement.⁴²

The construction industry in particular suffers from poor working conditions.⁴³ Texas has the fastest growing housing market⁴⁴ and the largest general construction market in the nation.⁴⁵ The 2010 U.S. Census estimated that over 952,000 Texans worked in the construction industry.⁴⁶ Texas's workforce is estimated at 12.6 million, indicating roughly one of every thirteen workers is employed in the construction industry.⁴⁷ However some sources indicate these numbers may be larger due to the underrepresented undocumented immigrant population living in the shadows.⁴⁸

42. See Fine & Lyon, *supra* note 20, at 432–33 (listing working conditions for immigrants in low-wage occupations across the United States); see THEODORE ET AL., BUILD A BETTER SOUTH, *supra* note 2, at 11–16 (summarizing working conditions in the South's construction sector and describing it as unstable work). But see Moore, *supra* note 41 (arguing blue-collar jobs can place employees and their families in middle and higher socioeconomic classes). Stephen Moore, however, only references highly skilled trades, like welders and technicians, while the majority of construction jobs have a poor reputation, particularly among graduating high school students because of the decrease in “good” jobs with benefits. See, e.g., PRICE ET AL., *supra* note 23, at 28 (citing a high injury rate, lack of benefits, low wages, and no training as deterrents for entry into the construction industry).

43. See Ross, *supra* note 19, at 129 (citing statistics from the Project Wage Claim survey of low-wage workers in Austin from August 1, 2002 and March 31, 2003, that revealed 70% of wage claims were from the construction industry, demonstrating that the problem of wage theft is long standing); see also AFL-CIO, DEATH ON THE JOB: THE TOLL OF NEGLECT 9 (Apr. 2016), https://aflcio.org/sites/default/files/2017-03/1647_DOTJ2016_0.pdf [<https://perma.cc/5D6X-2SLH>] (finding that of the 3,846 workplace inspection conducted in 2015, well over half were related to construction).

44. Fine & Lyon, *supra* note 20, at 433 (stating “[o]ne in 13 workers in Texas is employed in the construction industry” and Texas issues “more new housing construction permits . . . than New York, New Jersey, Pennsylvania, and Illinois combined.”).

45. PRICE ET AL., *supra* note 23, at i (acknowledging that despite the 2008 recession, the Texas construction industry fared better than the U.S. construction industry with respect to the rate of employment).

46. *Id.* at i, vi n.8.

47. *Id.* at vi n.8.

48. See ROBERT JUSTICH & BETTY NG, THE UNDERGROUND LABOR FORCE IS RISING TO THE SURFACE 2 (2005), <http://www.respectwashington.us/studies-and-reports/BearStearnsUnderground.pdf> [<https://perma.cc/KEN2-BE4K>] (noting the number of undocumented immigrants was not properly estimated by the 2000 U.S. Census largely due to undocumented immigrants' non-responsiveness).

One-fourth of all Texas construction workers are based out of the Dallas-Fort Worth Metroplex.⁴⁹ In Dallas alone, 30% of construction workers surveyed in 2017 experienced wage-theft in the form of not getting paid overtime, not getting paid at all, or both.⁵⁰ This number reflects an increase in the number of workers who experienced wage-theft because the State's average in 2013 was 20% of 1,194 workers surveyed in Austin, Dallas, Houston, San Antonio, and El Paso.⁵¹

While reports indicate an increase in the number of employees experiencing wage-theft, the most common proposed solution to the problem is the improvement of existing polices.⁵² There are two agencies assigned to address wage-theft: (1) the Wage and Hour Division of the Department of Labor (DOL),⁵³ and (2) the Texas Workforce Commission (TWC).⁵⁴ Under each agency, different laws were designed to provide relief for victims of wage-theft.⁵⁵ The DOL enforces the Fair Labor Standards Act (FLSA), which protects the employee's right to receive minimum wage and overtime.⁵⁶ For example, if Rosa's employer hired her for \$9.95 an hour to watch his children⁵⁷ and she decided to file a wage claim with the DOL, FLSA would only protect her

49. THEODORE ET AL., BUILD A BETTER SOUTH, *supra* note 2, at 30.

50. *Id.* at 32.

51. PRICE ET AL., *supra* note 23, at 5, 46.

52. See Fine & Lyon, *supra* note 20, at 432 (listing solutions, including increased penalties for workplace violations, strategic targeting of high violation industries, and an increase in resources for agencies enforcing labor standards in the form of more investigators and co-enforcement by the state and the industry); see also THEODORE ET AL., BUILD A BETTER SOUTH, *supra* note 2, at xi (reiterating the agencies who enforce this legislation lack funding despite wholly existing to protect workers.) This lack of funding stifles the legislation's efficiency, limits involvement from local municipalities, and creates a void between policymakers and community organizations. *Id.*

53. WAGE & HOUR DIV., *Mission Statement*, *supra* note 3.

54. TEX. WORKFORCE COMM'N, *Employee Rights and Laws*, *supra* note 4.

55. Ross, *supra* note 19, at 133 (listing Texas contract law, unjust enrichment doctrine, and the Mechanic's and Materialman's Lien provisions as other methods employees can recover lost wages under).

56. WAGE & HOUR DIV., *Mission Statement*, *supra* note 3.

57. See *Occupational Employment and Wages, May 2016, 39-9011 Childcare Workers*, BUREAU OF LAB. STAT., <https://www.bls.gov/oes/current/oes399011.htm> [<https://perma.cc/H42D-KC46>] (last updated Mar. 31, 2017) (estimating the average Texas childcare workers earned \$9.95 in 2016).

right to \$7.25 per hour.⁵⁸ In effect, Rosa would not be able to recover the remaining \$216 through her FLSA claim, based on a forty-hour work week paid every two weeks. Additionally, if she wanted to file a claim for her overtime pay, FLSA would only allow her to recover up to \$10.88⁵⁹ instead of the \$14.93 she would have been entitled to otherwise.⁶⁰

The TWC enforces the Texas Minimum Wage Act which, in part, ensures employees receive the federal minimum wage.⁶¹ TWC also enforces the Texas Payday Law.⁶² The Texas Payday Law further outlines when employees should be paid, proper notice of paydays, form and delivery of payment, and allowable deductions.⁶³ While FLSA could protect Rosa's right to earn the federal minimum wage, the Texas Minimum Wage Act could not because it exempts employees that provide domestic services in a private home.⁶⁴

In spite of resources provided by the DOL and TWC, few low-wage workers are even aware these resources exist to protect their labor rights.⁶⁵ In 2013, 63% of construction workers surveyed in Texas reported they had never heard of the DOL; 77% reported the same with respect to the TWC.⁶⁶ One of the reasons workers have never heard of these two agencies is lack of the agencies' presence. For example, TWC does not conduct field investigations, making it less likely workers will come into personal contact with representatives from the commission.⁶⁷

58. Fair Labor Standards Act of 1938, 29 U.S.C. § 216(b) (2016) (allowing employees to recover under FLSA for a maximum of the federal minimum wage, which is currently \$7.25, for regular hours worked).

59. *See id.* (calculating overtime based on federal minimum wage, thus currently capping overtime wages at \$10.88).

60. *See id.* (allowing for liquidated damages equal to the minimum or overtime wages granted, and attorney's fees).

61. TEX. LAB. CODE ANN. § 62.051 (2016).

62. *Id.* § 61.011.

63. *Id.* §§ 61.011–61.018.

64. *Id.* § 62.154 (exempting some forms of domestic employment from the minimum wage provisions).

65. PRICE ET AL., *supra* note 23, at 29.

66. *Id.*

67. *See* Ross, *supra* note 19, at 150–51 (describing the TWC wage claim procedure, and noting that it is solely based on written correspondence and some phone communication between the parties and the investigator); *see also* PRICE ET AL., *supra* note 23, at 30 (describing the procedure as inadequate because the TWC has to rely solely on the written complaint).

The TWC limits their investigation to the worker's filed complaint; any possible future communication with either the employer or employee, (or both) is likewise limited to an "as needed" basis.⁶⁸ In contrast from the TWC, the DOL is authorized to perform field investigations.⁶⁹ Still, the few workers who confront employers by filing complaints with either the DOL or TWC generally face long and expensive court proceedings, disappearing employers that fail to respond, and difficulties in actually collecting unpaid wages despite receiving a favorable judgement from one of the two agencies.⁷⁰

Wage-theft is a serious threat to the livelihoods of workers that are already receiving below living wages.⁷¹ Although there are expensive consequences and criminal convictions for committing wage-theft, employers have little incentive to stop because penalties are rarely imposed.⁷² Present labor laws fail to protect a large, vulnerable sector of the population employed in low-income occupations.⁷³ Indeed, wage-theft is one of the key reasons low-wage workers are struggling in today's economy.⁷⁴

68. *How to Respond to a Wage Claim Under Texas Payday Law*, TEX. WORKFORCE COMM'N, <http://www.twc.state.tx.us/businesses/how-respond-wage-claim-under-texas-payday-law#wageClaimInvestigationProcess> [<https://perma.cc/NK9V-HGNX>] (last updated Nov. 10, 2017).

69. *See* 29 U.S.C. § 211(a) (2016) (allowing onsite investigations in violations of FLSA provisions); *Oklahoma Press Publ Co. v. Walling*, 327 U.S. 186, 208–09 (1946) (discussing the DOL's authority to conduct investigations into alleged FLSA violations, "[i]t is enough that the investigation be for a lawfully authorized purpose, within the power of Congress to command."); *see also* Ross, *supra* note 19, at 156 (noting the ability to field investigations as one of the few advantages an employee's wage claim receives if filed with the WHD instead of the TWC).

70. THEODORE ET AL., *BUILD A BETTER SOUTH*, *supra* note 2, at 13; *see* Ross, *supra* note 19, at 151 tbl.4.3 (showing the time elapsed from file date to action in a TWC wage claim process).

71. *See* PRICE ET AL., *supra* note 23, at 18 (stating "[f]ifty-two percent of workers surveyed were found to be earning wages that placed them below the federal poverty line.>").

72. *See id.* at 30 (noting the TWC can fine employers who fail to pay their workers up to \$1,000, but rarely impose any fine at all); *see also* Priscila Mosqueda, *El Paso Becomes Second City to Indict Employer for Wage Theft*, TEX. OBSERVER (Apr. 26, 2013), <http://www.texasobserver.org/el-paso-becomes-second-city-to-indict-employer-for-wage-theft/> [<https://perma.cc/R6WM-Z798>] (identifying only two employers arrested for wage-theft in the entire state of Texas after two years of amending the Theft by Service Act in 2011).

73. THEODORE ET AL., *BUILD A BETTER SOUTH*, *supra* note 2, at 30–31 (estimating about 20% of Dallas households are living below the poverty line and identifying Dallas construction workers as some of the city's poorest residents).

74. *See id.* at 30 (identifying wage-theft and lack of benefits as two main issues construction workers face).

B. *Undocumented Workers Are Legally Entitled to the Same Wage Protections as Documented Workers*

Besides facing administrative hurdles, many workers experience employer retaliation by firing or reassignment to a less favorable position as a result of claiming stolen wages.⁷⁵ Undocumented workers face a more alarming form of retaliation: employers threaten to call or actually do call immigration services.⁷⁶ The DOL and the TWC maintain policies to protect undocumented workers' labor rights, including the right to minimum wage and overtime.⁷⁷ However, without legal status in this country, undocumented workers are more likely to experience wage-theft than any other group of low-wage workers.⁷⁸

In 2011, the DOL and the Department of Homeland Security (DHS) addressed the importance of securing the right to proper wages in light of anti-immigrations statutes in the *Revised Memorandum of Understanding Between the Departments of Homeland Security and Labor Concerning Enforcement Activities at Worksites* (MOU).⁷⁹ The purpose of the memorandum was to reach a compromise that would ensure immigrant workers' safety in filing complaints regarding working conditions without fear of reprisal.⁸⁰ The DOL's concern was that too many employers were avoiding workplace complaints because they were reporting their employees to immigration services and DHS was actually

75. *Id.*

76. *See id.* at 13 (indicating the threat of deportation is an exceedingly coercive measure used on undocumented workers); Luz M. Molina et al., *Vulnerabilities of Low-Wage Workers and Some Thoughts on Improving Workplace Protections: the Experience of the Workplace Justice Project*, 17 LOY. J. PUB. INT. L. 215, 225–26 (2016) (describing the employer's knowledge of the undocumented worker's immigration status as a "weapon of intimidation" that is used to commit wage-theft in the first place and then used to keep the worker from reporting the crime).

77. *See* TEX. L. HELP, *supra* note 21 (noting undocumented workers are covered by the Texas Payday Law); *see also* WAGE & HOUR DIV., *Fact Sheet #48*, *supra* note 21 (clarifying the DOL will enforce FLSA, requiring employers to pay covered employees the federal minimum wage and time and a half for overtime hours, despite the employees' immigration status).

78. *See* Fine & Lyon, *supra* note 20, at 433 (estimating undocumented workers in construction occupations are two and a half times more likely to fall victims of wage-theft).

79. U.S. DEP'T LABOR, REVISED MEMORANDUM OF UNDERSTANDING BETWEEN THE DEPARTMENTS OF HOMELAND SECURITY AND LABOR CONCERNING ENFORCEMENT ACTIVITIES AT WORKSITES (2011), <https://www.dol.gov/asp/media/reports/DHS-DOL-MOU.pdf> [<https://perma.cc/BB4Z-PQXG>] [hereinafter U.S. DEP'T LABOR, REVISED MEMORANDUM OF UNDERSTANDING].

80. *Id.*

responding to the reports.⁸¹ Sure enough, a large majority of unpaid overtime and other wage-theft violations occurred in industries populated with immigrant workers.⁸² Since the Texas construction industry is made up of over 40% foreign-born employees, there is an out-sized danger for retaliation in the form of immigration threats.⁸³ In Dallas and Houston, 63% and 77% of the workers in the construction industry, respectively, are foreign-born.⁸⁴

Among the twelve commitments the DHS and DOL agreed to include, one was a promise from ICE to refrain (with few exceptions) from conducting civil worksite enforcement activities if an existing DOL investigation is pending.⁸⁵ Another concerned better communication. Specifically, ICE promised to inform the DOL when employers or their surrogates report immigration violations to avoid a pending labor dispute.⁸⁶ Ultimately, the DHS agreed to not assist employers attempting to manipulate ongoing labor disputes by tipping off immigration officials to their workers' immigration statutes.⁸⁷

The MOU between DHS and DOL was amended in 2016.⁸⁸ At that time the Equal Employment Opportunity Commission (EEOC) and the

81. *See id.* (“The parties further recognize that effective enforcement of both labor- and immigration-related worksite laws requires that the enforcement process be insulated from inappropriate manipulation by other parties.”).

82. Fine & Lyon, *supra* note 20, at 432 (estimating, in 2010, over 50% of all workers born in Mexico and Central America were employed in “high-violation industries”).

83. *See* PRICE ET AL., *supra* note 23, at 10, 24 (profiling one construction worker’s experience of being threatened by his employer with a call to immigration when he demanded to be paid earned wages).

84. THEODORE ET AL., BUILD A BETTER SOUTH, *supra* note 2, at 30, 32 (reporting that in both cities, at least 50% of foreign-born construction workers are from Mexico).

85. *See* U.S. DEP’T LABOR, REVISED MEMORANDUM OF UNDERSTANDING, *supra* note 79 (including three exceptions: (1) when the Director or Deputy Director of ICE decides that the enforcement activity is necessary in support of an investigation regarding national security, the protection of vital infrastructure, such as ports and power plants, or a federal crime other than unauthorized employment; (2) when the Secretary of Homeland Security directs the enforcement activity; or (3) when the Secretary of Labor, Solicitor of Labor, or another DOL official designated by the Secretary of Labor requests the enforcement activity).

86. *Id.*

87. NAT’L IMMIGR. L. CTR. & NAT’L EMP. L. PROJECT, *Immigration and Labor Enforcement in the Workplace: The Revised DOL-DHS Memorandum of Understanding 2011*, <https://www.nilc.org/wp-content/uploads/2015/11/DHS-DOL-MOU-nelpnilc-2011-04.pdf> [<https://perma.cc/38BQ-57X3>] (last visited Mar. 12, 2018).

88. U.S. DEP’T LABOR, ADDENDUM TO THE REVISED MEMORANDUM OF UNDERSTANDING BETWEEN THE DEPARTMENTS OF HOMELAND SECURITY AND LABOR CONCERNING

National Labor Relations Board (NLRB) were added as parties.⁸⁹ The addendum extended the DOL's commitment to refrain from conducting civil worksite enforcement activities where an existing DOL investigation is pending to include worksites where an EEOC or NLRB investigation is pending.⁹⁰ The addendum also protects workers that attempt to unionize and undocumented workers who file claims of discrimination based on race, color, sex, national origin, religion, disability, and age.⁹¹

C. *Wage-Theft in Low-Wage Occupations in Arizona During the Enactment of Senate Bill 1070*

On April 23, 2010, Arizona's state legislature passed the Arizona Senate Bill 1070 (S.B. 1070), broadening the immigration enforcement powers of Arizona's local police.⁹² The anti-immigration law was designed to discourage the entry and presence of undocumented immigrants in Arizona.⁹³ In *United States v. Arizona*,⁹⁴ the Federal District Court for the District of Arizona enjoined several provisions related to undocumented immigrants, including § 2(B), which required officers conducting a stop, detention, or arrest to verify the person's immigration status with ICE; § 3, which criminalized mere presence in the state of Arizona as a misdemeanor; § 5(C), which criminalized seeking or obtaining employment as a misdemeanor; and § 6, which authorized warrantless arrests so long as the officer had probable cause

ENFORCEMENT ACTIVITIES AT WORKSITES (2016), <https://www.dol.gov/sites/default/files/documents/MOU-Addendum.pdf> [<https://perma.cc/YB4D-ZB33>].

89. *Id.*

90. *Id.*

91. *See id.* (explaining the EEOC investigations include the authority to enforce Title VII of the Civil Rights Act of 1964, Title I and V of the Americans with Disability Act of 1990, the Age Discrimination in Employment Act of 1967, and Title II of the Genetic Information Nondiscrimination Act of 2008; and that the NLRA investigations include the authority to enforce the National Labor Relations Act).

92. ARIZ. REV. STAT. ANN. § 11-1051 (2010); Andrea Christina Nill, Comment, *Latinos and S.B. 1070: Demonization, Dehumanization, and Disenfranchisement*, 14 HARV. LATINO L. REV. 35, 35 (2011).

93. *See* S.B. 1070, 49th Leg. 2d Reg. Sess. (Ariz. 2010), <https://www.azleg.gov/alispdfs/council/SB1070-HB2162.PDF> [<https://perma.cc/58JZ-PDEG>] (stating the intent of S.B. 1070 outlined in section 1 of the bill).

94. 703 F. Supp. 2d 980 (D. Ariz. 2010), *aff'd in part, rev'd in part*, 567 U.S. 387 (2012).

to believe the detainee committed an offense that made the detainee removable from the county.⁹⁵

However, in *Arizona v. United States*,⁹⁶ the Supreme Court upheld the most controversial provision, § 2(B), allowing police officers to enforce immigration laws at their discretion by asking individuals they stop, detain, or arrest for their “papers.”⁹⁷ The Court held it was improper to enjoin § 2(B) because there are three independent limitations that would prevent law enforcement from solely applying immigration laws at their discretion: 1) the presumption that a detainee is lawfully present if the detainee presents a valid Arizona driver’s license or similar identification; 2) the restriction prohibiting officers from considering race, color or national origin beyond what the United States Constitution and Arizona Constitution permit; and 3) the requirement to enforce immigration laws in a manner consistent with federal law.⁹⁸ The first limitation relied on the fact that by 2010, Arizona had passed a law limiting the issuance of Arizona driver’s licenses and identification cards to people in the country lawfully.⁹⁹ Presumably, the second and third limitations prevent discretionary enforcement of immigration laws because of federal considerations. In any event, not all officer-civilian encounters require a person to present a valid Arizona driver’s license, particularly when this type of demand unnecessarily extends certain routine encounters.¹⁰⁰

The Court went on to address two concerns mentioned by the United States. First, regarding the provision requiring law enforcement to verify immigration status of individuals stopped, detained, or arrested, the Court argued Congress encouraged information sharing about possible

95. *See id.* (“[C]hallenging constitutionality of Arizona’s Support Our Law Enforcement and Safe Neighborhoods Act, requiring, inter alia, that police officers check a person’s immigration status under certain circumstances.”).

96. 567 U.S. 387 (2012).

97. *Id.* at 411–15.

98. *Id.* at 411.

99. *See* ARIZ. REV. STAT. ANN. § 28-3158 (2018) (requiring driver’s license and instruction permit applicants “shall give the department satisfactory proof of the applicant’s full legal name, date of birth, sex[,] and residence address and that the applicant’s presence in the United States is authorized under federal law.”).

100. *See Arizona*, 567 U.S. at 413–14 (using jaywalking as an example of the low likelihood of law enforcement performing immigration status checks that only prolong the encounter).

immigration violations.¹⁰¹ Therefore, according to the Court, there is room in the federal scheme for a policy requiring law enforcement to verify immigration status with ICE.¹⁰² The second concern brought up by the United States was the delay of release from a stop, detainment, or arrest for the sake of verifying immigration status.¹⁰³ The government argued that as a result of § 2(B)'s mandatory verification, officers would prolong detainments solely to verify immigration status.¹⁰⁴ However, the Court justified the provision by pointing out it was too early to determine whether this would actually occur.¹⁰⁵

Prolonged detentions are occurring. According to a review of officers from the Tucson Police Department conducted by the American Civil Liberties Union (ACLU) of Arizona from June 2014 to December 2015, more than 75% of stops involved either a clear violation or potential violation of constitutional rights.¹⁰⁶ All of these stops led to prolonged detentions due to efforts made to communicate with Border Patrol, many of which resulted in false “hits” that the person was undocumented when they were actually lawfully present.¹⁰⁷ Although many of the reviewed incidents were routine traffic stops that would typically result in a release, the stops lasted an average of one and a half hours.¹⁰⁸

Additionally, S.B. 1070 had a devastating effect in the workplace.¹⁰⁹

101. *See id.* at 412 (quoting 8 U.S.C. § 1357(g)(10)(A), which prohibits restricting communication between local government and ICE regarding immigration status of individuals).

102. *See id.* at 411–15 (implying that because Congress is silent on the issue, there is a possibility of collaboration between local law enforcement and ICE).

103. *Id.* at 413.

104. *Id.*

105. *Id.* at 414.

106. *See* Letter from James Lyall, Staff Att’y, ACLU of Ariz., to Chris Magnus, Chief of Police, Tucson Police Dep’t (May 2, 2016) (on file with ACLU Arizona), https://www.acluaz.org/sites/default/files/field_documents/aclu_itr_to_tpd_chief_magnus_re_107_0_enforcement_0.pdf [<https://perma.cc/TP5H-XHL3>] (citing specific instances within 110 police stops where individual rights were violated).

107. *See id.* (describing the process after individuals were picked up by police at traffic stops).

108. *See id.* (detailing the lengthy process individuals at traffic stops undergo as police officers try to determine whether they are in the United States illegally).

109. *See, e.g., Lee, supra* note 5, at 664–65 (discussing the difficulties of policing wage-theft after enactments of anti-immigrant policies like S.B. 1070, among others). *See generally* BBVA RES., *supra* note 28 (detailing the effects of S.B. 1070 on the labor market, the economic contribution of immigrants, and the general negative effects on the integral Mexican immigrant community in Arizona); *see also* Alex Nowrasteh, *The Economic Case Against*

Wage-theft in Arizona increased after the enactment of S.B. 1070.¹¹⁰ The law further pushed undocumented workers into the shadows for fear of deportation if they fought to have their labor rights respected.¹¹¹ Not only were victims of wage-theft unlikely to report workplace violations, the undocumented community across the United States was largely unwilling to even campaign for better working conditions despite the fact that S.B. 1070-type laws had not been enacted in every state.¹¹²

More significantly, the law pushed many undocumented workers and employers out of the state of Arizona all together; the former from fear of deportation and the latter from labor shortages.¹¹³ One report estimated the number of Hispanics in Arizona at 100,000 fewer after the enactment of S.B. 1070 compared to the number of Hispanics at the beginning of 2010.¹¹⁴ Between the time when the Arizona Legislature passed the Legal Arizona Workers Act (LAWA)¹¹⁵ in 2007 and the Supreme Court's ruling upholding controversial provisions of S.B. 1070

Arizona's Immigration Laws, 709 POL'Y ANALYSIS 1 (Sept. 25, 2012), <https://object.cato.org/pubs/pas/PA709.pdf> [<https://perma.cc/3ED4-PCPF>] [hereinafter Nowrasteh, *The Economic Case Against Arizona's Immigration Laws*] (detailing the economic decline in various areas of the labor market due to the passage of S.B. 1070 and other anti-immigrant legislation).

110. See Danny Postel & Ted Smukler, 'Go Ahead, Try and Make Me Pay You': Wage Theft and S.B. 1070, IN THESE TIMES (July 27, 2010), http://inthesetimes.com/working/entry/6265/go_ahead_try_and_make_me_pay_you_wage_theft_and_s.b._1070/ [<https://perma.cc/VG2Y-DCVH>] (quoting an Arizona community organizer who witnessed an increase in the number of workers who experienced wage-theft in the months leading up to the enactment of S.B. 1070); see also Dianne Enriquez, *S.B. 1070 Will Not Be Tolerated*, INTERFAITH WORKER JUST. (Apr. 24, 2012), <http://www.iwj.org/worker-center-network/no-sb1070> [<https://perma.cc/99KF-3D75>] (reporting an increase in wage-theft cases filed with the Arizona branch of Interfaith Alliance for Worker Justice, an organization that rallied for worker justice).

111. See Lee, *supra* note 5, at 664–65 (explaining that enforcing criminalization of wage-theft is a solution, but calling police officers to arrest employers ultimately exacerbates the situation where the worker is an immigrant; this is especially true with anti-immigrant laws like S.B. 1070, which create distrust in the immigrant community due to a belief that police officers have no discretion to enforce labor laws over immigration laws).

112. See Postel & Smukler, *supra* note 110 (quoting a group coordinator who witnessed a decrease in the number of immigrants willing to protest because they felt a general mistrust of police officers even though their state was not passing anti-immigration laws).

113. See BBVA RES., *supra* note 28, at 21–22 (estimating in the few months following S.B. 1070's enactment, there were fewer Hispanics in Arizona, either because of fear of the new law's application or because of Arizona's economic crisis).

114. See *id.* (referencing the population survey findings).

115. Legal Arizona Workers Act, H.B. 2779, 48th Leg. Sess. (Ariz. 2007) (prohibiting Arizona businesses from hiring undocumented immigrants by requiring employers to use E-Verify, a system offered by DHS used to verify immigration status of new hires).

in 2012, the number of undocumented immigrants in Arizona dropped by 40%.¹¹⁶ Although the recession in 2008 may have contributed to the drop in numbers, in no other state did the number of immigrants drop so drastically.¹¹⁷ Neighboring states like California and New Mexico only experienced an approximate 5% decrease in the number of undocumented immigrants during the same time period.¹¹⁸

Two industries suffered greatly from Arizona's anti-immigrant legislation: the agriculture and construction industry.¹¹⁹ The decline in agriculture employment occurred as early as 2007, prior to the passing of LAWA, because farmers anticipated fewer laborers would be available to harvest crops after the E-verify provision took effect in January of 2008.¹²⁰ Meanwhile, between 2008 and 2011, the percentage of Arizona's population employed in the construction industry was cut in half.¹²¹

Supporters of S.B. 1070 defended the anti-immigrant legislation because they argued it was meant to free-up employment opportunities for native and documented workers.¹²² However, since 2008, less than

116. See Lauren Godles, *Arizona as a Test Case for Immigration Effects on Employment*, ON LAB. (Apr. 29, 2016) <https://onlabor.org/arizona-as-a-test-case-for-immigration-effects-on-employment/> [<https://perma.cc/2B5T-53ZK>] (estimating the second largest drop in the number of immigrants during that period in New York at 25%); see also Bob Davis, *The Thorny Economics of Illegal Immigration: Arizona's Economy Took a Hit When Many Illegal Immigrants Left, but Benefits Also Materialized*, WALL ST. J. (Feb. 9, 2016), <https://www.wsj.com/articles/the-thorny-economics-of-illegal-immigration-1454984443> (describing the 40% drop in undocumented immigrants as the "biggest percentage decline [in] any state . . .").

117. Godles, *supra* note 116 (comparing Arizona's 40% population drop to New York's drop of about 25%, Illinois's drop of roughly 14%, and California's drop of about 13%).

118. Nowrasteh, *The Economic Case Against Arizona's Immigration Laws*, *supra* note 109, at 13.

119. *Id.* at 4–5 (identifying both construction and agriculture as among industries most heavily populated with undocumented immigrants nationwide, particularly in Arizona).

120. *Id.* at 5–6 (estimating the number of Arizona agriculture workers dropped approximately 16% from 2007 to 2011; while in neighboring states like California and New Mexico, the number of agriculture workers increased slightly).

121. *Id.* at 4–5 (recognizing declines in housing prices influenced the change in construction employment as it did in most states, but still emphasizing LAWA's ultimate responsibility for the drastic decline in employment by making it more expensive to hire employees and requiring electronic verification of employee information).

122. See *id.* at 4 ("After E-Verify went into effect, the foreign-born population bore the brunt of the employment decline in the construction industry, but native employment in construction did *not* increase to fill the gap, contrary to the claims of E-Verify supporters."). Nowrasteh argues that supporters of LAWA were wrong to believe the E-Verify provision would result in an increase in the number of documented immigrants or citizens taking over jobs

10% of the jobs previously held by undocumented immigrants were taken over by authorized workers.¹²³ Despite the labor shortage and mass exodus of thousands of immigrants, Arizona's unemployment rate continues to be one of the highest in the nation.¹²⁴ Although the law was successful in driving out thousands of immigrants, it did not cure or even mitigate the problem of unemployment.¹²⁵

The second major effect S.B. 1070 had in Arizona was a loss of entire industries, such as the immigrant-dependent construction industry discussed above.¹²⁶ A question was therefore raised: if undocumented workers left the state, why did employers follow? One theory is that immigrants took the jobs with them because they and their families created and sustained certain industries.¹²⁷ Under this theory, undocumented workers contribute to the economic growth as entrepreneurs, workers, and consumers.¹²⁸ Stated differently, they increase the demand for goods and services. By leaving the state of Arizona, undocumented immigrants took with them their money and spending power, which lowered the demand in all industries.¹²⁹

immigrants left behind. Rather, both the number of undocumented immigrants and the number of documented immigrants or citizens employed in construction in Arizona from 2006 to 2010 decreased. *Id.* See also Godles, *supra* note 116 (noting supporters also hoped anti-immigration laws would raise wages for native workers).

123. See Davis, *supra* note 116 (“[L]ow-skilled U.S. natives and legal Hispanic immigrants since 2008 picked up less than 10% of the jobs once held by undocumented immigrants.”).

124. See Godles, *supra* note 116 (describing the results of Arizona's exodus failed in lowering unemployment rates).

125. See Nowrasteh, *The Economic Case Against Arizona's Immigration Laws*, *supra* note 109, at 8 (arguing Arizona's anti-immigration laws actually increased the price of labor and left Arizona in a poor financial state).

126. See *id.* at 4 (“Arizona's employment of construction workers declined 14 percentage points more than in the neighboring states of California and New Mexico between LAWA's passage in July 2007 and September 2011.”).

127. See Michael D. Nicholson, *The Facts on Immigration Today: 2017 Edition*, CTR. FOR AM. PROGRESS (Apr. 20, 2017), <https://www.americanprogress.org/issues/immigration/reports/2017/04/20/430736/facts-immigration-today-2017-edition/> [<https://perma.cc/LCE3-YLLA>] (discussing the positive contributions immigrants create in the U.S. economy and the financial consequences of mass deportations); see also Nowrasteh, *The Aftermath of Arizona's Immigration Laws*, *supra* note 109 (blaming LAWA and S.B. 1070 for pressuring immigrants to leave Arizona, taking with them jobs in industries that were not affected by the Great Recession, such as agriculture).

128. Nowrasteh, *The Economic Case Against Arizona's Immigration Laws*, *supra* note 109, at 12.

129. *Id.*

It is undisputed that Arizona's economy suffered terribly in the months leading up to and following the enactment of S.B. 1070.¹³⁰ Despite the passage of time, Arizona's economy is *still* suffering after the enactment of anti-immigration legislation culminating with S.B. 1070.¹³¹ In 2016, the construction industry had only half the number of jobs it did ten years prior.¹³² Many employers were forced to move their companies out of Arizona; these moves were either premised on a labor shortage in positions traditionally filled by undocumented workers, or because patrons were wholly formed from immigrants and their families.

D. *Texas's Senate Bill 4: How Members of the Community Fought Against the Texas Legislature*

During his Facebook live video stream, Governor Abbott explained the purpose of S.B. 4 was to ban sanctuary cities which, he claimed, harbored criminals who were in the country unlawfully.¹³³ He argued S.B. 4 is meant to ensure safety for all.¹³⁴ He also warned public officials that the law imposed penalties of up to \$25,000 per day, jail time, and removal from office for non-compliance.¹³⁵ Like Arizona's S.B. 1070, Texas's S.B. 4 broadens local law enforcement's authority to enforce federal immigration laws.¹³⁶

Community-organizing groups throughout Texas and from various parts of the country, including Arizona, came to protest and rally in what became known as the "Summer of Resistance."¹³⁷ Some of the dozens

130. *Id.* at 12–15 (arguing the decline in the immigrant population further lowered real estate prices and increased rental vacancy during the Great Recession).

131. *See* Godles, *supra* note 116 (discussing the effects of the "massive immigrant exodus" on labor and wages in Arizona).

132. *Id.*

133. Office of the Governor Greg Abbott, *Governor Greg Abbot Signs Bill Banning Sanctuary Cities Into Law*, FACEBOOK (May 7, 2017, 4:33 PM), <https://www.facebook.com/TexasGovernor/videos/10155316084703256/> [<https://perma.cc/92NP-EXRC>].

134. *Id.*

135. *Id.*

136. *City of El Cenizo v. Texas*, 264 F. Supp. 3d 744, 756 (W.D. Tex. 2017), *granting stay in part*, 2017 WL 4250186 (5th Cir. 2017).

137. Mary Huber, *Hundreds Protest S.B. 4 on Final Day of 85th Legislature*, MYSTATESMAN (May 29, 2017), <http://www.mystatesman.com/news/state—regional-govt—politics/hundreds-protest-final-day-85th-legislature/FEIZNQ9uSaana4a6geYZD5O/> [<https://perma.cc/UX5A-NA9D>]. *See, e.g.*, James Barragan, *Texas Officials Call for a "Summer of Resistance" Against Sanctuary Cities Ban*, DALL. NEWS (May 16, 2017), <https://www.dallasnews.com/news/immigration/2017/05/16/local-officials-call-summer-resistanceagainst-sanctuary-cities-ban>

of groups that participated in the organization of various protests included the Workers Defense Project,¹³⁸ Voto Latino,¹³⁹ United We Dream,¹⁴⁰ and Texas Organizing Project.¹⁴¹ The protestors made their disapproval of the new Bill known when close to one thousand protesters united at the Texas State Capitol on the last day of the 85th legislative session.¹⁴² Protesters created a sea of red t-shirts inside of the Capitol Rotunda and conveyed a simple message: “Fight back; No S.B. 4.”¹⁴³

Even local law enforcement from major cities withheld support from the anti-immigration law.¹⁴⁴ Dallas’s law enforcement officials asked their city mayor, Mike Rawlings, to file suit.¹⁴⁵ Two law enforcement officials from the Dallas County Sheriff’s Department argued the law

[<https://perma.cc/PE4C-AETC>] (explaining the “Summer of Resistance” as a rally cry for opposition against the ban on Sanctuary Cities in the form of marches, litigation, and a push to vote).

138. See *About Us*, WORKERS DEF. PROJECT, <http://www.workersdefense.org/about-us/> [<https://perma.cc/5F64-FGQ3>] (last visited Mar. 12, 2018) [hereinafter WORKERS DEF. PROJECT, *About Us*] (“Workers Defense Project (WDP) is a membership-based organization that empowers low-income workers to achieve fair employment through education, direct services, organizing and strategic partnerships.”).

139. *About Us*, VOTO LATINO, <http://votolatino.org/about-us/> [<https://perma.cc/93YF-LJEQ>] (last visited Mar. 12, 2018) (“Voto Latino is a pioneering civic media organization that seeks to transform America by recognizing Latinos’ innate leadership.”).

140. United We Dream (UWD) is a campaign in support of the Development, Relief, and Education for Alien Minors Act (DREAM Act). See *About UWD*, UNITED WE DREAM, <https://unitedwedream.org/about/> [<https://perma.cc/W99X-EF9H>] (last visited Jan. 21, 2018) (stating UWD is one of the largest immigrant youth-led organizations).

141. See *About TOP*, TEX. ORGANIZING PROJECT, <http://organizetexas.org/contact-us/about-top/> [<https://perma.cc/C43T-DTLL>] (last visited Mar. 14, 2018) (“The Texas Organizing Project (TOP) works to improve the lives of low-income and working class Texas families through community organizing, and civic and electoral engagement.”).

142. Huber, *supra* note 137.

143. *Id.*; see Ryan Autullo, *Pastor Arrested in SB 4 Protest Says He Couldn't Stand on the Sidelines*, MYSTATESMAN (June 26, 2017, 5:49 PM), <https://www.mystatesman.com/news/local/pastor-arrested-protest-says-couldn-stand-the-sidelines/uNZVUrCYSUcEzUy4scqJ1J/> [<https://perma.cc/VDK6-4SBG>] (detailing the arrest of Reverend Jim Rigby as he participated in the protest against S.B. 4); see also *Texas Lawmakers Accuse Each Other of Assault, Threats as Hundreds of 'SB4' Protesters Disrupt Session*, ASSOCIATED PRESS, (May 29, 2017) <https://www.nbcnews.com/news/us-news/texas-lawmakers-accuse-each-other-assault-threats-hundreds-sb4-protesters-n765856> [<https://perma.cc/CK57-5RKQ>] (stating protesters wore shirts with the slogan “Lucha” [“fight” in Spanish], chanted “Here to stay!”, and waved banners that read “See you in court!”).

144. See Limón & Wilonsky, *supra* note 8 (summarizing Dallas County Sheriff’s argument that S.B. 4 would create fear in the community, leaving more crimes unreported).

145. *Id.*

would lead to fewer reported crimes from the immigrant community for fear of deportation.¹⁴⁶ Houston Police Chief Art Acevedo argued the anti-immigrant legislation would only make protecting the community more difficult as less immigrants would report crimes or be willing to participate in ongoing investigations.¹⁴⁷ Instead of making their city safer, law enforcement officials argued legislation like S.B. 4 would make their city more dangerous.¹⁴⁸

In *City of El Cenizo v. Texas*,¹⁴⁹ major cities including Houston, San Antonio, Dallas, Austin, and El Paso, along with Maverick County and the League of United Latino American Citizens (LULAC) filed suit in opposition of S.B. 4.¹⁵⁰ The City of El Cenizo, Maverick County, and LULAC were the first to file suit—just one day after the signing of S.B. 4.¹⁵¹ The plaintiffs’ oral arguments against S.B. 4 began on June 26, 2017 in San Antonio.¹⁵² Two months later, the court partially granted the plaintiffs’ request for a preliminary injunction to stop portions of S.B. 4 from taking effect on September 1, 2017.¹⁵³ Among the provisions the injunction blocked were: 1) the mandate on local officials to assist in

146. *Id.* (quoting Dallas Executive Chief Deputy, Jesse Flores, who spoke against S.B. 4 alongside Dallas Chief Deputy, Jesse Herrera).

147. See Meagan Flynn, *Houston’s Chief Acevedo, Defiant and Introspective, Rails Against SB 4*, HOUSTON PRESS (Apr. 28, 2017), <http://www.houstonpress.com/news/hpd-chief-acevedo-lambasted-sb4-in-defiant-candid-monologue-9394376> [https://perma.cc/HHQ4-EC6Y] (quoting Chief Acevedo, “[T]he number of Hispanics reporting rapes has dropped 43 percent compared to the same time last year, with a 13 percent drop in other violent crimes. That’s compared to an 8.2 percent increase in non-Hispanic victims reporting other violent crime.”).

148. See *Id.* (quoting Houston Police Chief, Art Acevedo, “When undocumented immigrants are afraid to report a crime for fear of police handing them over to ICE . . . that means a criminal goes free to prey on more people.”). See generally Limón & Wilonsky, *supra* note 8 (quoting Dallas Executive Chief Deputy, Jesse Flores, “If members of the community are afraid to come forward and report crimes due to fear of deportation, then those crimes will not be reported or investigated . . . We believe our community is safer when they report crimes without fear of deportation.”).

149. 264 F. Supp. 3d 744, 755 (W.D. Tex. 2017), *granting stay in part*, 2017 WL 4250186 (5th Cir. 2017).

150. *Id.*

151. *Id.* at 756.

152. Julián Aguilar, *Attorneys Spar Over Texas Immigration Law in Federal Court*, TEX. TRIB. (June 26, 2017), <https://www.texastribune.org/2017/06/26/attorneys-spar-over-texas-immigration-law/> [https://perma.cc/UC2H-XP25].

153. *City of El Cenizo*, 264 F. Supp. 3d at 812–13 (stating the District Court, “enjoin[ed] those portions of S.B. 4 that [it] preliminarily determined are preempted or are constitutionally invalid on their face.”).

federal immigration enforcement under penalty of a fine; 2) the prohibition on local officials from speaking out publicly against anti-immigration laws like S.B. 4; and 3) the requirement on sheriffs and police departments to accept requests to continue detention from federal immigration agents.¹⁵⁴

However, just like in Arizona, the injunction did not block the most controversial provision: the right of a local official to ask about immigration status.¹⁵⁵ The court justified its decision not to enjoin this provision on the basis that, although police officers had the right to ask for immigration status, status could not be the basis for arrest.¹⁵⁶ Using similar language found in the opinion of *Arizona v. United States*, the court clarified the arrest would have to be lawful for law enforcement officials to inquire into a detainee's status.¹⁵⁷ The court went on to declare that even if officers did obtain the detainee's legal status, the officer would not be forced to share this information with immigration agents, as S.B. 4 originally schemed.¹⁵⁸

Subsequently, the defendants moved for a stay of the injunction.¹⁵⁹ In late September, the Court of Appeals for the Fifth Circuit stayed two of the five provisions enjoined by the District Court.¹⁶⁰ First, § 752.053(b)(3), which prohibited law enforcement from interfering with those choosing to cooperate with ICE.¹⁶¹ Second, § 752.053(a)(1), which restrained law enforcement from adopting, enforcing, or endorsing a policy that would prohibit or limit the enforcement of immigration

154. *Id.*

155. *Id.* (concluding that although it would serve the public's interest to prohibit the legislature from passing legislation that allows local police officers to enforce immigration laws, the court is limited from doing so because it does not violate the Constitution); *see also* Julián Aguilar, *Judge Temporarily Blocks Immigration Enforcement Law*, TEX. TRIB., <https://www.texastribune.org/2017/08/30/judge-temporarily-blocks-sanctuary-cities-law/> [https://perma.cc/TH63-KE4D] (last updated Aug. 30, 2017, 9:00 PM) (summarizing Judge Garcia's holding).

156. *City of El Cenizo*, 264 F. Supp. 3d at 764–65 (“If for example, during a lawful stop an officer obtains information that the detained individual is undocumented, the officer may not arrest the individual or prolong the detention on this basis”).

157. *Id.* at 762–63.

158. *Id.* at 764–65.

159. *City of El Cenizo v. Texas*, No. 17-50762, 2017 WL 4250186, at *1 (5th Cir. Sept. 25, 2017).

160. *Id.*

161. *Id.*

laws.¹⁶² Although the courts enjoined large portions of the “Show Me Your Papers” law, S.B. 4 took effect on September 1, 2017.¹⁶³

Most recently, the Fifth Circuit withdrew their September 2017 opinion.¹⁶⁴ The Fifth Circuit only stayed the injunction for § 752.053(a)(1), only as it prohibits elected officials, not public employees, from endorsing policies that prohibit or materially limit the enforcement of immigration laws.¹⁶⁵ The rest of S.B. 4 was upheld in its entirety.¹⁶⁶

In the aftermath of the District Court’s decision in 2017, advocacy groups began educating members in the community on how best to interact with law enforcement.¹⁶⁷ The first piece of advice is detainees have a right to remain silent with respect to their immigration status.¹⁶⁸ In the event detainees are pulled over in their vehicles, organizers, such as the ACLU, urge they do not provide false documentation or foreign identification.¹⁶⁹ Once under arrest, the detainee should only provide their name, residence address, and date of birth.¹⁷⁰ Finally, detainees should make clear they wish to remain silent, not sign anything, and not make any decision without a lawyer’s counsel.¹⁷¹

162. *Id.* at *2.

163. *City of El Cenizo v. Texas*, 264 F. Supp. 3d 744, 756 (W.D. Tex. 2017), *granting stay in part*, 2017 WL 4250186 (5th Cir. 2017).

164. *City of El Cenizo v. Texas*, 890 F.3d 164, 173 (5th Cir. May 8, 2018).

165. *Id.* at 184–85 (holding the provision unconstitutional if applied to elected officials because it violates the First Amendment by infringing on the elected officials’ political speech).

166. *See generally id.*

167. *See generally Know Your Rights Under SB4*, ACLU OF TEX., <https://www.aclutx.org/en/sb4> [<https://perma.cc/C6BR-TGZS>] (last visited Mar. 27, 2018) (explaining S.B. 4, the law’s influence on law enforcement procedures, and what to do “[i]f questioned about immigration status by local or state police”); Kavita Khandekar Chopra, *What You Need to Know About SB4*, HUM. RTS. INITIATIVE OF N. TEX. (Aug. 31, 2017), <http://www.hrionline.org/what-you-need-to-know-about-sb4/> [<https://perma.cc/45MP-URYW>] (emphasizing individuals in the United States without legal status still have rights, and listing their rights in light of S.B. 4); *SB 4 Community Advisory*, IMMIGRANT LEGAL RESOURCE CTR., https://www.ilrc.org/sites/default/files/resources/sb4communityadvisory_final.pdf [<https://perma.cc/NVM6-B96M>] (last visited Mar. 21, 2017) (detailing how those without legal status can protect themselves in the wake of S.B. 4, including the power of knowing individual rights and creating contingency plans if detained).

168. ACLU OF TEX., *supra* note 167.

169. *Id.*

170. *Id.*

171. *Id.*

III. YOU CANNOT HAVE ONE WITHOUT THE OTHER:
AN ANALYSIS OF THE DIRECT CORRELATION BETWEEN WAGE-THEFT
AND ANTI-IMMIGRATION LAWS

A. *Current Workplace Conditions in Low-Wage Occupations*

At first glance, workplace regulation and immigration monitoring would seem independent of one another.¹⁷² However, the fact that low-income industries typically experience the most workplace violations,¹⁷³ and most low-wage positions are occupied by undocumented immigrants,¹⁷⁴ means a sector of the population is at high risk of exploitation: those employees in low-income industries. Thus, to address either issue, the government must simultaneously reform immigration and labor laws.¹⁷⁵ Reforming labor laws alone will not be enough to protect undocumented workers as there are already, albeit ineffective, federal and state policies in place meant to protect undocumented immigrants from wage-theft, yet large numbers of employees continue to suffer—fearing employer retaliation for asserting their right to a fair wage.¹⁷⁶ Indeed, even current policies prohibiting employer retaliation

172. See Lee, *supra* note 5, at 657 (suggesting those who support criminalization of wage-theft fail to recognize the disconnect between labor and immigration laws).

173. See Fine & Lyon, *supra* note 20, at 432 (citing studies from across the country concluding that low-wage industries are also high-violation industries; violations that include failure to pay minimum wage and overtime, failure to provide safety equipment, and exposure to hazardous workplace dangers).

174. See CONG. BUDGET OFF., THE ROLE OF IMMIGRANTS IN THE U.S. LABOR MARKET: AN UPDATE 15 (July 2010), https://www.cbo.gov/sites/default/files/111th-congress-2009-2010/reports/07-23-immigrants_in_labor_force.pdf [<https://perma.cc/CSR9-4RRV>] (estimating in 2009 that 53% of all U.S. workers employed in construction, restaurants, retail, landscaping, agriculture, food manufacturing, and building services were born in Mexico or Central America); see also BUREAU OF LAB. STAT., FOREIGN-BORN WORKERS: LABOR FORCE CHARACTERISTICS—2016 at 3 (May 18, 2017), <https://www.bls.gov/news.release/pdf/forbrn.pdf> [<https://perma.cc/ZQ2Y-GHML>] (estimating foreign-born workers are more likely to work in service occupations, such as food preparation and serving, construction, maintenance, and production).

175. See Fine & Lyon, *supra* note 20, at 439–446 (analyzing case studies of Washington and California and arguing that the co-enforcement of labor standards by the state and complementary lateral mechanisms should be considered within immigration reform to expand the number of workers protected).

176. See *id.* at 433–34 (asserting that the gap “[b]etween laws and regulations on the books intended to insure against exploitation and the implementation and enforcement of these laws” discourages immigrants from exercising their labor rights in the face of employer violations such as retaliation or intimidation of workers).

have been unsuccessful specifically because anti-immigration laws inadvertently allow employers to avoid labor laws and take advantage of undocumented employees. Because the two issues are intertwined, these workers need protection outside of labor laws in the form of an enduring legal status.

Modern immigration is driven, in part, by the pursuit of better employment.¹⁷⁷ In the United States, the majority of undocumented immigrants come through the U.S.-Mexico border from Mexico and Central America.¹⁷⁸ Crossing the border means leaving behind their families and risking their lives, but undocumented immigrants continue to come to the United States because United States employers are hiring.¹⁷⁹ Although many immigrants envision a country of opportunity that defends rights and freedom, many individuals are soon faced with a harsh reality: undocumented immigrants' rights are routinely violated in the United States.¹⁸⁰ Nevertheless, immigrants continue to stay and more continue to come because it is richer to be poor in the United States than it is to be poor in their country of origin.¹⁸¹

Since undocumented workers are motivated by economic reasons to cross the border,¹⁸² employers can use this as leverage. By the time an undocumented immigrant has reached the United States, they have invested time and money.¹⁸³ They are willing to take employment in

177. See Laque, *supra* note 28 (asserting trends in modern human migration indicate most migration “[s]erves the purpose of uniting families, escaping persecution, or more importantly, finding better employment opportunities”).

178. *Id.*

179. See BBVA RES., *supra* note 28, at 10–11 (concluding Mexican migration to the United States stems from the U.S. economy’s demand for cheap labor, rather than a lack of opportunities in Mexico); see also U.S. CHAMBER OF COM., *supra* note 27 (reporting immigrants actually contribute to the creation of jobs in the U.S. by virtue of their roles as entrepreneurs, consumers and taxpayers).

180. Laque, *supra* note 28.

181. See BBVA RES., *supra* note 28, at 10–12 (identifying three factors that most influence migration from Mexico to the United States: 1) demands in the U.S. labor market, 2) lack of employment in Mexico, and 3) the wage discrepancy between Mexico and the United States).

182. See Douglas S. Massey & Kristin E. Espinosa, *What’s Driving Mexico-U.S. Migration? A Theoretical, Empirical, and Policy Analysis*, 102 AM. J. SOCIOLOGY 939, 990 (Jan. 1997) (“Growing economic insecurity coupled with a strong desire to participate in [the] new political economy have led Mexican households to search for ways to self-insure against threats to family income and to gain access to scarce capital.”).

183. See *id.* at 962 (noting price inflation in the U.S. dollar and devaluation in the Mexican peso are likely to deter immigration because these factors increase the cost of immigrating illegally,

almost any industry for almost any pay.¹⁸⁴ The employer knows this. The employer takes advantage of the immigrant's vulnerable position by offering low wages; lower than the rate corresponding to the position.¹⁸⁵ Lower, even, than what an employer might have offered other employees who are working in the United States lawfully.¹⁸⁶

The employers' lack of incentive to offer undocumented workers a "good" paying job does not end at poor wages. For example, in the construction industry, workers are never formally trained, rarely provided with any safety equipment, and hardly ever offered employment benefits.¹⁸⁷ Many receive improvised training—new hires are trained by observing and copying a veteran worker's technique, sometimes in an unfamiliar industry, handling foreign tools.¹⁸⁸ Employment benefits, like health insurance and paid vacation or sick days are almost non-existent,¹⁸⁹ despite the fact that low-income industries are the most dangerous to work in.¹⁹⁰

Financial gain motivates immigrants to take substandard jobs as well as employers to create substandard workplaces.¹⁹¹ Failing to provide

indicating that undocumented immigrants use a cost-benefit analysis in determining whether or not to migrate).

184. See PRICE ET AL., *supra* note 23, at 18 (reporting the majority of construction workers in Texas suffer from economic hardship and are faced with potential exposure to hazards that result in worksite injuries and fatalities).

185. See *id.* 23 (illustrating wage-theft through the personal experience of a construction worker and highlighting the issues associated with prevailing wage mandates that require employers to pay higher wages when working on publicly funded worksites).

186. THEODORE ET AL., BUILD A BETTER SOUTH, *supra* note 2, at 11 (estimating that on average, undocumented construction workers earn lower wages than the average of all other construction workers).

187. PRICE ET AL., *supra* note 23, at 19 (noting employees with low-wages are more likely to lack workplace benefits, labor in risky and unsafe conditions, and be misclassified as a contractor; yet these same workers are less likely to be protected by workers' compensation).

188. THEODORE ET AL., BUILD A BETTER SOUTH, *supra* note 2, at 16 (describing how on-the-job "training" is one method used by construction workers to compensate for the lack of formal training). On-the-job training is sometimes combined with cross-training, mentoring systems, and frequent job rotations. *Id.*

189. See *id.* at 31 (estimating less than half of Dallas construction workers were offered health insurance by their employer, only 30% of workers have paid personal days, a mere 20% receive paid sick days, and just 18% were offered some form of retirement or pension benefit).

190. See PRICE ET AL., *supra* note 23, at 14 (estimating Texas construction workers are four and a half times more likely to be killed at work than the average non-Texas construction worker).

191. See Wade Goodwyn, *Texas Contractors Say Playing by the Rules Doesn't Pay*, NPR TEX. PUB. RADIO (Apr. 11, 2013, 3:21 AM), <https://www.npr.org/2013/04/11/176777498/texas->

living wages, safety equipment, training, or employment benefits further reduces costs on the already money-saving practice of hiring cheap labor from the immigrant community.¹⁹² These four employer practices comprise only some of the main problems plaguing low-wage industries.¹⁹³ Although undocumented immigrants are most affected by poor working conditions because they have less access to public resources and face the threat of deportation, other employees lawfully working in the United States are also impacted by the lack of living wages, benefits, and training.¹⁹⁴ Thus, the entire community should care about the unjust labor practices employers use to reduce costs in low-wage industries because the social cost of poor labor practices is placed on Texas taxpayers.¹⁹⁵

In addition to wage-theft, undocumented workers are also more likely to suffer from employee misclassification.¹⁹⁶ Misclassification is occasionally included in the definition of wage-theft¹⁹⁷ and takes place when an employer classifies an employee as an independent contractor.¹⁹⁸ This practice strips from workers basic employee rights

contractors-say-playing-by-the-rules-doesnt-pay (claiming the main benefit contractors derive from purposefully misclassifying workers is a reduced cost for employees, such as paying social security and taxes to stay competitive with other businesses in the industry).

192. See PRICE ET AL., *supra* note 23, at 24–25 (discussing different methods employers use to reduce costs, including payroll fraud); see also Goodwyn, *supra* note 191 (quoting the owner of a landscaping construction company who claimed that he purposefully misclassified his workers as independent contractors to avoid having to pay an hourly rate, thereby also avoiding overtime pay for lengthy projects).

193. See Fine & Lyon, *supra* note 20, at 432–34 (addressing labor conditions in low-wage occupations across the country); see also PRICE ET AL., *supra* note 23, at 13 (addressing 2013 working conditions in Texas’s construction industry); THEODORE ET AL., BUILD A BETTER SOUTH, *supra* note 2, at 2–4.

194. PRICE ET AL., *supra* note 23, at 45–50.

195. See *id.* at 47 (discussing the social costs of injured workers who work for employers that chose to not provide workers compensation or do not provide an option for health insurance).

196. See Lisa D. Kinzer, *Employee Misclassification in Texas: Why the New Law Won’t Work*, 55 S. TEX. L. REV. 435, 447 (2014) (identifying the employer’s ability to avoid penalties if they hire an undocumented worker and then misclassify him as an independent contractor).

197. *Misclassification of Employees as Independent Contractors*, U.S. DEP’T LABOR, <https://www.dol.gov/whd/workers/Misclassification/> [<https://perma.cc/JS8B-B647>] (last visited Mar. 27, 2018) (discussing the critical benefits and protections guaranteed by law that employees are denied by being misclassified).

198. See Kinzer, *supra* note 196, at 436 (discussing the differing definitions state and federal agencies, such as the TWC and IRS, use to define an “employee” and “independent contractor,” and concluding that the various definitions create an obstacle for enforcing civil penalties for misclassification); THEODORE ET AL., BUILD A BETTER SOUTH, *supra* note 2, at 2–4, 14 (defining

such as the right to a federal minimum wage and overtime pay.¹⁹⁹ In 2013, more than 300,000 construction workers in Texas were misclassified as independent contractors.²⁰⁰ Today, in Houston alone, about 38% of construction workers are misclassified.²⁰¹ If these workers filed a wage-theft complaint with the DOL or TWC, they would bear the heavy burden of proving they qualify as employees and are not subcontractors or contractors.²⁰² Overcoming this burden is difficult when the employee has never received formal training, receives minimal supervision, and has signed tax forms indicating a subcontractor position rather than a regular employee.²⁰³

Some employers misclassify to keep their employees off their records for tax purposes and pay them in cash or under the table.²⁰⁴ Employers go as far as requiring their employees to sign subcontractor tax forms.²⁰⁵ Misclassification is appealing to employers because it allows them to escape paying employment taxes in addition to regular employee benefits employers are generally responsible for securing, like contributing to the Texas Unemployment Compensation Trust Fund.²⁰⁶

Admittedly, misclassification is appealing to some workers in low-income occupations—they put more of their already low gross income in

“misclassification” as an employer labeling a wage worker as an independent contractor for tax purposes, thereby rendering employees ineligible for worker’s compensation payments). *See generally* Goodwyn, *supra* note 191 (discussing how “independent contractors” are utilized in specialized areas during the subcontracting process of construction work).

199. THEODORE ET AL., BUILD A BETTER SOUTH, *supra* note 2, at 14 (“Misclassified workers often lose the basic protections of employees, such as the right to minimum wage and time and half for overtime hours, and they must pay their employer’s share of payroll taxes”).

200. PRICE ET AL., *supra* note 23, at 24.

201. THEODORE ET AL., BUILD A BETTER SOUTH, *supra* note 2, at 33.

202. *E.g.* TEX. WORKFORCE COMM’N, *Employment Status—A Comparative Approach*, <http://www.twc.state.tx.us/files/businesses/form-c-8-employment-status-comparative-approach-twc.pdf> [<https://perma.cc/QW3U-KLJN>] (last visited Mar. 12, 2018) (distinguishing an employee from a contractor by comparing the relationship each has to the workplace, including factors like who receives instruction on how the job will be performed, who provides tools and equipment to perform the job, and whether the person has any investment or potential for loss in the business).

203. *See generally id.* (discussing the complications being classified as an independent contractor can create for an employee without proper resources).

204. *See* PRICE ET AL., *supra* note 23, at 24 (explaining how payroll fraud and misclassification deprive employees of their legal rights).

205. *See* THEODORE ET AL., BUILD A BETTER SOUTH, *supra* note 2, at 14 (reporting certain employers ask employees to sign an IRS 1099 form instead of the W-2 form that is legally required for employees).

206. *See id.*

their pockets without having taxes and other employee deductions taken out of their paycheck.²⁰⁷ However, when an employee reports a claim of wage-theft, a common defense for not paying minimum wage or overtime is that the worker was hired as a contractor or subcontractor—not an employee.²⁰⁸ Thus, misclassification has many negative consequences that employers do not disclose to their employees; consequences employees do not learn about until it is generally too late.²⁰⁹ Although misclassification is not typically considered a form of wage-theft, it can lead to devastating consequences for a low-wage worker if the employer decides not to pay his employee.²¹⁰

B. *How S.B. 4 Negatively Impacted Workplace Conditions for All Workers*

The large number of undocumented workers experiencing wage-theft in low-income industries is compounded by the government's failure to enact immigration laws that protect them.²¹¹ This failure creates an environment in which employers can easily take advantage of an already vulnerable sector of the population.²¹² Inefficient labor laws and anti-

207. See PRICE ET AL., *supra* note 23, at 24. According to Juan Girón, a drywall in Houston, Texas, even workers like him who have the proper documentation to work in the United States lawfully stay in these jobs because “you’re receiving money week after week. What happens if you lose your job, and then two, three, four weeks pass without getting another job that’s why I decided to stay quiet about it in the end.” *Id.*

208. Goodwyn, *supra* note 191 (illustrating how classifying a worker as a sub-contractor insulates the employer from paying taxes, Social Security, unemployment, and overtime compensation).

209. See THEODORE ET AL., BUILD A BETTER SOUTH, *supra* note 2, at 33–34 (relating the story of a residential construction worker who only learned of his misclassification as an independent contractor after he was injured on the job; his employer was thus able to escape liability for the injury).

210. See *id.* at 34 (explaining the worker’s struggle even after seeking legal aid).

211. See *id.* at 25–39 (explaining how the issue and its effects are nationwide). The negative impacts of misclassification of workers in the construction industry can be found in most major cities across the country like Atlanta, Georgia, Dallas, Texas, and Nashville, Tennessee. *Id.*

212. See Elizabeth Fussell, *The Deportation Threat Dynamic and Victimization of Latino Migrants: Wage Theft and Robbery*, 52 SOC. Q. 593, 594 (2011) (explaining the result of labor demand and restrictive immigration policies is an exploitative relationship between immigrants and those who seek to exploit them); see also Molina et al., *supra* note 76 (elaborating on Fussell’s explanation a step further by concluding this exploitative relationship usually manifests in the employer threatening the employee with calling immigration officials).

immigration laws only make the workplace worse—for *all* workers.²¹³

Native and naturalized workers, although not fearful of deportation, are generally caught in the cross fire: employers commit wage-theft against lawful workers because the agencies charged with handling wage-theft claims are inefficient, diminishing the likelihood of recovery of wages for *any* employee filing a claim.²¹⁴ In other words, the low risk of being penalized for committing unfair employment practices is outweighed by the free labor obtained. Agencies tasked with investigating and punishing wage-theft claims lack the resources necessary to carry out their mandate.²¹⁵ This inefficiency allows employers to steal wages with impunity.²¹⁶ As a result, the consequence of anti-immigration laws, such as S.B. 4, that create distrust between immigrant communities and law enforcement, gives employers yet another incentive to create and maintain a draconian workplace.²¹⁷

The advantage an employer has over his unauthorized workers has directly increased with anti-immigration laws like S.B. 4 which makes it easier for employer violations of labor laws to occur and go unnoticed.²¹⁸ Employers that set out to commit wage-theft depend on their employee's fear of deportation and mistrust of the police and government.²¹⁹

213. See THEODORE ET AL., BUILD A BETTER SOUTH, *supra* note 2, at 13 (“Several workers reported that employers retaliated against those who pursued wage claims by firing or reassigning them or by calling immigration authorities.”).

214. See Verga, *supra* note 24, at 286–88 (arguing that criminalization of wage-theft is necessary because the federal and state agencies responsible for handling wage claims are inefficient, which reduces the likelihood that workers will actually recover wages); Lee, *supra* note 5, at 661–62 (2014) (“[D]ay laborers often face grim choices when pursuing the recovery of wages. Their relatively low wages often deter private attorneys from taking on those cases . . . [a]nd while day laborers may proceed on their own through administrative or civil channels in some states, such a choice can be daunting.”).

215. Verga, *supra* note 24, at 286–89 (enumerating the inefficiencies within the DOL to meaningfully respond to complaints to the Wage and Hour Division because of issues like the lack of resources or the in-existent political will to investigate the claims of low-income workers).

216. See *id.* at 287 (“In addition to the federal FLSA, almost every state deals with non-payment of wages in its state labor laws. Like their federal counterparts, the state agencies charged with enforcing labor laws are understaffed, have very limited investigative resources, and generally lack the political will to assist low-wage workers.”).

217. Lee, *supra* note 5 at 664–65.

218. See, e.g., Verga, *supra* note 24, at 293 (suggesting police department handling wage-theft complaints implement a formal policy to refrain from enforcing immigration law so as to not silence victims and impede officers in enforcement of criminal penalties).

219. See Lee, *supra* note 5, at 664

Employers use this fear to intimidate their unauthorized employees from trying to collect stolen, unpaid wages.²²⁰

It is well known among the immigrant community that police officers can ask questions regarding an individual's immigration status.²²¹ However, police departments in major cities throughout Texas have refrained from doing so.²²² Officers avoid inquiring into a person's legal status, particularly when the person is a complaining victim, in an attempt to strengthen the community's cooperation and trust in the police department.²²³

However, law enforcement's efforts to gain trust with the immigrant community was directly affected by the signing of S.B. 4.²²⁴ In the

Where, for example, a subcontractor refuses to pay a day laborer for a day spent laying asphalt, wage theft laws empower that worker to call the police, thereby injecting a bit of urgency, discomfort, and fear into the process of recovering lost wages . . . [if the employee is unauthorized to work though] the wage theft fix becomes much more complicated, and in fact, the fix may end up making a bad situation worse.

220. See PRICE ET AL., *supra* note 23, at 17–18 (quoting Adrian Magallanes, a Dallas ironworker: “If you tell [the foreman] something is unsafe, they tell you to still do it. If you don't do it, you're fired.”).

221. See NIK THEODORE, DEP'T OF URBAN PLANNING & POL'Y, INSECURE COMMUNITIES: LATINO PERCEPTIONS OF POLICE INVOLVEMENT IN IMMIGRATION ENFORCEMENT 1 (May 2013), http://www.policylink.org/sites/default/files/INSECURE_COMMUNITIES_REPORT_FINAL.PDF [<https://perma.cc/QH7W-KKGK>] (demonstrating a decrease in crime reports through a telephone survey of 2,004 Latinos living in Cook County (Chicago), Harris County (Houston), Los Angeles County, and Maricopa County (Phoenix)). A substantial number of these residents were less likely to voluntarily contact police out of fear of questions regarding immigration status. *Id.*

222. *E.g.*, Dianne Solis, *North Texas Police Officers Try to Ease Fear Among Immigrants Over Senate Bill 4*, DALL. NEWS (Aug. 17, 2017), <https://www.dallasnews.com/news/immigration/2017/08/17/north-texas-police-officers-try-ease-fear-among-immigrants-senate-bill-4> [<https://perma.cc/C374-896D>] (reporting from an event taking place in Grand Prairie, Texas with several police departments discussing how these departments would interpret S.B. 4, and quoting a former Dallas police officer who claimed the Dallas Police Department did not routinely ask people for their immigration status).

223. The Grand Prairie, Texas Police Department has a support system for Spanish-speaking residents called UNIDOS. UNIDOS, GRAND PRAIRIE TEX., <http://www.gptx.org/city-government/city-departments/police-department/unidos#ad-image-2> [<https://perma.cc/6WJB-QZUR>] (last updated Jan. 6, 2016). UNIDOS is a Hispanic community outreach program that originated in 2002 by the efforts of a Grand Prairie Police Officer with a goal to provide assistance to Spanish-speaking residents of Grand Prairie. *Id.* However, even with this program in place, Sgt. Munoz of the Grand Prairie Police Department expressed concern after the passage of S.B. 4 that the community would begin to fear calling the police, causing a breakdown of confidence in the uniform. Solis, *supra* note 222.

224. Brooke A. Lewis, *HPD Chief Announces Decrease in Hispanics Reporting Rape and Violent Crimes Compared to Last Year*, HOUS. CHRON, <http://www.chron.com/news/houston->

months leading up to the enactment of S.B. 4, police departments across Texas noticed a drop in the number of immigrants reporting crimes.²²⁵ The Houston Police Department reported a significant drop in the number of Hispanics reporting rape and other violent crimes as compared to the year prior.²²⁶ Specifically, there was a 43% drop in the number of rape cases reported by Hispanic victims despite a 12% increase in the number of rape cases reported by non-Hispanic victims.²²⁷

Carrollton's Police Department reported a similar finding with respect to neighborhood crime calls.²²⁸ In February of 2017, District 11 (the predominantly Hispanic southern part of Carrollton) did not receive a single vehicle burglary, home burglary, or car theft report.²²⁹ This is significant as exactly one year prior, four car burglaries, two home burglaries, and two stolen vehicles were reported.²³⁰ Carrollton's Police Department speculates the lack of reports might be due to a fear of deportation.²³¹

As a result of today's anti-immigrant environment, wage-theft is among the list of crimes left under or unreported.²³² Fewer victims of wage-theft are coming forward.²³³ One indicator wage-theft is on the rise is the increased number of organizations mobilizing to counteract wage-theft.²³⁴ In the past six years, Workers Defense Project (WDP) has tripled in size, expanding their efforts to provide legal aid to low-

texas/houston/article/HPD-chief-announces-decrease-in-Hispanics-11053829.php [https://perma.cc/6FDD-SBZ6] (last updated Apr. 6, 2017, 10:01 AM).

225. Solis, *supra* note 222 (quoting Grand Prairie police chief, David Dye, "It has already hurt our trust, . . . we already have a lot of fear out there because of Senate Bill 4. It has already created damage.").

226. Lewis, *supra* note 224.

227. *Id.*

228. Elvia Limón, *Carrollton Police Cite Deportation Fears as Possible Reason for Decline in Neighborhood Crimes Calls*, DALL. NEWS (Apr. 21, 2017), <https://www.dallasnews.com/news/carrollton/2017/04/21/carrollton-police-cite-deporation-fears-possible-reason-decline-neighborhood-crimes-calls> [https://perma.cc/3QY2-YYRK].

229. *Id.*

230. *Id.*

231. *Id.*

232. *See* Verga, *supra* note 24, at 293 (discussing the vulnerability of undocumented workers in the workplace as victims of wage theft).

233. *See id.* at 293-94 (suggesting the lack of a rule regarding non-enforcement of immigration laws "inevitably silences immigrant crime victims and witnesses").

234. *See* WORKERS DEF. PROJECT, *About Us*, *supra* note 138 (describing their organizational work as part of a national movement against wage theft).

wage workers by opening offices in Dallas and Houston.²³⁵ More recently, in the aftermath of Hurricane Harvey, organizations tailored emergency resources to prevent wage-theft.²³⁶

While laws like S.B. 4 are meant to drive out undocumented immigrants, the result will affect Texans beyond the immigrant community.²³⁷ All low-wage employees are working under the same inferior working conditions that undocumented workers labor in.²³⁸ Without a labor law reform that incorporates the protection of undocumented immigrant workers, and vice versa, employers will have no incentive to follow labor laws.²³⁹

IV. COMPREHENSIVE IMMIGRATION AND LABOR LAW REFORM: A VIABLE SOLUTION TO WAGE-THEFT IN LOW-INCOME OCCUPATIONS

A. *Why Temporary Legal Status Will Not Work*

In the past, the U.S. Government has addressed the issue of immigration and domestic labor shortages with a comprehensive regulatory effort.²⁴⁰ For example, the Mexican Farm Labor Program Agreement, also known as the Bracero Program of 1942, permitted Mexican citizens to work in the U.S. agriculture industry.²⁴¹ The

235. *See id.* (describing Workers Defense Project's roots in Austin and highlighting its growing influence across Texas).

236. *See Hurricane Harvey Resources*, HOUS. IMMIGR. LEGAL SERV. COLLABORATIVE, <https://www.houstonimmigration.org/> (last visited Jan. 22, 2017) (providing temporary legal aid to post-Harvey workers in Houston); *see also Harvey Recovery Workers Rights Attorney*, WORKERS DEF. PROJECT, <http://www.workersdefense.org/harvey-recovery-workers-rights-attorney/> [<https://perma.cc/NT4W-58XP>] (last visited Mar. 12, 2018) (advertising a new attorney position dedicated to protecting post-Harvey workers' rights, implying a growth in demand of said services).

237. PRICE ET AL., *supra* note 23, at 11 (concluding that preserving jobs employing undocumented individuals is essential to Texas' long-term economic growth and prominence in the national economy).

238. *See id.*

239. *Id.* at 22 (showing that although the effects of wage-theft on construction workers can be devastating, employers committing the crime are not affected in the slightest).

240. *The Bracero Program*, UCLA LAB. CTR., <https://www.labor.ucla.edu/what-we-do/labor-studies/research-tools/the-bracero-program/> [<https://perma.cc/RL2W-D8EU>] (last visited Mar. 12, 2018).

241. *See* Alice J. Baker, *Agricultural Guestworker Programs in the United States*, 10 TEX. HISP. J. L. & POL'Y 79, 84 (2004) (describing some of the process employed to permit Mexican workers to seasonally cross the border along with protections granted to them by the federal government).

Program alleviated two problems: 1) it managed the migration of Mexicans into the United States, and 2) solved the U.S labor shortage due to the number of working-age men fighting in World War II.²⁴² However, despite being in the country lawfully, Mexican workers under the Bracero Program still suffered from wage-theft and other issues, such as poor living conditions and discrimination.²⁴³

The Deferred Action for Childhood Arrivals (DACA) is a more recent example of how immigration reform has a direct impact on the labor field.²⁴⁴ Approximately 20% of DACA recipients work in health care and education—two industries already suffering from a labor shortage.²⁴⁵ As a result, DACA recipients have made large contributions to the Social Security and Medicare fund.²⁴⁶

In both the Bracero and DACA programs, immigration laws sought to protect immigrants, which ultimately had a positive effect on the labor market.²⁴⁷ However, temporary programs like DACA have proven to be ineffective in light of the fact that they can easily be revoked, displacing any positive impact the program may have had.²⁴⁸

242. *Id.* at 83–84

243. *Id.* at 84, n.12 (blaming exploitation on the lack of government oversight over employers).

244. Nicholson, *supra* note 127 (summarizing the economic benefits of DACA, including large sums of contributions to the Social Security and Medicare fund from income).

245. Noam Scheiber & Rachel Abrams, *What Older Americans Stand to Lose if 'Dreamers' Are Deported*, N.Y. TIMES (Sept. 6, 2017), <https://www.nytimes.com/2017/09/06/business/economy/daca-dreamers-home-health-care.html> [<https://nyti.ms/2xbo9fW>].

246. Jose Magaña-Salgado, *Money on the Table: The Economic Cost of Ending DACA*, IMMIGRANT LEGAL RESOURCE CTR. 6-7 (Dec. 2016), <https://www.ilrc.org/report-daca-economic-cost> [<https://perma.cc/HMT3-QP5R>] (calculating DACA recipients' contributions to the Social Security and Medicare funds).

247. See Francisc Ortega, *The Economic Gains from Legalizing DREAMers*, ECONOFACT (Jan. 23, 2018), <http://econofact.org/the-economic-gains-from-legalizing-dreamers> [<https://perma.cc/2H2L-Q3HB>] (stating the DACA and Bracero programs resulted in lower unemployment rates and, moreover, had fewer negative effects on the wages or employment opportunities of native-born workers).

248. See VIVIAN S. CHU & TODD GARVEY, CONG. RES. SERV. EXECUTIVE ORDERS: ISSUANCE, MODIFICATION, AND REVOCATION 7–8 (2014) https://digitalcommons.ilr.cornell.edu/cgi/viewcontent.cgi?article=2271&context=key_workplace (detailing various revocations of past presidential executive orders by sitting presidents); see also Ike Brannon & Logan Albright, *The Economic and Fiscal Impact of Repealing DACA*, CATO INST. (Jan. 18, 2017, 3:00 PM), <https://www.cato.org/blog/economic-fiscal-impact-repealing-daca> [<https://perma.cc/N7VV-5P4G>] (estimating a \$60 billion cost to deport existing DACA recipients over the next ten years, in addition to a loss of \$280 billion in economic growth over the same time period).

While many claim the nation was on the verge of comprehensive immigration reform for undocumented immigrants living in the United States in 2001, the terrorist attack on September 11, 2001 left the political climate drastically off balance.²⁴⁹ Immigration reform was the last thing Americans considered safe in post-September 11th era.²⁵⁰ Those opposing immigration reform argued that opening legal immigration would make it easier for terrorists to repeat similar attacks.²⁵¹ Current legislation signaling a return to restrictive immigration policy embodies an overt “Hispanophobia.”²⁵² Such bias was on display in rhetoric deployed by Republican candidates during the 2016 presidential campaign.²⁵³

B. *Permanent Legalization of Undocumented Workers and Enforcement of Labor Laws*

Temporary programs that do not offer secure legal status to Texas’s workers have thus far failed. Anti-immigrant initiatives, such as S.B. 4 calling for mass deportation of undocumented immigrants only serve to threaten and target low-income undocumented workers. The solution to protecting both the undocumented and low-income community is a collaboration between both immigration law and labor law reform.²⁵⁴ Activists have proposed comprehensive immigration reform and more efficient labor enforcement.²⁵⁵ But, to protect immigrant workers from wage-theft, the solution must prohibit employers from threatening their

249. Laque, *supra* note 28, at 29 (estimating that in the first half of 2007, over 1,400 state bills were filed on immigration issues alone; virtually none of which treated immigration issues from terroristic concerns).

250. *See id.* at 32 (suggesting the 9/11 terrorist attack “blurred the lines between immigration and terrorism”).

251. *See id.* (“Since 9/11, policies regarding terrorism have misappropriated immigration laws to promote anti-terrorism goals. As a result, immigration policy has lost its independent policy agenda.”)

252. Nill, *supra* note 92, at 43 (explaining that Hispanophobia is the fear of Latinos and Latin culture, and is easily utilized to generate opposition of immigration because of how closely Latin culture is intertwined with immigration to the United States).

253. *See* Zahra Barnes, *Trump’s Office for Victims of Crime by Immigrants Ignores a Key Fact*, SELF (Mar. 6, 2017), <https://www.self.com/story/trump-immigration-crime-voice> [<https://perma.cc/R9BN-LHUY>] (quoting then presidential candidate Donald Trump: “when Mexico sends its people, they’re not sending their best They’re bringing drugs. They’re bringing crime. They’re rapists.”).

254. Fine & Lyon, *supra* note 20, at 446.

255. *Id.* at 444–45.

workers with deportation by providing a permanent road towards legalization of undocumented workers. Out of fear of deportation, employees will not report wage-theft claims thereby hindering the benefit of increasing the number of investigators, the amount in penalties employers could face, and the number of jurisdictions willing to enforce the investigators' findings and maximum penalties. Additionally, anti-immigration laws facilitating deportation further limit the benefit of any such labor reform.

One of the most recent attempts to strengthen labor laws was the proposed 2017 Wage Theft Prevention and Wage Recovery Act.²⁵⁶ The proposed legislation addresses three important barriers preventing workers from recovering wages: the bill 1) amends the FLSA test by doubling the amount awarded for unpaid wages and overtime; 2) directs the DOL to refer cases involving certain offenders to the Department of Justice for criminal prosecution; and 3) begins a new fund through the WHD that awards grants to eligible entities that assist in enforcing the wage and hour laws.²⁵⁷ The problem with this Act is that it still fails to shield the most vulnerable population from employer retaliation: undocumented immigrants.²⁵⁸ The Act increases a penalty rate for a rarely-employed punishment,²⁵⁹ expects the DOJ will punish a crime rarely prosecuted,²⁶⁰ and distributes funding to entities undocumented immigrants are afraid to seek refuge from out of fear of deportation.

An earlier attempt to protect immigrant workers from wage-theft was the Protect Our Workers from Exploitation and Retaliation Act (POWER Act), introduced in 2011.²⁶¹ The POWER Act aimed to protect immigrant workers from reprisals of deportation in the event they chose to report a labor law violation.²⁶² However, the POWER Act fails to

256. Wage Theft Prevention and Wage Recovery Act, H.R. 3467, 115th Cong. (2017).

257. *Id.*; see also Fine & Lyon, *supra* note 20, at 445.

258. Fine & Lyon, *supra* note 20, at 436.

259. *E.g.* Ross, *supra* note 19, at 152 (quoting TWC investigator that acknowledged that their policy avoided imposing penalties even when the employer demonstrated they committed wage-theft in bad faith).

260. *See* Verga, *supra* note 24, at 292 (noting that one of the hardships prosecutors and law enforcement face is not having proper training in investigating wage theft crimes).

261. Protect Our Workers from Exploitation and Retaliation Act, H.R. 2169, 112th Cong. (2011).

262. *Id.*

address many of the issues closely related to wage-theft.²⁶³ For example, the POWER Act does not address a workers' lack of knowledge of their right to be paid, earn a minimum wage, earn overtime, and for some, earn a specific rate.²⁶⁴ Returning to our example, if Rosa were to demand payment and her employer responded by threatening to call ICE, Rosa would risk deportation when first filing her wage claim, and only after her employer retaliates will the POWER Act step in to provide her protection, assuming she even qualifies.²⁶⁵

Each of these solutions are one-sided.²⁶⁶ They reform labor laws while proposing base-level protection to undocumented workers despite the fact that those most vulnerable to wage-theft are undocumented.²⁶⁷ The solution to wage-theft among unauthorized workers therefore must include comprehensive immigration reform.²⁶⁸ Without immigration reform that creates a path to legal status, any attempt at labor reform will still have to overcome the problem of enforcement.²⁶⁹

V. CONCLUSION

Supporters of S.B. 4 claim their goal is to reduce crime by broadening the local law enforcement's ability to enforce Federal immigration laws.²⁷⁰ But many, including local law enforcement, do not believe S.B. 4 will make Texas safer.²⁷¹ Ultimately, laws, such as S.B. 4, make it easier for employers to commit wage-theft crimes and misclassification

263. *See id.* (omitting content that would address overarching concerns associated with combating perpetual wage-theft).

264. *See id.* (failing to provide any language addressing the concerns described).

265. *Id.* § 2(b) (listing requirements for application of temporary protection provided by the Secretary of Homeland Security).

266. *See Verga, supra* note 24, at 286–88 (describing the drawbacks of the many available, albeit one-sided, solutions to combat wage-theft).

267. *See, e.g.* Arjun Sethi & Vijay Das, *Protect Undocumented Workers Who Fight Abusive Employers*, AL JAZEERA (June 12, 2015), <http://america.aljazeera.com/opinions/2015/6/protect-undocumented-workers-who-fight-abusive-employers.html> [<https://perma.cc/5RZG-NMWB>] (noting that prior immigration bills were ineffective and ultimately created a second-class workforce of exploited workers).

268. Matthew Fritz-Mauer, *Lofty Laws, Broken Promises: Wage Theft & the Degradation of Low-Wage Workers*, 20 EMPL. RTS. & EMPLOY. POL'Y J. 71, 127 (2016) (arguing that the goals of the anti-wage-theft movement can be reached by laws providing worker empowerment).

269. Verga, *supra* note 24, at 286.

270. *City of El Cenizo v. Texas*, 264 F.Supp.3d 744, 756 (W.D. Tex. 2017).

271. Limón & Wilonsky, *supra* note 8.

because it contributes to undocumented immigrants' fear of deportation and mistrust in local law enforcement.²⁷² Although employers can be arrested for wage-theft, only a handful of employers are ever indicted.²⁷³ As a result, *all* workers in low-income occupations are at risk of becoming victims of wage-theft because employers have little incentive to abide by labor laws that are rarely enforced.²⁷⁴

Success in recovering wages by filing a wage claim with the TWC or DOL is minimal.²⁷⁵ These agencies have been largely unsuccessful because 1) workers do not know they exist, and 2) the lack of resources within the agencies themselves.²⁷⁶ The first factor makes it easy for employers to take advantage of their employees. The second factor takes away any incentive for employers to self-correct since penalties are not being enforced.

Undocumented workers are legally entitled to the same wage protections as documented workers.²⁷⁷ Yet, undocumented workers are more likely to suffer from wage-theft because employers use the threat of deportation as a method of retaliation to avoid paying wages owed. Although undocumented workers are the most vulnerable to wage-theft and other workplace violations, *all* workers run an increased risk of suffering from these violations. Lawful workers are facing some of the same obstacles undocumented workers are facing, including hazardous working conditions, poverty-level wages, lack of training, and dead-end jobs without benefits.

Labor agencies have tried to reconcile the disconnect between immigration laws and labor laws by extending protection to immigrant

272. PRICE ET AL., *supra* note 23, at 3.

273. Fritz-Mauer, *supra* note 268, at 120.

274. See Kriston Capps, *Texas Cities Haul the State to Court Over Immigration*, CITY LAB (Jun. 26, 2017), <https://www.citylab.com/equity/2017/06/texas-cities-take-the-state-to-court-over-anti-sanctuary-law-sb4/531684/> [<https://perma.cc/8AK3-8RUD>] (noting that S.B. 4 will exacerbate workplace problems such as wage-theft and physical danger).

275. Ross, *supra* note 19, at 151 (illustrating a time frame of the TWC Wage Claim Process, and warning that even if a claim goes to the Collection Department, the TWC cannot guarantee any funds will actually be recovered).

276. PRICE ET AL., *supra* note 23, at 29.

277. See WAGE & HOUR DIV., *Fact Sheet #48*, *supra* note 21 (clarifying the DOL will enforce the Fair Labor Standards Act (FLSA), which requires employers to pay covered employees the federal minimum wage and time and a half for overtime hours, despite the employees' immigration status); see also TEX. L. HELP, *supra* note 21 (noting that undocumented workers are covered by the Texas Payday Law).

workers through policies and legislation. However, current labor laws are not protecting undocumented workers. Simply put: employers of low-wage occupations lack the incentive to create “good” jobs as current labor legislation is not being enforced.

Arizona is an example of how closely immigration laws can influence the workplace.²⁷⁸ Arizona’s LAWA and S.B. 1070 serves as an example of how anti-immigrant legislation that isolates entire sectors of the population fails to benefit anyone.²⁷⁹ LAWA and S.B. 1070 manipulated the labor market and created devastating results to Arizona’s economy.²⁸⁰ Economic motive is a prime reason undocumented immigrants cross the border and employers use this to their advantage when hiring for low-wage occupations.²⁸¹ After risking their lives and financially investing in journeying to the United States, undocumented workers would rather have their right to earned wages be violated than risk deportation.²⁸² Legislation should not allow employers who are motivated by their own economic interests to escape liability for such extortion. Revocable and temporary efforts to simultaneously address immigration and labor issues are ineffective and not sustainable. The solution to protecting both the undocumented community and the documented community in low-income occupations is a permanent reform effort addressing both immigration law and labor law.²⁸³ Only by removing this vulnerability will working conditions improve for all low-wage employees.

278. Nowrasteh, *The Economic Case Against Arizona’s Immigration Laws*, *supra* note 109, at 4 (explaining that due to the high number of immigrant workers in the agriculture and construction industries, these industries suffered the most from anti-immigrant laws).

279. *Id.* at 9.

280. *Id.*

281. See Massey & Espinosa, *supra* note 182, at 957 (identifying income-security as one of the three leading forces in promoting Mexican migration).

282. See Bryce Covert, *Houston is Being Rebuilt on a Foundation of Wage Theft*; IN THESE TIMES (Jan. 22, 2018), <http://inthesetimes.com/article/20815/the-exploitation-after-the-storm> [<https://perma.cc/KU79-KKDH>] (describing the time a day laborer in Houston “was driven to a job site far away and left stranded there without being paid. When he tracked down the man who hired him, he was shot in the arm and stomach. He survived—and is still showing up looking for work.”).

283. Fine & Lyon, *supra* note 20, at 444–45.