

RPTS MCKENZIE

DCMN BURRELL

MARKUP OF H.R. 2885, THE LEGAL
WORKFORCE ACT; H.R. 2847, THE
AMERICAN AGRICULTURE SPECIALTY ACT;
H.J.RES. 70; AND H.R. 2192, NATIONAL
GUARD AND RESERVIST DEBT RELIEF
EXTENSION ACT OF 2011

Wednesday, September 21, 2011

House of Representatives,
Committee on the Judiciary,
Washington, D.C.

The committee met, pursuant to call, at 10:15 a.m., in Room 2141,
Rayburn House Office Building, Hon. Lamar Smith [chairman of the
committee] presiding.

Present: Representatives Smith, Sensenbrenner, Coble,
Gallegly, Goodlatte, Lungren, Chabot, Issa, Pence, Forbes, King,
Franks, Gohmert, Jordan, Poe, Chaffetz, Griffin, Marino, Gowdy, Ross,

Adams, Quayle, Conyers, Berman, Nadler, Scott, Watt, Lofgren, Jackson Lee, Waters, Cohen, Johnson, Pierluisi, Quidley, Chu, Deutch, and Sanchez.

Staff Present: Sean McLaughlin, Chief of Staff; Allison Halatei, Deputy Chief of Staff/Parliamentarian; Sarah Kish, Clerk; Andrea Loving, Counsel; Perry Apelbaum, Minority Staff Director; and David Shahoulian, Counsel.

Chairman Smith. The Judiciary Committee will come to order. Without objection, the chair is authorized to declare recesses of the committee at any time. The clerk will call the roll to establish a quorum.

The Clerk. Mr. Chairman?

Chairman Smith. Present.

The Clerk. Mr. Sensenbrenner?

[No response.]

The Clerk. Mr. Coble?

[No response.]

The Clerk. Mr. Gallegly?

Mr. Gallegly. Here.

The Clerk. Mr. Goodlatte?

[No response.]

The Clerk. Mr. Lungren?

Mr. Lungren. Here.

The Clerk. Mr. Chabot?

[No response.]

The Clerk. Mr. Issa?

[No response.]

The Clerk. Mr. Pence?

[No response.]

The Clerk. Mr. Forbes?

[No response.]

The Clerk. Mr. King?

[No response.]

The Clerk. Mr. Franks?

Mr. Franks. Here.

The Clerk. Mr. Gohmert?

[No response.]

The Clerk. Mr. Jordan?

[No response.]

The Clerk. Mr. Poe?

[No response.]

The Clerk. Mr. Chaffetz?

Mr. Chaffetz. Present.

The Clerk. Mr. Griffin?

[No response.]

The Clerk. Mr. Marino?

[No response.]

The Clerk. Mr. Gowdy?

[No response.]

The Clerk. Mr. Ross?

Mr. Ross. Here.

The Clerk. Mrs. Adams?

[No response.]

The Clerk. Mr. Quayle?

[No response.]

The Clerk. Mr. Conyers?

[No response.]

The Clerk. Mr. Berman?

[No response.]

The Clerk. Mr. Nadler?

Mr. Nadler. Here.

The Clerk. Mr. Scott?

[No response.]

The Clerk. Mr. Watt?

[No response.]

The Clerk. Ms. Lofgren?

[No response.]

The Clerk. Ms. Jackson Lee?

[No response.]

The Clerk. Ms. Waters?

[No response.]

The Clerk. Mr. Cohen?

[No response.]

The Clerk. Mr. Johnson?

[No response.]

The Clerk. Mr. Pierluisi?

[No response.]

The Clerk. Mr. Quigley?

Mr. Quigley. Here.

The Clerk. Ms. Chu?

Ms. Chu. Here.

The Clerk. Mr. Deutch?

[No response.]

The Clerk. Ms. Sanchez?

[No response.]

The Clerk. Ms. Lofgren?

Ms. Lofgren. Here.

The Clerk. Mr. Watt?

[No response.]

The Clerk. Mr. Scott?

Mr. Scott. No. Just practicing.

The Clerk. Mr. Griffin?

Mr. Griffin. Here.

The Clerk. Mr. Forbes?

Mr. Forbes. Present.

The Clerk. Mr. King?

Mr. King. Here.

The Clerk. Mr. Gohmert?

Mr. Gohmert. Mostly here.

The Clerk. Mr. Goodlatte?

Mr. Goodlatte. Present.

The Clerk. Mr. Conyers?

Mr. Conyers. Present.

Chairman Smith. The quorum is present. So we will proceed.

Pursuant to notice, I now call up H.R. 2885, the Legal Workforce Act, for purposes of markup. And the clerk will report the bill.

The Clerk. H.R. 2885, to amend the Immigration and Nationality

Act.

[The information follows:]

***** INSERT 1-1 *****

Chairman Smith. Without objection, the bill will be considered as read. I just want to tell members and those who are in the room that last week we had opening statements on this bill, and today is a continuation of the markup that began then. We have a number of amendments. It is probably going to be a long day. And what we have done is to cluster amendments by subject matter. We hope that that will make for a little bit more of an efficient process and will be a little bit more understandable to those who are listening.

I will recognize myself for the first amendment. And the clerk will report the amendment.

The Clerk. Amendment to H.R. 2885 offered by Mr. Smith of Texas.
Page 2, beginning on line 16, strike on the date of --

[The amendment offered by Chair Smith follows:]

***** INSERT 1-2 *****

Chairman Smith. Without objection, the amendment will be considered as read. I recognize myself.

This amendment basically just corrects a drafting error. The amendment confirms the timing of attestation procedures; namely, that an employer must attest that they checked the required identity and work authorization documents to the rest of the bill's requirements. It clarifies that employers are allowed to begin the document check procedures once they offer an individual a job.

The Legal Workforce Act makes several commonsense changes to current employment eligibility authorization procedures. For instance, the bill allows an employer to use E-Verify to check work eligibility starting at the time the offer of employment is made. Current law requires that an employer actually hire an individual before the employer can check that they are authorized to work in the U.S. Such a post-hiring requirement forces employers to invest training resources in and pay a salary to an employee who is not work-authorized and will have to be released. This is unfair to employers, especially small businesses.

The amendment simply corrects the text to make the bill consistent. It ensures that one of the goals of H.R. 2885, to streamline the employment eligibility check process, is met.

I urge my colleagues to support it. Are there members who wish to be heard on this amendment?

The gentlewoman from California Ms. Lofgren.

Ms. Lofgren. Mr. Chairman, I move to strike the last word.

Chairman Smith. The gentlewoman is recognized for 5 minutes.

Ms. Lofgren. Mr. Chairman, this amendment is being offered as a technical correction to fix inconsistent language in the bill regarding the verification system to be used before the date of hire; as an example, to prescreen job applicants. However, the amendment would come down on the more objectionable side of that inconsistency. The amendment would make it even clearer that employers can prescreen job applicants before they hire.

Now allowing prescreening will increase discrimination. Although it is often ignored, current law prohibits employers from using E-Verify to prescreen job applicants before the date of hire. The purpose of this protection is to ensure that U.S. citizens and other authorized workers are not unfairly penalized for tentative nonconfirmations, called TNCs in the biz, resulting from system error. It particularly protects naturalized United States citizens who are more likely than others to receive TNCs from discrimination and wrongfully losing work opportunities.

This amendment would eliminate this protection, effectively disadvantaging citizens who fall victim to system error. Citizens who were cleared by the system can begin working and collecting paychecks right away, while those who receive erroneous TNCs are left in the cold while attempting to fix their records. Because error rates are much higher among foreign-born naturalized citizens, prescreening effectively requires employers to discriminate among U.S. citizens.

Prescreening unfairly shifts the burden of system error to

employees because the prohibition on prescreening currently ensures that system error does not unfairly deprive an American citizen of earning a living. Under the current system, a citizen who receives an erroneous TNC can continue to work and earn a paycheck while they address the error. But under this amendment, such a citizen could potentially be prevented from earning a living for months while attempting to fix any errors. The amendment, thereby, passes the cost of system error from the employer to the employee.

Prescreening will also lead to job losses. The desire to use E-Verify to prescreen job applicants is strong, even though illegal under current law. In 2009, Westat Corporation reported that many employers violate the current voluntary E-Verify rules by prescreening job applicants. And noncompliance with program rules would most certainly increase if all employers were required to use the system. According to Westat, employers in Arizona are generally less compliant with E-Verify procedures than E-Verify employers outside of Arizona. This is probably because unlike most E-Verify users, most Arizona employers did not volunteer to use the program.

In 2009, an independent Westat study commissioned by DHS found that 42 percent of workers reported that they weren't informed by their employers of a tentative nonconfirmation, and a survey of 376 workers in Arizona found that 33.5 percent, or a third, of them were fired without being notified of the TNC. Because failure to contest the TNC leads to a final nonconfirmation, employers who don't provide notice effectively eliminate the employee's ability to correct mistaken

records. This can lead to rescinded offers of employment and greater unemployment among authorized workers and American citizens.

The reality is, this bill will result in lost job opportunities for many Americans. And according to the 2009 Westat study, nearly half of the workers who were not offered a job because they were illegally prescreened were unable to find a new job for 2 months or longer, quite possibly because the error in the database continued and continued without correction because the American didn't know about the error.

The chairman calls this our best job bill. That is only if your goal is to make it harder for American workers to get back to work.

I urge my colleagues to oppose the amendment. I yield back.

Chairman Smith. Thank you, Ms. Lofgren. Are there other members who wish to be heard on the amendment?

If not, the question is on the amendment. All in favor say aye. Aye. Opposed say no.

Ms. Lofgren. No.

Chairman Smith. In the opinion of the chair, the ayes have it.

Ms. Lofgren. I would like a recorded vote, Mr. Chairman.

Chairman Smith. A recorded vote has been requested. And the clerk will call the roll.

The Clerk. Mr. Chairman.

Chairman Smith. Aye.

The Clerk. Mr. Smith votes aye.

Mr. Sensenbrenner?

[No response.]

The Clerk. Mr. Coble?

[No response.]

The Clerk. Mr. Gallegly?

Mr. Gallegly. Aye.

The Clerk. Mr. Gallegly votes aye.

Mr. Goodlatte?

[No response.]

The Clerk. Mr. Lungren?

Mr. Lungren. Aye.

The Clerk. Mr. Lungren votes aye.

Mr. Chabot?

Mr. Chabot. Aye.

The Clerk. Mr. Chabot votes aye.

Mr. Issa?

[No response.]

The Clerk. Mr. Pence?

[No response.]

The Clerk. Mr. Forbes?

Mr. Forbes. Aye.

The Clerk. Mr. Forbes votes aye.

Mr. King?

Mr. King. Aye.

The Clerk. Mr. King votes aye.

Mr. Franks?

Mr. Franks. Aye.

The Clerk. Mr. Franks votes aye.

Mr. Gohmert?

[No response.]

The Clerk. Mr. Jordan?

Mr. Jordan. Aye.

The Clerk. Mr. Jordan votes aye.

Mr. Poe?

[No response.]

The Clerk. Mr. Chaffetz?

Mr. Chaffetz. Aye.

The Clerk. Mr. Chaffetz votes aye.

The Clerk. Mr. Griffin?

Mr. Griffin. Aye.

The Clerk. Mr. Griffin votes aye.

Mr. Marino?

[No response.]

The Clerk. Mr. Gowdy?

[No response.]

The Clerk. Mr. Ross?

Mr. Ross. Aye.

The Clerk. Mr. Ross votes aye.

Mrs. Adams?

[No response.]

The Clerk. Mr. Quayle?

[No response.]

The Clerk. Mr. Conyers?

Mr. Conyers. Aye

The Clerk. Mr. Conyers votes aye.

Mr. Berman?

Mr. Berman. No.

The Clerk. Mr. Berman votes no.

Mr. Nadler?

Mr. Nadler. No.

The Clerk. Mr. Nadler votes no.

Mr. Scott?

Mr. Scott. No.

The Clerk. Mr. Scott votes no.

Mr. Watt?

[No response.]

The Clerk. Ms. Lofgren?

Ms. Lofgren. No.

The Clerk. Ms. Lofgren votes no.

Ms. Jackson Lee?

[No response.]

The Clerk. Ms. Waters?

[No response.]

The Clerk. Mr. Cohen?

[No response.]

The Clerk. Mr. Johnson?

[No response.]

The Clerk. Mr. Pierluisi?

[No response.]

The Clerk. Mr. Quigley?

Mr. Quigley. No.

The Clerk. Mr. Quigley votes no.

Ms. Chu?

Ms. Chu. No.

The Clerk. Ms. Chu votes no.

Mr. Deutch?

[No response.]

The Clerk. Ms. Sanchez?

[No response.]

Chairman Smith. The gentleman from North Carolina.

The Clerk. Mr. Coble votes aye.

Mr. Gohmert?

Mr. Gohmert. Aye.

The Clerk. Mr. Gohmert votes aye.

Mr. Goodlatte?

Mr. Goodlatte. Aye.

The Clerk. Mr. Goodlatte votes aye.

Chairman Smith. One more. The gentleman from Florida.

Mr. Deutch. No.

The Clerk. Mr. Deutch votes no.

Ms. Waters?

Ms. Waters. No.

The Clerk. Ms. Waters votes no.

Chairman Smith. The clerk will report.

The Clerk. Mr. Chairman, 15 members voted aye; 8 members voted nay.

Chairman Smith. The majority voting in favor of the amendment, the amendment is agreed to.

Are there any other amendments?

Ms. Lofgren. Yes, Mr. Chairman. We had previously agreed to cluster our amendments, and we certainly continue to agree with that. But because some of our members are not present, we would like to move to the agriculture cluster at this point.

Chairman Smith. Let me consult with the ranking member. The order of the cluster was agreed to by the minority yesterday, and that was done for intentional reasons. We acceded to a lot of the requests by the minority to put the amendments in this.

Ms. Lofgren. Well, then we can -- as far as I am concerned, I thought we were clustering to accommodate the majority.

Chairman Smith. You should have a list of the amendments in front of you.

Ms. Lofgren. Right. But Ms. Jackson Lee is not present, and that is why we would like to go to --

Chairman Smith. Your amendment No. 140 is the next one.

Ms. Lofgren. I intend to withhold that temporarily. I am not sure whether I will offer that or not.

Chairman Smith. We will come back to Ms. Jackson Lee and move to Mr. Deutch, and we will recognize her, even if she is not here, when she arrives. The gentleman from Florida is recognized to offer his amendment.

Mr. Deutch. Thank you, Mr. Chairman. We are going to turn I believe to amendment 16 at the desk.

Chairman Smith. Does the gentleman from Florida wish to offer amendment 28 or another amendment?

Mr. Deutch. Mr. Chairman, I believe it is marked as number 4 on the roster. It is amendment No. 28.

Chairman Smith. The clerk will report amendment No. 28 by Mr. Deutch.

The Clerk. Amendment to H.R. 2885 offered by Mr. Deutch. Page 47, beginning on line one, strike "no class action may be brought under this paragraph."

Chairman Smith. The gentleman from Florida is recognized to speak in favor of his amendment.

Mr. Deutch. Thank you. Mr. Chairman, my amendment strikes the provisions in section 3(d)(10) that prohibits class actions from being brought by workers who unjustly lose their jobs due to an error in the E-Verify system. The provision would eliminate any legal recourse for thousands of workers who lose their jobs due to database errors and will remove the ability of courts to effectively and efficiently resolve cases involving large numbers of workers who may be harmed by similar systemic E-Verify errors.

Class actions, Mr. Chairman, are an essential means by which courts can effectively address claims that are systemic in nature or impact a large number of people in a similar manner. Cases that would be too expensive to litigate on an individual case-by-case basis are often raised as class actions. Accordingly, class actions enable individuals who are not in a position financially to bring their own lawsuit to have a court hear and adjudicate their claim as part of a group of people similarly impacted.

Class actions also enable a court to efficiently administer their dockets to resolve cases involving a large number of people who are being harmed by a similar practice rather than having to resolve numerous individual cases. By prohibiting class actions, the Legal Workforce Act creates a barrier that prevents people from having their claims heard and resolved by a court.

It also prevents our already overburdened Federal courts from consolidating into one case numerous individual cases claiming a similar harm and providing adequate relief.

In fact, it is well known that large groups of people are erroneously identified as illegal residents in a similar manner by E-Verify. For example, women who get married and change or hyphenate their last name are often identified incorrectly in the system. People who legally come to this country may enter important dates, such as date of birth, on employment forms in a different order than is required by E-Verify. And as is customarily done in other countries, they may enter the birth dates or other personal information by day, month, year,

rather than month, day, year. Courts could best resolve these types of cases by consolidating them into one case.

Moreover, the bill provides an exclusive recourse for a worker who unjustly loses his job due to an E-Verify error. These individual workers can only seek lost wages against the Federal Government under the Federal Tort Claims Act, yet the FTCA has a cap on fees for attorneys that successfully recover lost wages for an individual worker who loses their job with an E-Verify error. Under the Tort Claims Act, attorney fees limited to 20 percent of any administrative settlement and 25 percent of any judgment or settlement after the case has been filed in court which creates another barrier for grieved individuals to receive back pay for losing their job from an E-Verify error, It makes it financially impractical for an attorney to represent an aggrieved low-income individual against the Federal Government in a case to recover lost wages. These cases will have to be filed in Federal court which will take months and years to resolve. In these cases, a class action may be the only way for a group of individuals to receive legal representation and have their case heard in Federal court for wages they unjustly lost from an E-Verify error.

Because a class action could be the best method for individual workers who lost their job because of an E-Verify error, this permits a court to consolidate claims into one case for purposes of efficiency.

And I urge support of this amendment, Mr. Chairman. I yield back the balance of my time.

Chairman Smith. Thank you Mr. Deutch. The gentleman from

California, Mr. Gallegly, is recognized.

Mr. Gallegly. Thank you, Mr. Chairman. I oppose this amendment. Pursuant to Federal Rules of Civil Procedure, class actions may be brought where the class is so large as to make individual suits impractical and there is a legal and factual claim in common among the class members. Terminations on grounds of employment eligibility are fact-specific. There is absolutely no justification for class actions, as each individual who alleges they were wrongfully terminated, based upon the system being used for verification processes, had unique circumstances surrounding the determination.

Further, the bill provides numerous remedies for individuals who may be harmed by employers who utilize the system. First and foremost, employers are subject to penalties if they misuse the system. Additionally, if an individual was harmed on account of use of the system, the Legal Workforce Act allows individuals to file suit via the Federal Tort Claims Act. In addition, advocates for illegal immigration in activist courts, such as the Ninth Circuit, will be tempted to use this class action to shut down E-Verify through injunction. They will use this very argument. They will use every argument they can think up to prevent the rollout of the E-Verify requirement because they know E-Verify will prevent illegal immigrants from getting jobs.

Class actions are simply not appropriate under these circumstances, and I urge all my colleagues to oppose this amendment. And I yield back.

Mr. Nadler. Mr. Chairman?

Ms. Chu. Mr. Chairman?

Chairman Smith. Would the gentleman yield to the ranking member?

Mr. Gallegly. I did yield back. But if it is appropriate, I will yield to the ranking member.

Mr. Conyers. Just to ask you, do you support workers' rights, as a general principle?

Mr. Gallegly. Under the general principle, of course; but not for the purpose of being dilatory.

Mr. Conyers. Do you support collective bargaining?

Mr. Gallegly. If it is not dilatory.

Mr. Conyers. All right. Thank you.

Chairman Smith. The chairman yields back his time. Are there other members who wish to speak? The gentleman from New York, Mr. Nadler, is recognized.

Mr. Nadler. Thank you, Mr. Chairman. The gentleman from California said that E-Verify employment decisions are fact-specific and therefore not suitable for class actions, and also activist courts might make wrong decisions and, therefore, we shouldn't allow the courts to make decisions.

The truth of the matter is, many of these cases will be fact-specific and not suitable for class actions, and there will be no class actions on them or the courts will throw out and decline to certify the class. The courts, you may have noticed, have become very, very strict on certifying classes. But it is conceivable, certainly,

that some big business or perhaps government will make a systemic error in the process, an error that will hurt thousands of legal people, that will improperly say that certain people, who are American citizens or legal immigrants, will get caught in the system when they shouldn't. And it is conceivable that that will happen. In such a circumstance, it is a heck of a lot better to have one class action suit to correct the error than to have 5,000 individual suits and tie up the court's time and the government's time and the employer's time. That is the whole rationale for any class action.

Secondly, you may not have 5,000 individual suits because none of the -- or very few of the people might be able to afford the lawsuit. That is, again, why you have a class action. It is entirely possible that most -- maybe all -- problems will be fact-specific and not suitable for class actions, in which case the question won't arise. But it is also possible that occasionally there would be a systemic error by a major corporation -- in a minor one, you wouldn't get a class action -- but by a major corporation or by government that should have a class action to resolve it. So to simply choose this area and say no class actions goes against our general law that permits class actions; albeit, as I said, the courts have been very strict recently -- perhaps overly strict, but that is a matter of judgment -- in certifying classes.

So I would hope that the amendment would pass because it would save employers and government a lot of money, if it were necessary. If it were not necessary, it is irrelevant. Either the amendment is

irrelevant and, therefore, harmless or it is very useful. And therefore, I urge its passage. I will yield.

Mr. Gallegly. May I respond? Clearly we have vetted this process very carefully, and we have the statistical evidence that E-Verify is clearly 99.9 percent fail-safe. So I don't know where you pull the 5,000 out of the sky.

Mr. Nadler. Reclaiming my time, I made up the number. I just said -- and I thought I made it clear that I made up the number. I don't know if E-Verify is 99.9 percent or only 97.6 percent. I am always distrustful of such numbers. But even if it is 99 percent, there is that 1 percent or 0.1 percent and that ought to be -- I mean, no human system is fail-safe or foolproof. I give you Fukushima. I give you Three Mile Island. I give you Chernobyl, all of which weren't supposed to happen because nuclear power was 100 percent safe, we were told. Nothing that human beings do is 100 percent correct. Therefore, an error will be made at some point. That error may be fact-specific, in which case class action is not necessary. It may be systemic in which case a class action can help a situation. So why prohibit it altogether?

Mr. Gallegly. The issue is that the argument for a class action is because there are going to be large volumes --

Mr. Nadler. Reclaiming my time, the argument is that there are going to be large volumes. The argument here is, there might be a large volume in one error or in two errors. Nobody is saying that class actions here will be very numerous. But the few that are necessary

will save the court's time, will save the government the expense, will save the corporations expense, and will enable American citizens who may, as a group, be unjustly told they can't work because of some systemic error, will give them the ability through one lawsuit rather than a few hundred or thousands or whatever it may be to get relief. If such an error doesn't occur, the situation won't occur at all, and we don't need the amendment. I don't see why the amendment -- as I said, if really there is never such a necessity, the amendment is irrelevant. But if there is such a necessity, then it is very necessary. So there is no case in which it would be harmful.

Therefore, we urge you pass the amendment. I yield back.

Chairman Smith. Are there other members who wish to be heard? The gentleman from Iowa, Mr. King.

Mr. King. Mr. Chairman, I move to strike the last word.

Chairman Smith. The gentleman is recognized for 5 minutes.

Mr. King. Thank you, Mr. Chairman. Mr. Chairman, I rise in opposition of the Deutch amendment. And I am encouraged by the language that I read here in this section that -- and for the case of an error of a verification mechanism that the relief will come only through the Federal tort claims and that would be injunctive relief. But the language is encouraging to me that we have the ability -- and I think the necessity -- to craft language that provides liability protection for the utilization of this overall underlying bill.

I just wanted to make that point that there has been some skillful language put in here. I support the language, and I support the Deutch

amendment. And I yield back.

Chairman Smith. Are there other members who wish to be heard?
The gentlewoman from California, Ms. Lofgren.

Ms. Lofgren. I move to strike the last word.

Chairman Smith. The gentlewoman is recognized for 5 minutes.

Ms. Lofgren. I think Mr. Deutch's amendment is very prudent. It is really about whether Americans who erroneously are denied employment have the opportunity to get redress. And there is an argument, how many it is you won't know until you move forward. But the data contained in the 2009 Westat study had a modest 0.5 percent. Well, if you extrapolate that across the workforce in America, that is 770,000 workers, Americans, who will be wrongfully fired because of mandatory E-Verify. I would say that is large enough to be a class, in most cases. It is really a conservative estimate.

When Los Angeles County audited its use of E-Verify for county employees in 2008-2009, it found that the tentative nonconfirmation findings were wrong 95 percent of the time. I mean, that is a stunning situation. So in the bill, the exclusive remedy provided for workers who have wrongfully been denied their opportunity -- Americans who have lost their jobs because of a mistake by the government -- is to seek lost wages through the Federal Tort Claims Act. But we know that when you prohibit all class actions, which is the most efficient way for courts to handle numerous problems of a similar nature, that the Federal Tort Claims Act is going to be a pretty inefficient way to actually receive a remedy.

There is no real due process in this bill. The Federal Tort Claims Act is slow. It is burdensome. It won't provide relief if the workers can't prove that the error resulted from a negligent or wrongful act or omission of any employee of the government. So if the error is on the part of the employer who is private sector, you are out of luck.

So the bottom line is, American citizens -- and if you look at the data, it could be at least 770,000 American citizens who get fired and lose their pay -- are just out of luck, and that is not acceptable. I would note also that it is the variation, depending on whether you are a naturalized citizen or not is very high.

I come from Silicon Valley. And I will say the tech companies are scrupulous about not hiring -- they won't hire anybody who isn't authorized. I mean they go to great lengths. At one point, Intel years ago did an analysis. They said 11 percent of American citizens who popped up as not authorized because they were naturalized citizens. Now they were able to clear that up. But the way this bill is drafted would cause problems for a company that was less scrupulous than Intel is. And unfortunately, that is a lot of them.

I would yield to Mr. Deutch.

Mr. Deutch. I appreciate the gentle lady yielding. I would also point out, while it is troubling to hear the seeming lack of concern for Americans whose jobs will be lost as a result of this E-Verify system, I would like to specifically address this argument that this is fact-specific. It is true that it is fact-specific when a name is

entered incorrectly. Or it is true that it is fact-specific that a hyphenated name may not have been picked up correctly. Yet there could be thousands of people in the same situation. That is exactly why we have class actions available. The fact is that the cost to bring a case in Federal court could be \$10,000. For some of these positions where the pay is only two or three times that, to tell them that they have a remedy simply by going to Federal court and pursuing a claim under the Federal Tort Claims Act, when they were fired, they lost their job for the same reason that hundreds if not thousands of other people lost their jobs doesn't make sense. It is not consistent with our justice system.

And finally, to that end, I would close by saying, if the argument is that it is somehow dilatory, it is somehow dilatory to permit class actions, I would respectfully suggest that what is dilatory is taking out class actions, and what is being delayed in this case would be justice.

I yield back to the gentlelady.

Ms. Lofgren. I yield back the balance of my time.

Chairman Smith. Thank you, Ms. Lofgren. Are there any other members who wish to be heard? If not, the question is on the amendment. All in favor say aye. All opposed say nay.

In the opinion of the chair, the nays have it.

Ms. Lofgren. We would ask for a recorded vote, Mr. Chairman.

Chairman Smith. A recorded vote has been requested, and the clerk will call the roll.

The Clerk. Mr. Chairman.

Chairman Smith. No.

The Clerk. Mr. Smith votes no.

Mr. Sensenbrenner?

Mr. Sensenbrenner. No.

The Clerk. Mr. Sensenbrenner votes no.

Mr. Coble?

[No response.]

The Clerk. Mr. Gallegly?

Mr. Gallegly. No.

The Clerk. Mr. Gallegly votes no.

Mr. Goodlatte?

Mr. Goodlatte. No.

The Clerk. Mr. Goodlatte votes no.

Mr. Lungren?

Mr. Lungren. No.

The Clerk. Mr. Lungren votes no.

Mr. Chabot?

[No response.]

The Clerk. Mr. Issa?

[No response.]

The Clerk. Mr. Pence?

[No response.]

The Clerk. Mr. Forbes?

[No response.]

The Clerk. Mr. King?

Mr. King. No.

The Clerk. Mr. King votes no.

Mr. Franks?

Mr. Franks. No.

The Clerk. Mr. Franks votes no.

Mr. Gohmert?

[No response.]

The Clerk. Mr. Jordan?

Mr. Jordan. No.

The Clerk. Mr. Jordan votes no.

Mr. Poe?

Mr. Poe. No.

The Clerk. Mr. Poe votes no.

Mr. Chaffetz?

Mr. Chaffetz. No.

The Clerk. Mr. Chaffetz votes no.

The Clerk. Mr. Griffin?

Mr. Griffin. No.

The Clerk. Mr. Griffin votes no.

Mr. Marino?

[No response.]

The Clerk. Mr. Gowdy?

[No response.]

The Clerk. Mr. Ross?

Mr. Ross. No.

The Clerk. Mr. Ross votes no.

Mrs. Adams?

[No response.]

The Clerk. Mr. Quayle?

[No response.]

The Clerk. Mr. Conyers?

Mr. Conyers. Aye

The Clerk. Mr. Conyers votes aye.

Mr. Berman?

Mr. Berman. Aye.

The Clerk. Mr. Berman votes aye.

Mr. Nadler?

Mr. Nadler. Aye.

The Clerk. Mr. Nadler votes aye.

Mr. Scott?

Mr. Scott. Aye.

The Clerk. Mr. Scott votes aye.

Mr. Watt?

Mr. Watt. Aye.

The Clerk. Mr. Watt votes aye.

Ms. Lofgren?

Ms. Lofgren. Aye.

The Clerk. Ms. Lofgren votes aye.

Ms. Jackson Lee?

[No response.]

The Clerk. Ms. Waters?

Ms. Waters. Aye.

The Clerk. Ms. Waters votes aye.

Mr. Cohen?

[No response.]

The Clerk. Mr. Johnson?

[No response.]

The Clerk. Mr. Pierluisi?

Mr. Pierluisi. Aye.

The Clerk. Mr. Pierluisi votes aye.

Mr. Quigley?

Mr. Quigley. Aye.

The Clerk. Mr. Quigley votes aye.

Ms. Chu?

Ms. Chu. Aye.

The Clerk. Ms. Chu votes aye.

Mr. Deutch?

Mr. Deutch. Aye.

The Clerk. Mr. Deutch votes aye.

Ms. Sanchez?

Ms. Sanchez. Aye.

The Clerk. Ms. Sanchez votes aye.

Chairman Smith. The gentleman from North Carolina.

Mr. Coble. No.

The Clerk. Mr. Coble votes no.

Chairman Smith. The gentleman from California.

Mr. Issa. No.

The Clerk. Mr. Issa votes no.

Chairman Smith. The gentleman from Ohio.

Mr. Chabot. No.

The Clerk. Mr. Chabot votes no.

Chairman Smith. The gentleman from Virginia.

Mr. Forbes. No.

The Clerk. Mr. Forbes votes no.

Chairman Smith. The gentleman from Pennsylvania.

Mr. Marino. No.

The Clerk. Mr. Marino votes no.

Chairman Smith. The clerk will report.

Mr. Gohmert. I am sorry. I thought I had been recorded. I am told I was not.

The Clerk. Mr. Gohmert.

Mr. Gohmert. No.

The Clerk. Mr. Gohmert votes no.

Mr. Chairman, 12 members voted aye, 18 members voted nay.

Chairman Smith. The majority voted against the amendment. The amendment is not agreed to.

The gentlewoman from California, Ms. Waters, is recognized.

Ms. Waters. Thank you very much. I have an amendment at the desk.

Chairman Smith. The clerk will report the amendment.

Ms. Waters. Number six. It is the Lofgren-Waters amendment.

Chairman Smith. The clerk will report amendment No. 32.

The Clerk. Amendment to H.R. 2885 offered by Ms. Lofgren and Ms. Waters. Page 41, insert after line 3 the following and redesignate succeeding paragraphs accordingly. Five, registration of employers.

Chairman Smith. Without objection, the amendment will be considered as read. The gentlewoman is recognized to explain her amendment.

[The amendment of Ms. Waters follows:]

***** COMMITTEE INSERT *****

Ms. Waters. Thank you very much, Mr. Chairman. I also want to thank Congresswoman Lofgren for her diligent work as ranking member on the Immigration Subcommittee and I am pleased to join her in offering an amendment requiring certification and training of E-Verify users.

Our amendment is a reasonable proposal that could do a lot to reduce job losses from employers' potential use and misuse of mandatory E-Verify. We know Americans and authorized immigrants could lose jobs due to user and database errors. E-Verify currently requires users to complete a tutorial before using the system, but other staff members of the employer can use the system if they simply borrow the user name and password of the person who completed the tutorial.

Lack of training leads to errors. And according to the 2009 Westat Corporation study, 42 percent of employers made data entry mistakes that resulted in erroneous tentative nonconfirmations. Since TNCs often lead to adverse employment actions, lack of training means loss of jobs for American workers.

E-Verify could prevent millions of U.S. workers from getting a job. With 60 million new hires every year, even smaller error rates means hundreds of thousands or millions of U.S. workers will be denied jobs.

Moreover, while current law prohibits employers from using E-Verify to prescreen job applicants, employers frequently violate this rule and are often denied job offers due to TNCs. The Smith bill actually invites prescreening. So it will exacerbate the problem of U.S. workers being denied job opportunities because of database and

user errors. This amendment ensures employer accountability and quality control by requiring that employers are registered and trained. This amendment would also require that they have specific individuals trained to administer the program appropriately.

I, along with many of my colleagues on this side of the aisle, have repeatedly expressed the need for comprehensive immigration reform. We understand that comprehensive immigration reform is the only way we will be able to provide a sensible and fair path to citizenship for legal workers while protecting American workers. Again, comprehensive reform is the only way that we will be able to create an immigration system that is fair, feasible, and protects American workers. A fragmented reform policy that focuses only on E-Verify and deportation yields unintended consequences that will negatively impact American workers.

So I thank you, and I would yield back.

Ms. Lofgren. Would the gentlelady yield?

Ms. Waters. I yield to the gentlelady from California.

Ms. Lofgren. I thank gentlelady for yielding, and I agree with the cosponsor of the amendment. I would just simply add that the amendment, in addition to requiring training in civil rights and privacy, would also require employers to inform employees of the use of the verification system, which is important in that it can only be used for immigration purposes, not for other types of adverse actions.

Now the training and certifying of users is particularly important when it comes to naturalized citizens. Many employers

wrongly assume that foreign-born workers who have errors in their records are undocumented when, in fact, they can be American citizens. And so it is really important to train the employer so that Americans, by choice, people who have come here and have gone through the naturalization process don't become discriminated against in the workplace. Surely we can all agree that that would be a terrible wrong, and this amendment would keep that from happening.

I thank the gentlelady for yielding to me.

Ms. Waters. I yield back the balance of my time.

Chairman Smith. Thank you, Ms. Waters. I will recognize myself to speak on the amendment.

The amendment requires through statute some actions that DHS takes and that are required by the E-Verify enrollment process. For instance, when businesses enroll in E-Verify, they are required to provide information about the company and individuals or entities that may be using E-Verify on their behalf. In addition, DHS currently provides employers with educational resources about E-Verify use. The U.S. Citizenship and Immigration Services Web site includes 12 such printable resources, ranging from manuals for employers to quick reference guides for State workforce agencies. We should be requiring employers to be educated about how to use E-Verify. Education will help limit unintentional error use.

However, inflexible and one-size-fits-all educational requirements will imperil the ability to enroll millions of businesses in E-Verify. That could mean it would take longer for the bill to open

up jobs for American workers. We should discuss these issues with DHS to determine how different statutory language choices would impact the expansion of the program.

So if the gentlewoman from California is willing to withdraw the amendment, I am confident we could work on language and come up with an agreeable language that would go to the House floor.

Ms. Waters. Mr. Chairman, I am a little bit hesitant to withdraw the amendment. But I do appreciate that you are offering to work with me on this amendment, that you basically agree conceptually that there should be some training that is necessary for all of the employees to ensure that they understand the rules of E-Verify. So if that is what you are saying conceptually, I want to work with you.

Let me defer to my coauthor Ms. Lofgren on this.

Ms. Lofgren. I thank the gentlelady for yielding and concur in her judgment that we should work with the majority. But I did want to note that the willingness to work with us is a recognition that the impact of the bill will be to discriminate against naturalized citizens, in particular. And I thank the gentlelady.

Ms. Waters. With that, Mr. Chairman, I will accept your kind offer to work to make sure that we have included in this bill the training that we are looking for to make sure that the rules of E-Verify are understood by everybody in some shape or form.

Chairman Smith. Thank you, Ms. Waters. Without objection, the amendment is withdrawn. We will continue to work on that. Are there other members who wish to offer an amendment?

Mr. Nadler. Mr. Chairman, I have an amendment at the desk, number 7.

Chairman Smith. The gentleman from New York, Mr. Nadler. The clerk will report the amendment.

The Clerk. Amendment to H.R. 2885 offered by Mr. Nadler and Mr. Deutch. Page 18, after line six, insert the following: Notice of nonconfirmation, not later than three business days after --

[The amendment of Mr. Nadler follows:]

***** INSERT 1-3 *****

Mr. Nadler. Mr. Chairman, I move the reading of the amendment be waived.

Chairman Smith. Without objection, it will be considered as read. And the gentleman from New York is recognized to explain the amendment.

Mr. Nadler. Thank you. Mr. Chairman, this amendment, which I am offering with Mr. Deutch, deals with the following: America is blessed to be a country with a strong foundation and belief in the rule of law. Everyone recognizes the importance of having a set of rules, requiring that those rules be followed, and imposing penalties when there are violations. Throughout our history, lawmakers have been careful to put procedures in place to see that the law is properly enforced. As applied to immigration, the rule in our system is that it is illegal to employ people who are not authorized to work.

The flip side is that it is improper to deny authorized legal employees the right to work. Any enforcement mechanism must keep in mind and balance those goals, enforcing the law against unlawful hiring while at the same time protecting workers who are improperly fired or otherwise not allowed to work. These protections ensure that we are acting consistently with our common values. It is in this area, due process protections for authorized workers, where H.R. 2885 is found wanting. If E-Verify is made mandatory for all employers, as this bill would require, we know there will be U.S. citizens and authorized legal immigrants who will improperly lose their jobs due to user and database errors.

According to a 2009 study of the program by Westat, which has already been referred to, half of 1 percent of authorized workers received erroneous final nonconfirmations of employment eligibility. While that might seem like a small percentage, if that figure is extrapolated to the population, one can project 770,000 workers, American citizens and lawful immigrants, will be wrongly fired because of mandatory E-Verify. If you are one of those 770,000 workers, the chance that you lost your job improperly is 100 percent.

In this economy, when it is so hard to find a new job, being fired wrongly is devastating. It is important to point out that not all workers face the same likelihood of being unfairly fired. Certain groups of workers -- for example, those who are foreign-born and women who have married or divorced and as a result have changed their name are more likely to have database errors. These database errors will result in a disproportionately large number being told incorrectly they are not allowed to work and being fired. The bill has very limited provisions to ensure that these and other American workers do not wrongly lose their jobs as a result of the bill and that if they do erroneously lose their jobs, they receive basic due process protections to ensure that we make things right and help them get back on their feet as quickly as possible.

The only thing the bill does for workers who incorrectly lose employment because of E-Verify errors is to authorize lawsuits for lost wages against the Federal Government under the Federal Tort Claims Act. This is clearly insufficient. Before filing a suit under the FTCA,

a worker first has to file an administrative claim. The agency has 6 months in which to act and the filer must wait either until the agency has acted or until the end of that period, whichever comes first. If the claim is denied or 6 months elapsed without a ruling, then and only then can the worker go to Federal court. At that point, it could take years to get a resolution. Even if a worker wins or settles a Federal Tort Claims Act suit, it will still take at least six 6 or 8 weeks further to get the Department of Justice to submit the settlement or judgment to the Government Accountability Office and for the responsible United States Attorney's Office or Department of Justice attorney to process the payment. In these tough economic times, they would be jobless and without pay for this entire period that could last months or years.

Moreover, workers who lose their jobs due to E-Verify errors will get nothing unless they prove that the error resulted from a, quote, negligent or wrongful act or omission of any employee of the government. Simple data entry mistakes, lost paperwork, and so on, will not be enough to generate any recovery.

Additionally, there are a variety of exceptions to government liability under the Federal Tort Claims Act that the Federal Government might assert. One of those is the discretionary function exception which bars claims, quote, based upon the exercise or performance or the failure to exercise or perform a discretionary function or duty on the part of a Federal agency or employee of the government whether or not the discretion involved the abused, unquote. A rather large

exception.

So the only remedy for someone who is wrongly fired -- an American citizen, a legal immigrant who is wrongly fired because of an error by E-Verify is a Federal Tort Claims Act suit which will take years after the administrative process and in which recovery may not be gained because it may not be negligence because it comes under one of these exceptions.

My amendment would add meaningful due process procedures for workers caught up in or fired as a result of E-Verify. First, it would provide the administrative appeals process and judicial review of rulings for worker to receive a final confirmation notice.

Second, workers would be allowed to work during this process. We should not penalize hardworking people as they contest allegations that they are not eligible to work.

Third, the amendment would ensure that back pay and attorney's fees will be provided to workers who lose their jobs due to system or employer error.

So this would in effect say that someone who lost their job wrongly, who is an American citizen and wrongly lost their job, would continue to work while an appeals process goes forward.

The underlying bill has many problems but at the very least if we are going to mandate the use of E-Verify, we must provide a true remedy for citizens and legal immigrants who are legally authorized to work but lose their jobs due to an error by E-Verify. Enforcing the law is not just about preventing unauthorized workers from getting

jobs. It should also be about allowing for a meaningful way for legal workers to obtain redress if they are incorrectly fired. Particularly at a high time of high unemployment and poverty, we should not punish people who simply want to work, are legally entitled to do so, but through no fault of their own get caught up in an error that we are setting up and making mandatory.

I move the adoption of the amendment, and I yield back the balance of my time.

Chairman Smith. Thank you, Mr. Nadler. The gentleman from California, Mr. Gallegly, is recognized.

Mr. Gallegly. Thank you, Mr. Chairman. Mr. Chairman, I oppose this amendment. It mirrors provisions contained in several comprehensive immigration reform amnesty bills that have either failed or never been considered in Congress. It is an attempt to make E-Verify compliance cumbersome. Its wage provisions incentivize delaying tactics and filing appeals, and the amendment also overturns Supreme Court precedent that prevents employers from having to pay back wages to illegal immigrants.

RPTS BLAZEJEWSKI

DCMN ROSEN

[11:20 a.m.]

Mr. Gallegly. The Legal Workforce Act balances legitimate concerns of all interested parties regarding E-Verify: The business community, the American people's desire to see immigration laws enforced and employees. This amendment tips the balance in favor of one party to the detriment of another. Specifically, the amendment creates an administrative process following an E-Verify nonconfirmation, so if an individual's employment is terminated or is not hired based on E-Verify's issuance of a nonconformance of work eligibility, the individual has access to the administrative and judicial review process.

The Legal Workforce Act retains the current deadlines for a final E-Verify verification determination. The bill requires DHS to issue the final determination within 10 days of the date that an employee or potential employee receives notice of a tentative noncompliance. There is an exception that can be exercised by DHS on a case-by-case basis, but this is for the unique instances only. The final determination deadline is necessary in order to give employers a chance to find another employee if need be and to prevent illegal immigrants from occupying scarce jobs.

The administrative process created by this amendment allows at least 123 days before determination of work eligibility could become

final, but in reality, the amendment leaves the process open-ended. It is no actual deadline for the time within which an individual must file the initial administrative appeal, and other deadlines can also be open ended if the DHS Secretary chooses to extend them. Illegal aliens could work potentially for years under this amendment as their appeal drag on. Of course, this would abuse the process. The lack of time limit on final determination of work eligibility is an unnecessary burden on U.S. businesses. Companies should have a cut-off date at which point they can move on to find a different employee if need be.

Next, the amendment requires that the government compensate the individuals for lost wages, reasonable costs, and attorney fees. The compensation could be upwards of \$125,000. U.S. taxpayers should not be required to foot this bill. Furthermore, the bill also allows remedies of an individual alleged to have -- that he would not have been dismissed from a job for an error on the E-Verify system. The individual can file a claim using the Federal Torts Claim Act and can seek injunctive relief.

In addition, the very last provision of the amendment attempts to overturn the 2002 Supreme Court ruling in the Hoffman Plastic Compounds versus the NLRB. The Court ruled that the NLRB could not order a company to pay back pay to an illegal immigrant who had been working for the Hoffman Plastics Company, but subsection 11, beginning on page 13 of this amendment, specifically states that a former employee's status as an illegal immigrant shall not be a basis for

denying back-pay remedies to the employee. So under this amendment, businesses will be forced to pay back wages to illegal immigrants.

For all these reasons previously mentioned, I oppose the amendment and strongly encourage my colleagues to do the same and yield back.

Ms. Lofgren. Mr. Chairman?

Chairman Smith. Thank you, Mr. Gallegly. The gentleman from North Carolina, Mr. Watt.

Mr. Watt. Move to strike the last word and yield to Mr. Nadler.

Chairman Smith. The gentleman is recognized for 5 minutes and the gentleman yields to whom?

Mr. Watt. Mr. Nadler.

Chairman Smith. The gentleman yields to Mr. Nadler.

Mr. Nadler. Thank you. I, again, if we want to institute, make the E-Verify system mandatory in order to ensure or try to ensure that undocumented aliens are not working, I don't approve of it. I think it is a huge imposition on business, it will cost \$2.7 billion. At a time when the Republican Party is saying that new regulations and burdens on businesses are killing the economy, we will add another one. But all right, I understand, inconsistency.

But our fundamental notions, our fundamental notions of due process say that we should give people an -- a real opportunity in court, in an administrative agency and in court if they are not guilty as charged, guilty in this case not of a crime but of being an undocumented or illegal alien.

The gentleman from California says, well, they have someone who is wrongly denied a job, who is wrongly fired, even though he is an American citizen, even though he is a legal immigrant entitled to work under the law. Well, he can sue under the Federal Tort Claims Act. Yes, he can. After the administrative proceeding is ended, after at least 6 months, and that can take a long time.

The gentleman says if we pass my amendment, well, some people during the pendency of such a proceeding may continue to work. Well, I would submit that someone who really is an illegal alien is not likely to file such a proceeding because it gets him nowhere, it costs a lot, costs money and gets him nowhere. But someone who is an American citizen who files such a proceeding, who rather -- who is an American citizen, knows he is an American citizen should not have to wait months and years, meanwhile he is unemployed, and a fundamental notion of fairness should say that there should be access to the court for someone who has a legitimate claim, and what Mr. Gallegly is saying, in effect, is we should abandon our American principles of justice, we should say it is administratively burdensome, it might, in a rare occasion, result in an illegal alien working for a few months before the court rejects his claim, which he would not have brought knowing he is an illegal alien presumably, but rather than risk that, we should deny to American citizens the right to go to court, the right to any due process protections because it is so important that no illegal alien be permitted to work for the time it might take for an adjudication.

I submit that is simply wrong, that American citizens and legal

aliens, legal immigrants who are entitled to work are entitled to some protections, and I am not going to repeat what I said a few minutes ago about the weaknesses of the Federal Tort Claims Act, the many exceptions, and how long it will take you to get an injunction and so forth, and how long it takes to get this. It is just wrong to say to hundreds of thousands of American citizens, we are going to deny you employment and the possibility of employment in this economy for months and years lest a small number of illegal aliens maybe work for a couple months before we weed them out.

It is just wrong, and I submit it is unAmerican, and I urge the passage of the amendment, and I yield back.

Mr. Conyers. Would Mr. Watt yield?

Mr. Watt. Let me yield to Ms. Lofgren first. I reclaim my time and yield to her.

Ms. Lofgren. I will be prompt. I would urge the adoption of this amendment. We have plenty of instances where American citizens were wrongly denied employment, including Navy veterans with, you know, high security clearances who couldn't -- were denied employment because of glitches, and to think that the Federal Tort Claims Act is going to work is absurd. I mean, in order to even proceed you have to file an administrative claim. That is 6 months before that gets acted on. Because of the crowded Federal courts it could be years. And unless we have something like this, Americans are going to be out of luck, and, you know, the gentleman, my colleague from California is talking about people who are unlawfully present. I will bet you very few people

unlawfully present are going to file this because it is going to come out that they are unlawfully present.

It is the Americans who are going to get the short end of the stick, and I will tell you, 770,000 people minimum American citizens, you know, if you figure out how many people are going to be coming to our district offices complaining, good luck to you. It is not something I look forward to, and I thank the gentleman for yielding and yield back to Mr. Watt.

Mr. Watt. Reclaiming my time. I yield to the ranking member.

Mr. Conyers. Thank you. Could I pose a question to Subcommittee Chairman Gallegly. Do you support due process in these employment claims to Americans and legal immigrants?

Mr. Gallegly. Mr. Chairman, I have -- Mr. Ranking Member and Mr. Chairman Emeritus, I have always supported due process. I would also like to respond to the comment that I believe it was either Mr. Nadler or Ms. Lofgren made, a combination of both, about the issue of denying Americans jobs because of this process, many of whom might be veterans.

Well, I can tell you that under the current status quo that many of my friends that are making these arguments for today are doing just that, denying 7 or 8 million American citizens, legal residents, veterans as well by not having E-Verify in place, and with that I would yield back.

Mr. Watt. Reclaiming my time. It just seems to me that Mr. Nadler's amendment is a reasonable effort to provide some due process in this whole issue to weed out the mistakes that are made and the

process that is most likely to be used by people who have been wrongly caught up in the system and denied employment, so I support Mr. Nadler's amendment and yield back.

Chairman Smith. Thank you, Mr. Watt. I will recognize myself in opposition to the amendment. It fundamentally changes the E-Verify process in a negative way and is an attempt to do the labor unions' bidding to overturn subtle Supreme Court precedent. The amendment creates an administrative and judicial review process of an E-Verify nonconfirmation. It could add at least 125 days to the process of employment eligibility confirmation that should, in fact, take just a minute or 2. This blatantly burdens U.S. employers, who are the only entities that can create jobs for the 14 million Americans, including 17 percent of Black Americans and 11 percent of Hispanics, who are without jobs. In addition, the very last provision of the amendment attempts to overturn the 2002 Supreme Court ruling of Hoffman Plastic Compounds versus National Labor Relations Board. As the gentleman from California explained earlier, overturning that precedent will require U.S. employers to pay back wages to illegal workers.

I understand why those who want amnesty oppose this bill. They want to legalize illegal immigrants, not encourage them to return home. But amnesty prevents Americans from getting jobs, since millions of illegal immigrants will become eligible to work legally in the United States. I oppose the amendment and urge my colleagues to oppose it as well.

Ms. Sanchez. Mr. Chairman?

Chairman Smith. The gentlewoman from California is recognized.

Ms. Sanchez. Way over here on the end. Thank you, Mr. Chairman. I just wanted to speak in support of Mr. Nadler's amendment. I think it is an imminently reasonable thing that he is trying to do, which is provide some process by which people who are wrongfully identified as not eligible to work in this country have some kind of recourse that doesn't take 6 months or a year to get resolved by a bureaucracy.

Now, we all know that mistakes are made very often in bureaucracies, and the idea that it would take 6 months to a year for somebody to finally clear their name and be eligible to work, in a year you can lose your home, you can -- you know, your family can be living out on the street, all over a simple clerical error that has somebody wrongly identified as not eligible to work in this country.

Now, we have seen problems with government databases before. If you look at the terrorist watchlist, for example, there are numerous examples of Members of Congress who have been wrongly misidentified as on the terrorist watchlist, Members who have had to sit for hours in airports while things are straightened out, and they are Members of Congress. Maybe it isn't important to some of the Members on the other side of the aisle that there be some kind of due process in this, but if somebody whose name Linda Sanchez happens to be a very common name in the Hispanic community, I could see the potential for a lot of mischief of false positives, and trust me, it only takes one divorce or one middle initial that is off, and a database where the information isn't 100 percent correct and there is a false match and somebody being

told you can't work in this country.

I wonder how many people on the other side of the aisle would be willing to be told you are ineligible to work in this country, and it is going to take you 6 months to a year, and we are going to take away your job in the meantime, and it is incumbent on you to clear up this problem with the bureaucracy that has created this mess. I would venture to guess not many Members on the other side of the aisle would be very happy with that situation, and yet what Mr. Nadler is proposing is to provide a little due process so that people have a way to try to correct this error and not be, you know, forced out on the street or not become bankrupt in the meantime, and the idea that we would have U.S. citizens and veterans who have served this country honorably falsely identified and not able to work for 6 months or a year is, quite frankly, not acceptable to me, so, you know, I support very strongly Mr. Nadler's amendment, and I would urge the members of this committee to really think about what they are doing and to support the amendment as well, and with that, I will yield back the balance of my time.

Chairman Smith. Thank you, Miss Sanchez. The question is on the amendment. All in favor say aye. Aye. Opposed nay. No. In the opinion of the chair the nays have it, and the amendment --

Mr. Nadler. Mr. Chairman, I ask a roll call vote.

Chairman Smith. Roll call vote has been requested, and the clerk will call the roll.

The Clerk. Mr. Smith.

Chairman Smith. No.

The Clerk. Mr. Smith votes no.

Mr. Sensenbrenner?

Mr. Sensenbrenner. No.

The Clerk. Mr. Sensenbrenner votes no.

Mr. Coble?

Mr. Coble. No.

The Clerk. Mr. Coble votes no.

The Clerk. Mr. Gallegly?

Mr. Gallegly. No.

The Clerk. Mr. Gallegly votes no.

Mr. Goodlatte?

[No response.]

The Clerk. Mr. Lungren?

Mr. Lungren. No.

The Clerk. Mr. Lungren votes no.

Mr. Chabot?

Mr. Lungren. No.

The Clerk. Mr. Lungren votes no.

Mr. Chabot?

Mr. Chabot. No.

The Clerk. Mr. Chabot votes no.

Mr. Issa?

[No response.]

The Clerk. Mr. Pence?

Mr. Pence. No.

The Clerk. Mr. Pence votes no.

Mr. Forbes?

Mr. Forbes. No.

The Clerk. Mr. Forbes votes no.

Mr. King?

Mr. King. No.

The Clerk. Mr. King votes no.

Mr. Franks?

Mr. Franks. No.

The Clerk. Mr. Franks votes no.

Mr. Gohmert?

[No response.]

The Clerk. Mr. Jordan?

[No response.]

The Clerk. Mr. Gohmert?

Mr. Gohmert. No.

The Clerk. Mr. Gohmert votes no.

Mr. Jordan?

[No response.]

The Clerk. Mr. Poe?

Mr. Poe. No.

The Clerk. Mr. Poe votes no.

Mr. Chaffetz?

Mr. Chaffetz. No.

The Clerk. Mr. Chaffetz votes no.

Mr. Griffin?

Mr. Griffin. No.

The Clerk. Mr. Griffin votes no.

The Clerk. Mr. Marino?

Mr. Marino. No.

The Clerk. Mr. Marino votes no.

Mr. Gowdy?

[No response.]

The Clerk. Mr. Ross?

[No response.]

The Clerk. Mrs. Adams?

[No response.]

The Clerk. Mr. Quayle?

Mr. Quayle. No.

The Clerk. Mr. Quayle votes no.

Mr. Conyers?

[No response.]

The Clerk. Mr. Berman?

Mr. Berman. Aye.

The Clerk. Mr. Berman votes aye.

Mr. Nadler?

Mr. Nadler. Aye.

The Clerk. Mr. Nadler votes aye.

Mr. Scott?

Mr. Scott. Aye.

The Clerk. Mr. Scott votes aye.

Mr. Watt?

Mr. Watt. Aye.

The Clerk. Mr. Watt votes aye.

Ms. Lofgren?

Ms. Lofgren. Aye.

The Clerk. Ms. Lofgren votes aye.

Ms. Jackson Lee?

[No response.]

The Clerk. Ms. Waters?

[No response.]

The Clerk. Mr. Cohen.

[No response.]

The Clerk. Mr. Johnson?

[No response.]

The Clerk. Mr. Pierluisi?

Mr. Pierluisi. Aye.

The Clerk. Mr. Pierluisi votes aye.

Mr. Quigley?

Mr. Quigley. Aye.

The Clerk. Mr. Quigley votes aye.

Ms. Chu?

Ms. Chu. Aye.

The Clerk. Ms. Chu votes aye.

Mr. Deutch?

Mr. Deutch. Aye.

The Clerk. Mr. Deutch votes aye.

Ms. Sanchez?

Ms. Sanchez. Aye.

The Clerk. Ms. Sanchez votes aye.

Chairman Smith. The gentleman from Virginia.

Mr. Goodlatte. No.

The Clerk. Mr. Goodlatte votes no.

Chairman Smith. The clerk will report.

The Clerk. Mr. Chairman, 11 members voted aye, 17 members voted nay.

Chairman Smith. The majority having voted against the amendment, the amendment is not agreed to. Before we go to the next amendment, without objection, the ranking member's statement on the Deutch amendment number 28, the gentleman from Michigan's statement will be made a part of the record.

And are there other amendments? Okay.

Ms. Lofgren. Mr. Chairman, I realize that number 38 is on the list. I am considering whether or not to offer that. I may offer it later in the day. I am doing some further research on that.

Mr. Sensenbrenner. [Presiding.] Are there further amendments? For what purpose does the gentleman from California, Mr. Lungren, seek recognition?

Mr. Lungren. Mr. Chairman, I have an amendment at the desk, number 20.

Mr. Sensenbrenner. The clerk will report the amendment.

[The amendment of Mr. Lungren follows:]

***** INSERT 2-1 *****

Ms. Lofgren. I reserve a point of order, Mr. Chairman.

Chairman Smith. Mr. Chairman, I will reserve a point of order.

The Clerk. Amendment to H.R. 2885, offered by Mr. Lungren of California, page 1 --

Mr. Lungren. Ask unanimous consent that the amendment be considered as read.

Mr. Sensenbrenner. Without objection. Subject to the two reservations, the gentleman is recognized for 5 minutes.

Mr. Lungren. That is not quite the bipartisan consensus I was looking for. Mr. Chairman, as a supporter of E-Verify, I offer this amendment with the purpose of advancing the prospect for success of the bill when and if it gets out of committee and to prevent the collateral damage it will inflict on the agricultural industry if a workable agricultural labor program is not included within its four corners.

It is a great fear of mine that if we do not address the disparate impact of H.R. 2885 on agriculture and do it immediately, we are consigning it to a new wave of opposition and interminable controversy which will consign E-Verify to its inevitable asphyxiation. It is entirely avoidable and it is within our hands to choose a very different course which will end with the enactment of the missing element in immigration enforcement. For one has been involved in these battles for over 3 decades, that missing element is an employment verification system.

As the gentlewoman from California pointed out at the hearing on

H.R. 2784, the chairman's introduction of an agriculture proposal is, in itself, an acknowledgment that the E-Verify legislation needs to specifically address the agricultural worker issue. The relationship between these two issues logically leads to the conclusion they should be considered together, and that is precisely what my amendment seeks to accomplish. My proposal, the Legal Agricultural Workforce Act, would establish a market-based approach to the agricultural labor issue.

After advertising on an electronic job registry and accepting any qualified U.S. applicants for agricultural job openings, the Secretary of Agriculture would determine the level of admissions for foreign agriculture workers who would then be eligible in U.S. agriculture only for up to 10 months in any 12-month period. In other words, the supply of foreign agriculture labor would be determined by demand annually. Importantly, and this goes to a point made by the gentlelady from California at our hearing, importantly these workers would not be tied to an individual employer. This, in my view, is critical to any foreign agricultural worker program. If we have learned anything from the Becerra program, it is that the abuses which did occur were largely attributable to one aspect of the program, and that is tying an employer and an employee. Furthermore, a more mobile workforce provides maximum flexibility for employers, particularly in the area of specialty crops, which is growing in its application around the country. This type of mobility isn't particularly important.

Finally, I would mention that my proposal has a built-in incentive

for the workers to return home after their term of employment ends. We would hold a portion of the worker's wages equal to that which would otherwise be their contribution to Social Security. This money would be placed in a trust fund, and upon their return to the country of origin, it would be refunded to them. If they were not there personally, that is physically present in their home country, they would not be able to redeem the amount.

I would also mention that the employer portion of the Social Security tax and Federal unemployment tax would be used to provide for funding for the administration of the program, so there would be no additional tax to the general taxpayers. In short, we need a flexible agriculture guest worker program to be part and parcel of the E-Verify legislation. Both the prospects of this legislation and successful implementation would require that we do both these things together and that we do them now.

I would just say that if anybody looks at the history of agriculture throughout the country, but I will particularly talk about my own State of California, we have had a significant reliance on a foreign workforce for well over 100 years, and it has either been legal or illegal, depending on whether we had a program that works, and I think for us to go forward with an E-Verify program, which I do think is essential for us to be able to actually implement employee sanctions in an effective way but also be fair to employers so that it is user friendly, we have to recognize that American agriculture has come to rely on foreign workers. We can pretend that is not true, we can debate

about whether the figures are 80 percent or 70 percent, but the fact of the matter is, a significant amount of those in the fields are here from foreign countries.

Ironically, the fact that we do a better job of enforcing the law at our borders has created another situation. That is, if a worker gets here illegally and begins work, they fear going back home because they don't think they can make it back again, and so you have this perverse effect of having foreign workers remain in the United States when they may very well wish to return to their home country and their families there, and so our failure to recognize the reality of the situation creates the worst of all possible worlds. It makes it difficult, more difficult for us to --

Mr. Sensenbrenner. The gentleman's time has expired.

Mr. Lungren. -- the law on the border and at the same time, I think causes more and more people to violate the law, and with that, I would offer my amendment.

Mr. Sensenbrenner. Does the gentlewoman from California wish to make a point of order?

Ms. Lofgren. I do, Mr. Chairman. The amendment is not germane. It adds a new section to the bill that creates an entirely new seasonal agricultural visa program. The amendment also delays implementation until the new visa program has been implemented. It is clearly nongermane. The amendment contains language outside the committee's jurisdiction, creates a new trust fund, expands consulates, all of which would require referral to the Energy and Commerce Committee,

Foreign Affairs, and possibly the Ways and Means Committee.

Secondly, the bill deals with only one subject, the verification of the employment eligibility of workers. This amendment goes far beyond the underlying bill, and therefore is not germane.

I would note, however, that although the amendment is nongermane, it does raise an important point, which is this bill will destroy agriculture in America, and while I understand that the author of the amendment is trying to deal with this, as was the chairman with his hearing last week, neither proposal is actually a workable one. If we are 20 days late while interviewing 36,000 people at American consulates, there is no way that we are going to interview 500,000 to a million workers and get them to the fields on time, and with that, I would insist on my point of order and yield back.

Mr. Sensenbrenner. Does the gentleman from Texas insist on his point of order?

Chairman Smith. Mr. Chairman, yes, I do, and I will be very brief. I think the gentleman from California is very well-intentioned with his amendment, and I happen to agree and I think most of us agree that we do need a user friendly guest worker program, but the subject of the amendment goes beyond the subject of the underlying legislation. It does impinge upon the jurisdiction of other committees, so I feel that it is nongermane, and I will insist on my point of order as well.

Mr. Lungren. Mr. Chairman?

Mr. Sensenbrenner. The gentleman from California.

Mr. Lungren. May I be heard on the point of order?

Mr. Sensenbrenner. On the point of order.

Mr. Lungren. According to House precedents and as so noted in Section 935 of the House rules and manuals which are the ones that we must refer to for this committee as well as for action on the House, the three primary tests of whether an amendment is germane relate to subject matter, committee jurisdiction, and fundamental purpose. My amendment clearly passes these three tests.

First with respect to subject matter. The subject matter of the underlying bill relates to the adoption of changes in the law to provide a mechanism to achieve a legal workforce, and it contains specific language relating to the question of agricultural labor on pages 20 to 21 and page 25. I am attempting to alter this very language in the bill which addresses the subject matter of agricultural labor with an amendment which seeks to ensure that when the provisions of the underlying bill apply to agricultural labor, a subsection of the overall universe of labor, a workforce of legal agricultural workers will be possible. I do this by amending two subsections of the bill before us, H.R. 2885, which, in clear terms, specify their subject matter to be "agricultural labor or services." Let me repeat this so there is no misunderstanding. My amendment addresses the issue of agricultural labor services, which would implement two sections of these -- of the underlying bill which by their very titles address the subject of agricultural labor or services. It should be added that the titles of these two subsections accurately reflect their content. The express terms of the underlying bill provide a 36-month period

during which those who employ agricultural labor are given the chance to move to a legal workforce.

My amendment specifically addresses this transition to a legal agricultural workforce and specifies that this must take place 6 months prior to the application of hiring provisions of the underlying bill, so unless we are willing to redact the specific language that is in the underlying bill, it is not possible to conclude that my amendment, which deals with the same subject matter, is somehow not in order.

The second primary test of germaneness goes to the fundamental purpose of the underlying bill. The fundamental purpose of the underlying bill with respect to agricultural labor or services is found, as I said, on pages 20 to 21 and page 25, and it is identical, that is the fundamental purpose, to the purpose of my amendment. Both seek to achieve a legal agricultural workforce.

Furthermore, the intent to provide the agriculture industry with a sufficient time, 36 months, in the underlying bill to accomplish that objective is best accomplished through the adoption of my amendment, which would require as a condition precedent to the expiration that a mechanism be in place to accomplish such a purpose. There surely is a reason -- there is surely a reason why the hiring provisions of H.R. 2885 kick in after a 36-month period. Everyone is aware that the high concentration of illegal aliens in the agricultural industry, so apparently we are to conclude that during this time the industry will not be able to get its act together. Well, if that is the case, the adoption of my amendment will provide more than a hope that this will

be achieved.

The purpose of my amendment is to realize the purpose of the agricultural subsections it amends and the purpose of the underlying bill itself, i.e. to achieve a legal workforce. So there is no conflict between the fundamental purpose of my amendment and the fundamental purpose of the bill it seeks to amend.

Thirdly, it is clear that amending the Immigration and Nationalities Act through the adoption of my amendment is within the jurisdiction of this committee. There surely is no one who would suggest that this committee would not have jurisdiction over a guest worker bill. If that is, in fact, the case, we would have a dilemma with respect to the proposal H.R. 2847 itself.

I would further stipulate that both the subsection of the underlying bill, both sections -- both of the subsections of the underlying bill are likewise subject to the jurisdiction of this committee, thus attempting to amend provisions in the underlying bill which are subject to the jurisdiction of this committee with an amendment whose subject matter is also within the jurisdiction of the committee is surely in order.

The fact that legislation or parts of legislation might be referred to other committees is not in itself dispositive of the issue. The fundamental question is whether an amendment relating to foreign agricultural labor amending language in the underlying bill which addresses the same subject, that is whether both are within the jurisdiction of this committee, and the answer to this is clearly yes

or else we couldn't be considering the underlying bill that is before us.

So on those three litmus tests that are noted in Section 935 of the House rules and manual, that is subject matter committee jurisdiction or fundamental purpose, I believe my amendment passes the test, and therefore I would say, I would ask the chair to rule that my amendment is, in fact, germane.

Mr. Sensenbrenner. The chair is prepared to rule unless anybody else wants to speak on the point of order. Under Section 935, the various tests of germaneness are not exclusive. However, they are strongly suggested when a question like this comes up. However, in Section 936 of the manual it says one individual proposition is not germane to another. The amendment of the gentleman from California is an individual proposition to create visas and set up a trust fund for temporary agricultural workers, whereas the underlying bill establishes an E-Verify system that does not talk about creating new visas or setting up a trust fund. So in the opinion of the chair the first argument that the gentleman from California has made does not conform with the rules.

Secondly, the gentleman from California introduced the same bill as a freestanding bill, and the parliamentarians of the House referred that bill to the Committee on Energy and Commerce, and that was because of the trust funds that were set up in the text of his amendment.

For these two reasons, the chair rules that the amendment is not germane and that the two points of order raised by the gentlewoman from

California and the gentleman from Texas are well taken, and thus the amendment is stricken.

Are there further amendments?

The gentleman from California, Mr. Berman.

Mr. Berman. Thank you, Mr. Chairman. I have an amendment at the desk.

Mr. Sensenbrenner. The clerk will report the amendment.

Mr. Berman. Berman 1 also prefiled by the gentleman from Iowa, Mr. King. It is Berman 1.

Mr. Sensenbrenner. I am told by the parliamentarian that this was not prefiled by you, and the chair is to give priority under the agreement to amendments that have been prefiled.

Mr. Berman. Mr. Chairman, could I then take up -- can I ask unanimous consent to take up the prefiled amendment by the gentleman from Iowa, substitute my name for his, and offer it at this time?

Mr. Sensenbrenner. Is there objection? The chair hears --

Chairman Smith. Reserving the right to object.

Mr. Sensenbrenner. Objection is heard by the gentleman from Texas.

Mr. Lungren. Reserve my right to object.

Mr. Berman. He said he reserved the right. Mr. Chairman, under what agreement are we not -- am I not allowed to offer Berman 1 at this time? I was recognized to offer an amendment. It is not on the list of prefiled amendments, but it is in the section that we are undertaking now on agriculture, and I would like to offer this amendment.

Chairman Smith. [Presiding.] If the gentleman will yield.

Mr. Berman. Yes.

Chairman Smith. Under our committee rules, the understanding is that we will consider prefiled amendments first, so this amendment, as I understand it, was filed about 30 minutes ago. It will be considered, but it will be considered after we have finished considering the prefiled amendments.

Mr. Berman. Reclaiming my time, could I yield to the gentleman from Iowa.

Mr. King. I thank the gentleman from California. I would say that, you know, the history of this committee has been to take these amendments up, and I understand the chairman's rationale on this, and particularly the grouping of the subject matter, and so to help resolve this matter, if there is some resistance or an objection to the unanimous consent request on the part of the gentleman from California, then I would ask the chair if I could be recognized to take up my amendment instead, number 15. I yield back to the gentleman.

Ms. Lofgren. If the gentleman would yield, I would just like to note that my amendment would have been next, but I am very happy for Mr. Berman to go ahead because he is senior on the committee, number one, and he is ranking member on another full committee that may call him away, and I think just as courtesy it is the right thing to do, and I wanted to make sure members knew that.

Chairman Smith. Does the gentleman from Iowa have an amendment at the desk?

Mr. King. I have an amendment at the desk, sequential order number 15.

Chairman Smith. Clerk will report the amendment.

[The amendment of Mr. King follows:]

***** INSERT 2-2 *****

The Clerk. Amendment to H.R. --

Mr. Lungren. Mr. Chairman, what happened to sequential order number 13?

Chairman Smith. That is a legitimate question.

Mr. Lungren. Yeah, that is what I have been, that is the only reason I raised it, that mine was the next in order since the gentlelady from California evidently wasn't going to raise hers.

Chairman Smith. And the gentlewoman from California is not going to offer her amendment number 114?

Ms. Lofgren. I will offer it later in the grouping.

Mr. Gallegly. Mr. Chairman, point of order. Mr. Chairman. Mr. Chairman, point of order.

Mr. Sensenbrenner. [Presiding.] The gentleman from California will state his point of order.

Mr. Gallegly. Thank you, Mr. Chairman. It was my understanding before we started this morning and at the inception of the chairman's statement that there had been a great deal of effort put into establishing the format and the process by which the amendments would be heard today because of the large number of amendments and maintaining some level of continuity, and it was my understanding that my friends on the other side of the aisle had consented to that. Now we are all over the board.

Mr. Sensenbrenner. If the gentleman will suspend, let's constrict the board. The gentleman from Iowa, Mr. King, had been recognized to offer his amendment. If he withdraws his request for

recognition, then the next up would be Mr. Lungren for amendment number 13 on the roster.

Mr. Berman. Point of parliamentary inquiry.

Mr. Sensenbrenner. I understand that the gentlewoman from California, Ms. Lofgren, is not going to offer amendment 12 at this time.

Ms. Lofgren. At this time. I do intend to offer it at a later time in the context of this section.

Mr. Sensenbrenner. Okay. And for what purpose does the gentleman from California --

Mr. Berman. Point of parliamentary inquiry, Mr. Chairman.

Mr. Sensenbrenner. The gentleman will state his point of parliamentary inquiry.

Mr. Berman. Is it either the custom or the rule that the chair recognizes an amendment from one side and then from the majority side and then an amendment from the minority side? The gentlelady has said she doesn't want to offer her amendment now and wants to give the minority slot to me to offer my amendment.

Mr. Sensenbrenner. The gentleman from California is partially correct in his parliamentary inquiry.

Mr. Berman. All right.

Mr. Sensenbrenner. It has been the practice in the past to alternate by sides. However, there has been an agreement between the current chair, not me, but the permanent chair and the ranking member to go by the order that appears on the roster, and since Ms. Lofgren

has deferred, the next on the roster list pursuant to that agreement is amendment number 13 on the roster offered by Mr. Lungren. So there the chairman is --

Ms. Lofgren. Point of parliamentary inquiry.

Mr. Berman. May I just seek to clarify?

Mr. Lungren. You have had 9 in a row.

Mr. Berman. You are essentially saying we are going to take -- if each of the Democrats on the committee is prepared to hold off on offering their amendment until a nonfiled amendment comes up, then will I be able to offer my amendment --

Mr. Sensenbrenner. The answer is yes.

Mr. Berman. -- when the next Democrat -- all right.

Mr. Sensenbrenner. Right.

Mr. Berman. At which point, after every Republican amendment is offered or --

Mr. Sensenbrenner. No, if the gentleman will notice, the amendments related to agriculture, they are in order by party, switching the parties, until there are no more Republican amendments, which the last one is number 15 of Mr. King, and then the rest of them are all amendments to be proposed by the Democratic members.

Mr. Berman. This may be a larger fight than -- a fight that is not worth the time expended or dispute, but let me simply point out that Mr. Lungren's amendment follows Ms. Lofgren's.

Mr. Sensenbrenner. Yes, and Ms. Lofgren said on the record that she didn't want to offer her amendment at this time.

Mr. Berman. That is right.

Mr. Sensenbrenner. And the chair said it would be in order for her to offer it later.

Ms. Lofgren. May I be heard, Mr. Chairman?

Mr. Sensenbrenner. The gentlewoman from California, for what purpose do you seek --

Ms. Lofgren. I wish to defer to my senior member of the committee, Mr. Berman, which was why I wished to defer, and although I realize there was an agreement or apparently there was an agreement, I don't think the agreement voids the committee rules, and I would hope that we could allow Mr. Berman to take my place in line as a courtesy to him.

Mr. Sensenbrenner. If the gentlewoman from California will yield, the power to recognize is always vested in the chair, and the chair is going to follow the -- the chair is going to follow the printed roster of amendments that have come on up, and since the gentlewoman from California deferred on amendment number 12, the chair is prepared to recognize Mr. Lungren. I would also point out that under Rule 2(f) of the committee rules, the chairman may use his discretion to give priority to amendments submitted in advance, and the chair is exercising his discretion now.

For what purpose does the gentleman from California --

Mr. Watt. Mr. Chairman, parliamentary inquiry.

Mr. Sensenbrenner. The gentleman will state his inquiry.

Mr. Watt. For those of us who don't know what is going on here

or what this subterfuge is, is there some reason you all don't want Mr. Berman to offer his amendment? This is ridiculous. We have now spent 20 minutes talking about --

Mr. Sensenbrenner. The gentleman from North Carolina --

Mr. Watt. It makes absolutely no sense.

Mr. Sensenbrenner. Yes. Well, the gentleman from North Carolina knows full well what the procedure is that has been imposed by the current --

Mr. Watt. Well, the procedure has always been that we apply every procedure that we were allowed to apply, nothing would happen in this --

Mr. Sensenbrenner. The chair was responding to your question.

Mr. Watt. We would have read the bill, we would read every amendment. If you want to -- if you all want to play that game, then we will play it.

Mr. Sensenbrenner. The chair was responding to the gentleman from North Carolina where he quoted committee rule 2(f) that said that the chair may afford priority to prefiled amendments. The chair is following this rule that is in the committee rules. And for what purpose does the gentleman from California seek recognition?

Mr. Berman. Point of parliamentary inquiry, Mr. Chairman, one time. I just want to understand. Is the chair saying that under the rules, he has the right to exercise his discretion to recognize prefiled amendments, having already exercised his discretion to recognize me to offer an amendment? So the rule really says notwithstanding that, I exercised my discretion to recognize a member, I now am allowed to

withdraw that recognition to stop him from offering his amendment in order to go in a different exercise of my discretion, even though I have already recognized the gentleman for an amendment?

Mr. Sensenbrenner. Well, the gentleman will remember that when the chair turned to him, the chair said for what purpose does the gentleman from California --

Mr. Berman. And I said to offer an amendment.

Mr. Sensenbrenner. And the gentleman from Texas objected to that. For what purpose does the gentleman from California, Mr. Lungren, seek recognition?

Mr. Berman. Point of parliamentary inquiry, Mr. Chairman. The gentleman from Texas objected to your request for unanimous consent for something that didn't require unanimous consent. There has been no action by this committee to set in order at the beginning of this markup for the offering of amendments.

Mr. Sensenbrenner. The chair --

Mr. Berman. I was recognized, I was not --

Mr. Sensenbrenner. The chair is enforcing the rules. For what purpose does Mr. Lungren seek recognition?

Ms. Lofgren. Mr. Chairman --

Mr. Lungren. To offer my amendment that is next in order.

Mr. Sensenbrenner. Okay, the clerk will report the amendment.

The Clerk. Amendment in the nature of a substitute to H.R. 2885 offered by Mr. Daniel E. Lungren.

[The amendment of Mr. Lungren follows:]

***** INSERT 2-3 *****

Mr. Berman. Mr. Chairman, I reserve a point of order.

Ms. Lofgren. And I reserve a point of order.

Mr. Sensenbrenner. Okay. Without objection the amendment will be considered as --

Mr. Watt. I object.

Mr. Sensenbrenner. The clerk will read subject to the two reservations.

The Clerk. Strike all after the enacting clause and insert the following. Section 1, short title. This Act may be cited as the Legal Workforce Act. Title I, Electronic Employment Eligibility Verification System.

Mr. Lungren. Mr. Chairman, I ask unanimous consent that the bill be considered as read.

Mr. Watt. I object. I object.

The Clerk. Section 101, Employment Eligibility Verification Process. A, in general Section 274A(b) of the Immigration and Nationality Act, (8 USC 1324a(b)) is amended to read as follows: (b), Employment Eligibility Verification Process. (1), New Hires, Recruitment, and Referrals. The requirements referred to in paragraphs 1(B) and (3) of subsection (a) are, in the case of a person or other entity hiring, recruiting, or referring an individual for employment in the United States the following: (A) Attestation After Examination of Documentation, Attestation. On the date of hire, as defined in subsection (h)(4), the person or entity shall attest, under penalty of perjury and on a form, including electronic and telephonic

formats, designated or established by the Secretary by regulation not later than 6 months after the date of the enactment of the Legal Workforce Act, that it has verified that the individual is not an unauthorized alien by, (I) obtaining from the individual the individual's Social Security account number and recording the number of the form --

Mr. Lungren. Mr. Chairman, I ask unanimous consent that --

Mr. Watt. I object.

Mr. Lungren. -- the amendment be considered as read.

Mr. Watt. I object.

The Clerk. -- if the individual claims to have been issued such a number and if the individual does not attest to United States nationality under subparagraph (B), obtaining such identification or authorization number established by the Department of Homeland Security for the alien as the Secretary of Homeland Security may specify, and recording such number on the form; and, (II), examining (aa), a document relating to the individual presenting it described in clause (ii) or (bb) a document relating to the individual presenting it described in clause (iii) and a document relating to the individual presenting it in clause (iv).

Documents Evidencing Employment Authorization and Establishing Identity. A document described in this subparagraph is an individual's -- (I) unexpired United States passport or passport card; (II), unexpired permanent resident card that contains a photograph; (III), unexpired employment authorization card that contains a

photograph; (IV), in the case of a nonimmigrant alien authorized to work for a specific employer incident to status, a foreign passport with Form I-94 or I-94A or other documentation as designated by the Secretary specifying the alien's nonimmigrant status as long as the period of status has not yet expired, and the proposed employment is not in conflict with any restrictions or limitations identified in the documentation; (IV), passport from the Federated States of Micronesia (FSM) or the Republic of the Marshall Islands (RMI).

Mr. Berman. Mr. Chairman, I ask unanimous consent that the reading of the amendment be dispensed with.

Mr. Watt. Reserving the right to object.

Mr. Sensenbrenner. On his reservation, the gentleman from North Carolina.

Mr. Watt. I thank the gentleman. Now, we have just illustrated how this committee can't operate or the House can't operate without some degree of recognition of what is fair here. What the chair did made no sense, and what I did made no sense, but if that is the way we are going to operate, then that is the way we are going to operate, and it is going to operate on both sides, and you have got to understand that.

So I am going to withdraw my reservation, I am going to withdraw my objection, but you have got to understand that we operate by a set of rules and by a set of agreements and gentlemanly and ladyly protocols here, and you just can't up one day and decide you are going to take over the committee and decide to do whatever the hell you want in this

committee. That is not the way this committee is going to operate.

Mr. Sensenbrenner. The chair will respond by saying he quoted rule 2(f) of the committee rules.

Mr. Watt. In that case, I will continue to object.

Mr. Sensenbrenner. Okay, the clerk will read.

The Clerk. Or other documentation as designated by the Secretary, indicating nonimmigrant admission under the Compact of Free Association Between the United States or the FSM or RMI; or, (IV) other documented -- document designated by the Secretary of Homeland Security if the document (aa) contains a photograph of the individual and biometric identification data from the individual and such other personal identifying information relating to the individual as the Secretary --

Mr. Nadler. Mr. Chairman.

Mr. Sensenbrenner. For what purpose does the gentleman from New York seek recognition?

Mr. Nadler. I ask unanimous consent to dispense with the reading of the amendment.

Mr. Sensenbrenner. Without objection. The gentleman from California is recognized for 5 minutes, subject to the two reservations of points of order.

Mr. Lungren. I am actually a noncontroversial guy. I don't understand this sort of thing here.

I would just say in preface to this that I have a copy of an amendment roster which I understood the chairman of the committee

announced was worked out pursuant to an agreement between him and the ranking member, that this is the order in which the amendments would be offered. All I was seeking to do was to be recognized in accordance with that roster.

Ms. Lofgren. Would the gentleman yield?

Mr. Lungren. Excuse me, just a second. This is not an unusual process. It is one that is used in the other committees that I have been a member of and have never thought that it was in violation of the rules. It actually is a means by which we attempt to expedite consideration, and as I look at the list of the first 10 amendments, one was a Republican amendment and 9 were Democratic amendments, and there was no objection on this side for consideration of amendment after amendment which happened to be offered by Democrats, so I thought all I was doing was trying to preserve my place in line. I have said oftentimes the subject of illegal immigration --

Mr. Berman. Mr. Chairman --

Ms. Lofgren. Mr. Chairman.

Mr. Lungren. I think what people object to was people cutting in line, and I was not trying to cut in line, I was just trying to keep my place in line.

Mr. Sensenbrenner. The floor belongs to the gentleman from California.

Mr. Nadler. Would the gentleman yield?

Mr. Lungren. If I had more time, I would, maybe at the end, he will yield me more time for that.

So I have been on this committee a long time, and I think we generally try and respect one another, and I meant no disrespect to the other side. I was just trying to claim my position in line as I was told and we were told was worked out pursuant to an agreement on all sides.

The amendment before you contains the substance of the amendment I offered before, but it is offered in the nature of a substitute, the substitute containing the E-Verify language of the bill, along with this amendment which thereby allows for the addition of my amendment on agricultural labor without changing the chairman's base amendment.

Once again, I want to underscore the fact that based on the hearings that we have had in this committee and subcommittee, there is a demonstrated need for foreign workers in agriculture. That has not been demonstrated in other industry, to my knowledge. If that is a fact, and I think it is uncontroverted on the record, both in this committee and the House Committee on Education and Workforce, then it seems incumbent upon us to ensure that we meet that challenge, and while you may have different positions on E-Verify, I think there is a recognition based on the testimony before this committee and the subcommittee that an impact, although maybe not intended, an impact of E-Verify would be to devastate the vast majority of agriculture, not only the State of California, but throughout the country.

So it can either do one of two things: There are those who want to not have E-Verify, I understand that, but if we are going to have an E-Verify, it seems to me we need to ensure that in the enforcement

of E-Verify we do not at the same time destroy a very important industry to us and thereby drive both employers and employees out of business. There are those who suggest that, well, the simple answer to this is our farmers here could farm in foreign lands. That may be an interesting argument, but it certainly doesn't solve the problem of agriculture here in the United States.

As we move to more locally grown produce, crops, which seems to be something that is supported around the country, we find a greater need for seasonal workers in many, many different States, and so we need a mobility in the system, and I just think it is folly for us to, after the last 30 years, realizing that we have a tremendous presence of foreign workers in our fields who are not here legally, that it is a rather confined subject matter, that is, this industry I think has shown that it relies on it, for us not to try and deal with it in a realistic fashion.

I appreciate the fact that the chairman has attempted in some small parts in this bill and also in his freestanding bill to address the most egregious problems with H(2)(a), but I am convinced that that does not work for 95 or 96 percent --

Mr. Sensenbrenner. The gentleman's time has expired.

Mr. Lungren. I would ask unanimous consent for 2 additional minutes.

Mr. Sensenbrenner. Without objection.

Mr. Lungren. And so if, in fact, the record is correct, then we are doing ourselves a disservice by pretending that this need is not

out there, and as I have said before, and when the gentlelady from California has suggested, mobility of this workforce is important if we are going to have temporary workers. I think that works both in terms of the factual presentation that has been made with respect to seasonal agricultural workers or specialty crops, but it also gives a greater protection to the foreign workers here, and if people would pay attention to how we work our bill, those who would qualify -- well, the priorities under the system would be those who are named, that is employers could name those that worked for them before, they would get first priority.

Second, those that have prior work in agriculture, and after that it would be chronological order of those who have signed up for it. But the determination of the numbers of people who would be involved would be made by us, our government, the Secretary of Agriculture. The demand would be the demand that is actually out there, and yet we would achieve something that hasn't been achieved for some time, a legal workforce with all the protections of the law that are available to American workers, a temporary workforce because they would be required to go home 2 months out of every year, a carrot to get them back, and serving a demonstrated need, that is workers in agriculture.

And so for those reasons, I offer this in the hope that all of this back and forth that we just got into will be set aside, and we will at least look at the reality of the situation and the terms of this, of my amendment being able to meet the reality of the situation.

So with that, I would offer that in the hope that we might be able

to support this on a bipartisan basis.

Mr. Sensenbrenner. The gentleman's time has expired. Does the gentlewoman from California insist upon her amendment --

Ms. Lofgren. I do.

Mr. Sensenbrenner. -- or her point of order?

Ms. Lofgren. I do. The substance of this amendment combines Chairman Smith's E-Verify bill with Mr. Lungren's proposal for an entirely new seasonal agricultural visa program. It contains language outside the committee's jurisdiction, and like Mr. Lungren's new bill, this bill creates a new trust fund, authorizes expansions of consulates abroad, those provisions require that the bill be referred to the Energy and Commerce and Foreign Affairs Committee.

Second, the bill deals with only one subject, the verification of employment of eligibility of workers. It deals with verification only, does not create or eliminate any person's immigration status or employment authorization. Any amendment that deals with granting immigration status or creating a new visa program is outside the scope of the bill's scope and isn't germane. I would note also, if I may, that the minority did, in an effort to move forward in an orderly way, did agree to group these amendments by subject matter. We did not agree to the order of the amendments, although I understand the chairman, the chair has the authority to call on people. I don't dispute that. But we didn't agree to the order. I was just trying to help things along by being courteous to my senior colleague on the committee, who is ranking on another full committee, and my effort to extend that

courtesy created more verbiage than I think was necessary, so at this point, I do insist on my point of order. I do note that the amendment, while nongermane, does point out that the bill itself will be a disaster for the ag industry, and I yield back.

RPTS WALKER

DCMN HOFSTAD

[12:21 p.m.]

Mr. Sensenbrenner. Does the gentleman from Texas, Mr. Smith, insist upon his point of order.

Chairman Smith. Yes, I do, Mr. Chairman.

But let me also say at the outset that I think the gentleman from California, Mr. Lungren, makes a compelling argument for a guest-worker program and something new and different than the dysfunctional system we have right now, and on that, I agree.

However, I do think this amendment is non-germane because it deals with subject matter beyond the scope of the underlying legislation. For example, it gets into immigration benefits and visas, which are clearly beyond the bill at hand. In addition to being a subject matter beyond the bill at hand, it implicates other committees. Several others have been mentioned, such as Energy and Commerce. And for those reasons, I think the amendment is non-germane.

Mr. Sensenbrenner. The chair is prepared to rule unless someone else wishes to speak.

Mr. Lungren. I would love to be able to respond, Mr. Chairman.

Mr. Sensenbrenner. The gentleman from California, Mr. Lungren.

Mr. Lungren. Thank you very much, Mr. Chairman.

At the outset, I would just say, I think giving one side 9 out of 10 amendments to begin with is certainly fair and evenhanded.

Although I believe the substantive arguments made on behalf of my prior amendment remain valid, I would think that the arguments for the second amendment are even stronger.

First of all, there can be no question about the germaneness, in that the subject matter of the amendment remains identical to that of H.R. 2885. My amendment provides for the identical employment verification to that contained in the underlying bill.

Like the underlying bill, my amendment would also recognize the unique impact that E-Verify will have on the agricultural sector of our economy. Under the terms of the underlying bill, there is a grandfather of, I believe it is 3 years, something like that, for those in agriculture, thereby treating agriculture differently than every other employer. But that, of course, is related to the H-2A program.

But it does recognize the unique impact that E-Verify will have on the agricultural sector of my economy. And so we respond to that by adding to the mechanism that is contained in the bill which, as I say, grants this grandfather clause for the agricultural industry by allowing this other process.

In fact, my amendment shares the identical purpose of H.R. 2885 of achieving a legal workforce. I would add that it not only shares the purpose of the underlying bill but actually makes it more likely that the objectives of the bill concerning the sections on agriculture labor or services -- and that is the title, in caps, contained in the bill -- found on pages 20 to 21 and page 25, makes more likely that these objectives will be realized.

And on the last point and the one that the chair ruled on in the prior amendment, it is not dispositive that the amendment here in the nature of a substitute is also subject to the jurisdiction of another committee so long as it is subject to this committee's jurisdiction. If the underlying bill is within the jurisdiction of the committee, and if our chairman's second agricultural bill, H.R. 2847, which is to be dealt with as we finish this bill, if they are both within the jurisdiction of the committee, it would seem to be a logical deduction that the chairman's E-Verify in my agricultural worker bill would be within the jurisdiction of the committee.

The sum of the parts is no less within our jurisdiction than the individual parts themselves. The fact that legislation or parts of legislation might also be referred to other committees, it has not been in the past dispositive of the issue so long as the language of the amendment falls within the jurisdiction of this committee. And I have not heard any argument brought forth that the language of my amendment does not fall within the jurisdiction of this committee.

And, with that, I would ask a ruling of the chair.

Mr. Sensenbrenner. Does anyone else wish to speak on the point of order?

The gentleman from California, Mr. Issa.

Mr. Issa. I thank the chair.

And I, like Chairman Smith, believe the underlying merits of what the gentleman from California is trying to achieve should have vast bipartisan support. If this does not prevail today, it will be because

we didn't have the courage to stretch our rules to realize that he does fall within the committee's jurisdiction, even if it would lead to a sequential referral. I understand we may not have the votes here today, but I would strongly recommend that the underlying legislation that Mr. Lungren has proposed, in addition to other proposals, get serious and real consideration.

It is not a partisan issue to solve the portion that we can solve together. We cannot solve all of the problems of illegal immigration. We certainly have the power to have a reform of our agricultural guest-worker program such that guests can be invited here for a limited period of time, paid legitimate, comparable -- or, legitimate American wages in the ordinary course, return to their home country, and be held accountable.

So I stand with Mr. Lungren for saying, if not now, when. And that "when" cannot be far in the future or we continue to compromise our real ability to be competitive in agriculture, not just in California, but throughout this Nation.

I yield back.

Mr. Watt. Mr. Chairman?

Mr. Sensenbrenner. On the point of order, the gentleman from North Carolina is recognized.

Mr. Watt. I would just like to observe that we have already stretched our rules as far as they need to be stretched today, and we ought to observe the rules of the House. Thank you.

Mr. Sensenbrenner. The chair is prepared to rule pursuant to the

rules of the House.

For reasons expressed by the gentlewoman from California, Ms. Lofgren, and the gentleman from Texas, Mr. Smith, and consistent with the chair's earlier ruling on an amendment by Mr. Lungren, the chair rules this amendment not germane and sustains the two points of order.

Chairman Smith. [Presiding.] Are there other amendments?

The gentleman from California, Mr. Berman, is recognized.

Mr. Berman. Yes, Mr. Chairman, I have an amendment at the desk, Berman 1, which is the exact amendment as has been pre-filed by my colleague from Iowa.

Chairman Smith. The clerk will report the amendment.

The Clerk. "Amendment to H.R. 2885 offered by Mr. Berman. Page 18, strike lines 15" --

Mr. Berman. I will ask unanimous consent --

Chairman Smith. Without objection, the amendment will be considered as read.

[The amendment of Mr. Berman follows:]

***** INSERT 3-1 *****

Chairman Smith. And the gentleman from California is recognized to explain the amendment.

Mr. Berman. Thank you very much, Mr. Chairman.

And these comments may extend a minute or 2 beyond the 5 minutes, but for any other amendment I offer, I will promise to keep them within the 5 minutes.

Mr. Chairman, you and I have worked on a number of issues together in a bipartisan way. Your successful shepherding of the patent reform bill, which was signed last week, is just the latest example of your effectiveness in working in that collaborative way. We spent 2 years together, you as chair and me as the ranking member, of the House Ethics Committee.

The one issue which we have consistently fought about since we are both on this committee is immigration, and argued about and disagreed about. And the amendment at this desk is an amendment -- knowing where you come from as well as I do, I cannot believe that you wouldn't want to correct this flaw in the legislative proposal you have now.

You and Mr. Lungren are right: E-Verify will have real consequences on the seasonable fruit and vegetable industry in this country, and nurseries as well. But the dysfunction is far greater than the dysfunction in the current agricultural guest-workers program, which, if Mr. Issa were here, I would point out we have been trying to change for 11 years and would love to have his support. It is called AgJOBS. It has been bipartisan, and it has been around a

very, very long time.

The real dysfunction is trying to do E-Verify when there are 10 million to 12 million to 14 million people in this country who don't have work authorization. You condemn E-Verify to failure when you try and do it in that context.

The real answer is, E-Verify has a very legitimate and logical place, with the kinks worked out, as part of a comprehensive immigration reform package. But we are not considering a comprehensive reform package. The chairman has decided to move ahead with E-Verify.

But on something that I know has to be driven by a political strategy -- and there is nothing wrong with a political strategy, except that this one I think is a flawed political strategy -- because he knows the consequences to the single industry that attracts more than any other industry undocumented workers, people who are engaging in violating the law by crossing the border to work, and that is the perishable fruit and vegetable industry in this country.

He provides a loophole that is so large that says, if you are bringing a returning worker into this country, you do not have to go to E-Verify. Well, what is seasonal fruits and vegetables? You got a small number of year-round workers, and then you have millions of people who, for one part of the season or another, whether it is the planting or the harvesting or the pruning, are brought in for specific missions.

To compound the fact that huge numbers of those people would be considered returning workers -- because he doesn't have anything that

says the employer has to prove they are returning workers; he just says they are returning workers -- you compound it by a provision in the bill that says farm labor contractors are subject to the same provision. So if the farm labor contractor had somebody who worked in one farm somewhere else in the country now come to your farm, that is considered a returning worker.

I know, on the merits, you cannot expect E-Verify to be a workable system. When you create a huge magnet for disassembling this, you are falling into the same trap that Mr. Lungren and I fell into in 1986. You are trying to do some immigration reform but you aren't dealing with whether or not employers are hiring unauthorized workers in an effective way because you create within your own bill a massive loophole.

Now, the reason it is a flawed political strategy is, it is done to try and get agriculture behind it, but agriculture isn't going to settle for this. You know it. Mr. Lungren knows it. That is why he offers his amendment, flawed though that may be because the real answer, I think, is the proposal in AgJOBS. But you are not going to get the support you want for this bill even with that amendment.

So my hope is you will be persuaded to get rid of the returning-workers exemption from E-Verify -- which, by the way, is the most unverifiable exemption I have ever seen since the employer has to just assert, or the farm labor contractor just has to assert, that the person is returning, and, therefore, he doesn't have to verify -- in the largest single recruiter of undocumented workers in the country.

You are not doing this for some small, little industry. You are doing it for perishable fruit and vegetable growers and their farm labor contractors all over the country -- massive loophole.

So my first hope is that you agree to support this amendment, because this is a laughable de facto amnesty. And, by the way, what greater incentive for somebody who has gone home to come back than to know, because I might have once worked there, I can now come back, and if I can sneak across the border and get that job, I am safe, I got a safe harbor? Safe harbor for undocumented farm workers, that is what this bill is.

But if, on the merits of this argument, you don't vote for it, then my next hope is to watch the vote on the rollcall of people who want to trumpet that they want to do something about illegal immigration but they will never support any legalization program; they are going to just push E-Verify. With this big loophole, I want to watch the rollcall on the amendment where the people vote "no" on an amendment to close a massive loophole, and the consequences of that "no" vote.

Chairman Smith. The gentleman yields back his time. Thank you, Mr. Berman. And I do appreciate your recounting the times that we have worked together in the past and the committees that that has occurred on. And those were satisfactory times. Maybe they will even occur again with regard to immigration, but it won't be on this amendment, which I oppose.

And let me say also that I certainly don't question the gentleman's intentions with this amendment, and I am sure they are

well-grounded, but the amendment does raise some suspicions. And it raises suspicions for this reason: Should the amendment pass, it is, in my judgment, going to hurt the ag industry in California. So it is hard to believe that the gentleman would want to intentionally do that.

Back to my opposition on this amendment. There are no jobs Americans won't do, but there is one job that many Americans seem not to choose if they have other options, and that is seasonal agricultural work. Because of this, U.S. employers often face a shortage of available American workers to fill seasonal agriculture jobs, such as labor-intensive fruit, vegetable, and horticultural specialty crops.

Labor-intensive agriculture needs a period of time to adjust to an E-Verify requirement, so the Legal Workforce Act gives agriculture 3 years before implementation of E-Verify. That is why the committee will mark up the American Specialty Agriculture Act to institute a new agriculture guest-worker program to provide growers with legal access to the foreign workers they need. And that is why the provision this amendment strikes is so important.

Under the Legal Workforce Act, seasonal agricultural workers who return to work for employers they have worked for in previous years will not be run through E-Verify. This will give growers an additional cushion as they adjust to a legal workforce.

Under current law, only new hires have to be verified through the I-9 process. The question is, who is considered not a new hire but a current employee? Federal employment eligibility verification

regulations provide that, quote, "an employer may not be deemed to have hired an individual for employment if the individual is continuing in his or her employment," end quote. And they state that an individual is continuing in their employment, if the person, quote, "is engaged in seasonal employment," end quote.

Accordingly, under current law, a seasonal farm worker who returns to work for a grower is considered a current employee whom the grower does not have to reverify through the I-9 process. The Legal Workforce Act does not require employers to go through the time-consuming process of verification for all of their current employees. It is only fair that agriculture employers be treated the same way.

This amendment requires that growers apply E-Verify to returning seasonal employees. That is not in the interest of employers or growers or the ag industry anywhere in the country. For the reasons I have stated, I oppose the requirement and I oppose the amendment.

Are there other Members who wish to be heard?

The gentleman from North Carolina, Mr. Watt.

Mr. Watt. Thank you, Mr. Chairman. I move to strike the last word.

Chairman Smith. The gentleman is recognized for 5 minutes.

Mr. Watt. I thank the chairman.

I think I now understand why there was such a great reluctance to have Mr. Berman offer his amendment: Because it exposes a major, major, major flaw in this bill. And I suppose the sponsors of the bill

were embarrassed about this, so we spent 45 minutes arguing about why his amendment shouldn't be brought up.

And justifiably embarrassed they should be. This is a loophole that is big enough to drive freight trucks, Mack trucks, airplanes, locomotives -- all filled with workers, by the way -- through. And I would be interested in watching those who have been so adamantly opposed to illegal immigration, so publicly, vociferously opposed to it, I would be interested to see how you are going to vote on this amendment too.

I can't believe this provision is in the bill. Let me read it: "An individual shall not be considered a new hire subject to this E-Verification system under this paragraph if the individual is engaged in seasonal agricultural employment and is returning to work for an employer that previously employed the individual." That is a massive loophole, a massive loophole.

Now, the gentleman says, well, it is going to hurt agriculture in California. Sure, it is going to hurt agriculture in North Carolina. But this E-Verify bill that we are debating is going to hurt every industry in America. If that is the justification that we are using, the whole bill needs to be pulled.

So I don't know how you can, with a straight face, offer a bill that supposedly closes all the loopholes on illegal immigration and leave this massive loophole out there and say, "Everybody other than agriculture has got to comply with the E-Verify system." That makes no sense to me.

North Carolina is a big agriculture State. I am from North Carolina. But the laws that we pass have to have some degree of consistency and some degree of rationality if we are going to be able to stand up and defend them. And this provision in this bill is so out of kilter with everything else in the bill and creates such a massive loophole that I can understand why we spent 45 minutes on procedural mumbo jumbo not trying to get to this amendment.

I at least understand what that prior discussion was all about. I didn't even have a dog in the fight. I was just trying to understand and trying to get to something that was fair. But now it is patently clear to me, nobody wanted to talk about this amendment. And they were justified in not wanting to talk about it because they should be embarrassed by the provision in the bill.

I yield back.

Chairman Smith. The gentleman yields back his time.

The gentleman from Iowa is recognized -- would the gentleman yield to me just for a minute?

Mr. King. I would be recognized and yield to the chairman.

Chairman Smith. Okay. Thank you.

I just wanted to point out -- and I was going to do so before he finished -- to the gentleman from North Carolina and ask him if he knew the North Carolina Growers Association has endorsed the bill.

But I also wanted to read again from the --

Mr. Watt. Would the gentleman yield?

Chairman Smith. The gentleman from Iowa has the time.

Before I yield back, let me make one more point, and that is -- let me read again, because I am not sure that members of the committee heard it. But in the Code of Federal Regulations, this is a definition. It is not something that we have made up. "An employer will not be deemed to have hired an individual for employment if the individual is continuing in his or her employment." And they state that an individual is continuing in their employment if the person, quote, "is engaged in seasonal employment." So the bill rests on a very firm foundation, and that is the definition of "employee" in the Code of Federal Regulations.

I thank the gentleman from Iowa for yielding. And, without objection, the gentleman from Iowa will have an additional minute.

Mr. Watt. Will the gentleman yield?

Mr. King. And reclaiming my time, I would yield to the gentleman from North Carolina.

Mr. Watt. I thank the gentleman for yielding.

I appreciate the chairman pointing out folks from North Carolina who support the bill. Let me point out some people from North Carolina who oppose it: the National Council of Farmer Cooperatives, the National Federation of Independent Business in Raleigh.

But my point goes beyond who supports it and who doesn't support it. It is about having a rational system in place that does not have a massive loophole in it.

And I don't dance to any of these groups, to be honest with you. We got to try to do the right thing, and that is what we were sent here

for. And if the right thing is E-Verify, we shouldn't create a massive loophole in the -- I happen to oppose the underlying bill, but this provision in the bill doesn't make it any more palatable to me. It ought to be rational.

I appreciate the gentleman yielding.

Mr. King. And reclaiming my time, I appreciate the viewpoints on this. I do support the underlying bill for a number of reasons. I think it moves us in the right direction.

And this point of rational consistency is something -- this is an issue that came out to me, and I want to compliment the gentleman from California for generating a good idea here. The underlying bill provides a carveout for illegal workers. And it sets it up as, essentially, in perpetuity as long as those illegal workers can keep coming back, either themselves within their own body or showing up as the person that was their predecessor with the same name.

We don't have a very good record of identifying people that are here illegally. Those that come from Mexico, perhaps half of them have a birth certificate. They are the ones born in the hospital. The other half, when you ask them, can you produce a birth certificate, their answer is, "Yes. What do you want it to say?" I think we have a real identification problem with this workforce that is between 1 million and 1.4 million illegals in the ag sector.

But this exemption from the rule of law is what troubles me. And if we carve out an exception in the rule of law, we have undermined a principle that is one of the essential pillars of American

exceptionalism. And grandfathering in those who are here working illegally, which is specifically what this does -- I mean, it is adept language, certainly, but the effect of it is it grandfathered in people that are working here illegally. And it sets the stage for employers to make the claim that the people that come back to work for them the following year are the ones that worked for them the previous year.

Another thing that it does -- and I may be in a conceptual disagreement with the gentleman from California on this one -- and that is -- it depends on, I think, whether Mr. Smith's ag worker bill actually becomes law, but the question becomes, do they go back to their home country and come back into the United States as a seasonal worker that is grandfathered in, or do they find it more difficult to come back into the United States? And if that is the case, does this provide a perverse incentive for them to stay in the United States illegally and wait for the next season? So there is a perverse incentive there on the one side of this, and on the other side, it undermines the rule of law. So I think it is an unjust preference.

And then, I spent my life in the construction business. We are seasonal. We start up about the 1st of April, and we freeze out about December 10th, on average. And my seasonal workers would have to be reverified every year -- or, used to be, and now I sold that business to my oldest son, but they would have to be reverified every year. We compete against ag workers in some of the jobs that we do. They would have an unfair and unjust advantage, I think. Just requiring, though, an employer to attest that they were an employee previously is, I think,

a significant loophole.

And I want to say that the 36-month extension for ag workers, I think, is a legitimate request. And that is another place where I might not agree with the comment, but with the language of the underlying amendment I do.

And then I would point out that -- let's see, the -- I would point out that we did some numbers just yesterday, without regard to this bill that was coming before us, that were quite interesting to me. So I have tracked for a long time the number of people working in the United States illegally. And we have seen that number be 6.9 million, then up to 8 million, back down to a number pretty close to 7 million, as the chairman says, illegals working in the United States.

I look at the number under the U.S. Department of Labor's chart that shows us how many people in America are simply not in the workforce. And when you add that up -- you have to go to each age category and add that up. And then you add the unemployed to the numbers of people that are not in the labor force. That number has gone, over the last 5 or 6 years, from 69 million Americans simply not in the workforce to, about 3 or 4 years ago, 80 million Americans not in the workforce to -- data from just yesterday, we have surpassed 100 million Americans of working age that are not in the workforce -- 100 million. And I am seeing a number here that 1 million to 1.4 million illegals are working within agriculture. I have to believe that 1 out of 100 of those that are not in workforce at all, that some of them could be recruited to do some of this work.

Mr. Berman. Would the gentleman yield?

Mr. King. I would yield.

Mr. Berman. I thank the gentleman.

I will get more of this on someone else's time, but your point about the perverse incentive, if the chairman intends and Mr. Lungren intend to present a guest-worker program to accompany this bill, first of all, shouldn't it be in the bill? But, secondly, why would you keep this perverse incentive, which says, "We don't care what guest-worker program -- as long as I can assert that it is a returning worker, I don't have to deal with all the problems of going through a formal guest-worker program"?

Mr. King. Reclaiming my time, I don't have an answer for that, which is some of my trouble with the underlying bill. I just think it is important that one of the incentives was that this means that employers will not have to go through the time-consuming process of verifying each individual employee. That was one of the justifications.

So, again, I compliment the gentleman from California. And I regret we are at this place within the discussions in this bill, but I do intend to support the gentleman's amendment. And I yield back.

Ms. Lofgren. Mr. Chairman?

Chairman Smith. The gentlewoman from California, Ms. Lofgren, is recognized.

Ms. Lofgren. I am somewhat torn about the amendment, but I do intend to support it.

I think that, really, what would be a better amendment, but it is not germane, would be if the gentleman from California were able to offer his AgJOBS bill as an amendment to this bill. Because that is really what we need to move forward.

I would note that many opponents of the underlying E-Verify bill have talked about this provision, which the amendment would alter, as the amnesty section of the bill. But it is not really amnesty for the employees. The employers are going to get "olly olly oxen free," but the undocumented workforce is still going to be living in fear. And so I really think that, just in terms of equity, it is important to adopt Mr. Berman's amendment.

I think that we come to this position of support with varying motives. It is sort of interesting. I mean, you know, Mr. King and I rarely agree, and we are probably agreeing for different reasons this time. But I think that that just underlies the defect in the underlying bill from a variety of perspectives, whether it is amnesty -- which, clearly, it is -- or whether it is equity, which it really is not equitable, to both employer and employee.

So I think that the amendment is meritorious. I thank Mr. Berman for offering it. And I thank the chairman for allowing the courtesy -- I tried to offer earlier to allow my senior Member to offer an amendment ahead of me. I appreciate that we have been able to do that. I think Mr. Berman has one more that is leaping ahead of us more junior Members. And I appreciate that courtesy, as well.

And, with that, I would -- if Mr. Berman wants to say additional

things, I would yield to him, and or else I would yield back.

Mr. Berman. Just the reference to the more senior Member, it reminds me of the old Tom Foley joke. When you hear that a member of your party in your committee who has more seniority than you gets sick, your first question is, "Is it serious?"

Ms. Lofgren. I yield back.

Chairman Smith. Thank you, Ms. Lofgren.

The gentlewoman from Texas, Ms. Jackson Lee, is recognized.

Ms. Jackson Lee. Mr. Chairman, as you well know, many of us have had a constant refrain in this body, and that is, what is wrong with comprehensively fixing the sickness and the problem that prevails in this country, and that is an unordered immigration system that doesn't answer the questions of the immediacy of the day, which is 12 million individuals who are undocumented, along with, as everyone knows, a rising unemployment?

And before I go further, I would like to acknowledge Congressman Clay, one of our distinguished Members, who served as the chairperson of the Ed and Labor -- it has changed many names. But he continues to -- I shouldn't say startle us with his youth, and many of us thought that a young man had walked into the room.

Chairman Clay, it is a pleasure to see you here today.

But we have a combined problem, and that problem is the unemployment and the existence of undocumented individuals who are still here in spite of the fact, Mr. Chairman, as you well know, the present administration has been well-complimented on the number of

individuals that they have been able to deport on the basis of the present legal structure. So we know that we don't have as many entering the United States, particularly for work, that we have had in years past because there is certainly -- as they say, news travels.

But now we have legislation that puts in place the E-Verify, which I made a point during the hearing on the fact that, again, we are doing a piecemeal situation.

But I comment specifically on Mr. Berman's amendment because it brings to mind the irony of the bill in its language in the section that Mr. Berman seeks to strike, is that the person becomes an old friend, an old shoe. The individual who initially gets verified by this process has longevity. They can go back and forth and go back and forth.

And so we are talking about providing an opportunity for American workers. If that is what we were concerned about, you would think if someone left and I was inspired to go work in agricultural work, that I would have the opportunity, but, no, wait, I can't, because someone is in front of me based upon their old documentation, at least as this section reads. You don't have to be considered a new hire. You don't have to go through the same leaps and bounds.

And so we institutionalize the idea of workers. There is no such thing as a guest worker. We know that draws concerns for many. But we still are chipping away at the problem instead of looking at it comprehensively.

The other point is that businesses are suggesting -- and I know

we heard this, Chairman Smith. We worked together on these issues when we were talking about H-1B visas. And I do believe there are ways of doing this. But businesses are again saying, I guess outside of the agricultural community, how they are going the work with E-Verify on such a slow technological system on overload. And they really are asking as to whether or not they can do this in a manner where there is a give-and-take from the business community, again, I guess with pressure on them to hire Americans, but also how this program would work.

And I found the comments of my friend from Iowa unique in the possibility that there may be a semblance of agreement, but the point is, there is a preference here. So the agricultural hires get a free ticket in immigration reform, and others who are in restaurants and construction and other places don't. But the overall problem remains. Are any of them hiring Americans? Are any of them hiring minorities, which has always been a crisis?

So I am concerned of the free ride that the language that Mr. Berman is trying to strike gives. And I would argue that his amendment is constructive, because it looks as if there are so many free rides, we can't seem to make an argument that this is a fair and balanced provision in this particular bill.

Lastly, I cry out for comprehensive immigration reform. And I add that we must pass the jobs bill for the American people. And we must find a way for businesses to invest in America, and we will have jobs. And find a way to have a parallel system, that our industries

that need workers can do that without undermining the American worker.

I rise to support the gentleman's amendment.

Mr. Nadler. Mr. Chairman?

Chairman Smith. Thank you, Ms. Jackson Lee.

The gentleman from New York, Mr. Nadler, is recognized.

Mr. Nadler. Thank you, Mr. Chairman.

I applaud and I congratulate the gentleman for his extremely constructive amendment. I support it.

And I yield to the gentleman from California.

Mr. Berman. I thank the gentleman for yielding. And I thank my colleagues for their comments.

Mr. Chairman, though, I want to respond specifically to the regulatory language you read. The bill defines what are returning employees, and it doesn't define it.

So, first, let's take two scenarios. The first one, everyone is telling the truth. The employer has hired that person in the past, and now that person is crossing the border again to come back. He doesn't have to verify. And what does he do? He simply says, this is a returning employee; I don't have to verify. And the worker really did work for that employer before in an undocumented status, and he crosses the border once again, that magnet, because he knows that there is a job for which he will work, and he is safe from getting busted by the E-Verify system because he doesn't have to be verified through that system. That is one scenario.

The second scenario is that maybe not everybody is playing this

straight. And I would submit to you that, for very understandable economic reasons, agriculture knows full well that when they have hired seasonal workers or when they have taken farm labor contractors' referrals on to their farms, they know they don't look into whether the Social Security card is valid or the birth certificate, as Mr. King pointed out. All they want to do is to get workers to pick their crops. This is a crisis. The harvest is coming. They ain't looking at this.

In other words, no one is playing a straight game in this racket, for understandable reasons. There would be no seasonal fruit and vegetable industry in this country if people played a straight game. Why you think with this loophole they will be necessarily somebody who worked in that farm in the previous season -- maybe 10 seasons ago. Maybe, if it is a farm labor contractor referral, maybe they once worked for him in some other farm on the other side of the country. It is a massive exemption --

Chairman Smith. The gentleman's time --

Mr. Berman. -- for which there is no verification.

Mr. Nadler. I yield back.

Chairman Smith. Okay. The gentlewoman from California, Ms. Waters, is recognized.

Ms. Waters. Well, thank you very much, Mr. Chairman.

I support Mr. Berman's amendment for a number of reasons.

I am about the American way of thinking, what is good for the goose is good for the gander. I cannot believe that in this legislation we have an amnesty carveout. I have heard Members on the opposite side

of the aisle railing against amnesty to the place where Members on this side of the aisle, in trying to describe what it would like to see in immigration reform, do not even use the words anymore because it has been demonized so much.

And here we have an affirmative action amnesty carveout. And I don't want to talk about how Members on the opposite side of the aisle have railed against affirmative action either.

But I don't understand how you could, with a straight face, have this amnesty carveout. And why would you do it just for one industry? Your colleague, Mr. King, talked about the construction industry. Why not a carveout for them? What about the people in the tourist industry, whose hotels and other kinds of things are seasonal? Why not a carveout for them?

You know and I know that, just as Mel Watt described, that this carveout that is a great, big loophole that is designed for amnesty for one industry is wrong, and that even those people who would support the bill conceptually cannot support this kind of amnesty carveout.

I am honestly looking for a way, honestly looking for a way, to deal with verification. I really do think it is best done in comprehensive immigration reform, but I am looking at what this bill does, what it does not do, because I have not made up my mind yet. But I certainly can't even consider this bill with this amnesty portion in it.

Amnesty is what the opposite side of the aisle have consistently said is wrong with immigration reform. They have said "amnesty for

no one," that we have to have a system that is, you know, fair to everybody. Then why and how can you carve out amnesty in this bill and still make that argument? Amnesty is amnesty, no matter how you carve it out, no matter how you talk about it.

And, again, this amnesty is just for one industry. And Mr. King made a great argument: Why not consider construction? It is seasonal. And I can further that argument. We are talking about the tourist industry and seasonal work.

So I would suspect that a lot of people here, on both sides of the aisle, have appreciation for what Mr. Berman has brought to our attention and how he is attempting to explain to you how this amnesty is not workable.

And I would ask that, Mr. Chairman, who -- you know, you have done your job in defending this entire legislation with the amnesty provision in it. You have talked about the special interests of agriculture, who is behind this amnesty portion of the bill. And so, if the chairman would, I would yield time to him so that the chairman could explain to us why amnesty for the special industry, why amnesty is carved out in this bill. And how does he maintain the argument on amnesty and immigration reform while he has amnesty so clearly identified in this bill?

Mr. Chairman, I yield to you.

Chairman Smith. Thank you for yielding.

The bill itself reads -- and I will just remind the gentlewoman that there is nothing in here about amnesty. What we are doing is

letting current workers who leave return without going through the E-Verify check. And that is under the definition of the Federal rules that I read a few minutes ago.

And it is, I will acknowledge, it is industry-specific. I do think agriculture, as I explained earlier, has greater needs and different needs than other industries, and we wanted to try to do something for agriculture.

Ms. Waters. Will the gentleman --

Chairman Smith. If the --

Ms. Waters. Reclaiming my time --

Chairman Smith. Well, would you yield just for another minute?

Ms. Waters. Yes.

Chairman Smith. Although the gentleman from North Carolina isn't here now, a while ago he acknowledged that it was going to hurt ag. We are trying to help ag, not hurt ag. And that is why I don't understand how anyone with agriculture in their State --

Ms. Waters. Reclaiming my time, Mr. Chairman --

Chairman Smith. -- could be in favor of this amendment.

Ms. Waters. Reclaiming my time, you know, let me just say that you just said that you believe that ag deserves amnesty while --

Chairman Smith. No, I did not say that.

Ms. Waters. -- construction does not deserve amnesty and that they have a greater need. I guess you have done polling. You have determined that this industry, more than any --

Mr. Lungren. Regular order.

Ms. Waters. -- other industry, deserves to have amnesty.

Chairman Smith. The gentlewoman's time has expired.

Are there other Members who wish to be heard?

Mr. Lungren. Mr. Chairman?

Chairman Smith. The gentleman from California, Mr. Lungren, is recognized.

Mr. Lungren. Mr. Chairman, for some of us who watch NCAA football, there is something known as the Brent Musburger drinking game. And people will understand what I mean. I think the gentlelady, if we had the drinking game here, you have to drink every time you mention "amnesty," we wouldn't be able to proceed for the rest of the day.

It is interesting to see that the -- at least the talking points extend to the letter "A."

I am a little betwixt and between on the gentleman's amendment, not because it deals with the part of the bill that grants amnesty. Let's make it very, very clear. This would relieve those in agriculture of having to go through the E-Verify process for returning workers, much like the bill does not require most employers to verify their current workforce. Now, that is a public policy argument that we can have, as to whether or not employers ought to be burdened with checking their already existing workforce. And this is done because of the unique nature of seasonal agricultural workers.

The reason why I am betwixt and between is that it does not answer the question for agriculture -- that is, this provision -- in that it

doesn't change the status of the worker or the employer's obligation about hiring an illegal worker knowingly.

And my concern is that, while some might see this as a safe harbor, others might see this as a target-rich environment for ICE. That is, if most employers have the obligation to go through the E-Verify system and the ICE, knowing the history of agriculture and knowing that employers are not burdened by the E-Verify system, would then think that perhaps agriculture seasonal workers would still be subject to the laws with respect to their presence in the United States illegally and thereby find an area where they could collect a lot of arrestees, both employer and employee.

So I am a little bit concerned about this provision making agricultural seasonal workers and their employers probable targets of ICE in the future. So I am a little concerned about this.

Mr. Berman. Would the gentleman yield?

Mr. Lungren. Yes, I would be happy to yield.

Mr. Berman. Thank you very much.

You captured this. There is a reason why, even with this unbelievably broad loophole -- I assert they are returning, and therefore I don't have to verify them; or I got them from a farm labor contractor who asserted they were returning somewhere -- but even with that, the Farm Bureau, the Western Growers, the major employers of workers harvesting seasonal fruits and vegetables are against this bill: Because they don't want to be put into this world where they are still playing the lying game. They want to be regularized. They

want to be operating --

Mr. Lungren. Reclaiming my time, that is why I would hope that the gentleman would have supported my amendment --

Mr. Berman. I never had a chance to.

Mr. Lungren. Well, I understand that. Well, I hope he will when we have it as a freestanding bill.

The point of fact is, look, when you and I worked on this 25 years ago and I made a good-faith effort to try and get a guest-worker program for agriculture, we settled for something called the SAW-RAW program. I was fearful that it would involve itself with a lot of fraud and abuse, and it did. We rewrote the H-2 program. I put a lot of the words in there, the H-2A program. It doesn't work. We have had 25 years of experience knowing that it doesn't work. We need to do something fundamentally different. That is why I offered my amendment.

That is why I am betwixt and between with your amendment. Because I understand what you are saying; it does not meet the need. But, at the same time, it is being mis-argued here as somehow an attempt to try and get rid of an amnesty provision. This is not amnesty. People should understand that.

You can be against it for other reasons, but let's make it clear. When we throw that word around so easily, we distort, in my judgment, my opinion, we distort the debate, and it makes it more difficult for us to come to a resolution. So --

Mr. Berman. Would the gentleman yield?

Mr. Lungren. -- I understand why the gentleman is doing what he

is doing. I was probably 45 -- I was 45 percent of my way in your direction, but I just can't get over that 50 percent.

Mr. Berman. Would the gentleman yield?

Chairman Smith. The gentleman's time has expired.

The gentlewoman from California is recognized.

Ms. Chu. I support this amendment because it stops a broad loophole in the bill. And there are notable ones who agree with this, and I would like to just read some quotes from these folks.

Khris Kobach, the mastermind behind State E-Verify bills, called the bill "amnesty" when he wrote, "The bill would effectively allow agricultural workers to skip E-Verify. All an employer has to do is assert that the alien worked for him at some point in the past. This loophole alone would allow millions of illegal aliens to continue working here. In sum, the bill is a bad bargain for any American who thinks our immigration laws should be enforced."

Mr. Berman. Would the gentlelady yield?

Ms. Chu. Yes.

Mr. Berman. Very good point. Khris Kobach we all know, right? This is one of the sharpest minds on the opposite side of my view of this issue. He calls it what it is.

And, Dan, my friend from California, when Maxine calls it an amnesty, she is right. I mean, we brought up a bill called the DREAM Act last December on the floor, where if a 5-year-old kid is brought into this country by parents or by coyotes or guardians or relatives, having no notion of what is happening to him, and he is being brought

here, all we heard was, this is a nightmare law because it provides amnesty for that person who came here when they were 5.

To hear what Khris Kobach says about this provision -- and you don't need this provision. You are not getting the growers with this provision, and it is not a substitute for finding a way to get a legal workforce. But this provision is a huge amnesty. You just don't want to acknowledge that. Because it allows an employer to assert that this person is returning, he doesn't have to show anything, he doesn't have to show an I-9, he doesn't have to show documentation. He asserts, and he doesn't have to go to E-Verify. It is -- Maxine called it like it is.

Chairman Smith. Does the gentlewoman from California, Ms. Chu, does she yield back her time?

Ms. Chu. Yes, I yield back my time.

Ms. Waters. Would you yield to me?

Ms. Chu. I yield to the gentlewoman from California.

Chairman Smith. Okay.

Ms. Waters. In case Mr. Lungren would like to liken this to having to drink every time you hear a word, let me give you something to drink on.

As Mr. Berman has said, this is amnesty. You may not like to hear it. You don't want to be confronted with it. You don't want to admit that this is what many of your colleagues have railed against. But amnesty is amnesty, no matter how you would like to look at it.

Mr. Lungren. Am I hearing the gentlelady properly? Did you use

the word "amnesty"?

Ms. Waters. Would you please repeat it? Would you say it one more time?

And we have to define "amnesty" in ways that apply to everybody. This special affirmative action that you want to do is not fair. It does not comport with what you have said you care about as we have looked at immigration reform.

Whenever we have tried to make a case for immigration reform, where we talk about those who have lived in this country for years, those who have paid taxes, those who have served in the war, et cetera, and talk about some way by which we recognize that, you have called it amnesty. Because in your definition, you have said no one should be able to have this kind of favoritism, as you would call it.

And now you have carved out this big loophole that Mr. Watt so aptly described earlier when he talked about the Mack truck and the train and the airplane and all of that, and you expect us not to remind you that this is what you have told us you did not want to see. You did not want to see amnesty in any shape or form. You don't like amnesty, it should never be a part of immigration reform, and amnesty is what you will not support.

So why have you changed your mind? Why do you want amnesty now? And why do you want it for one special industry, one special carveout? And why don't you accept Mr. King's concern about the fact that construction is seasonal?

This is just unfair. It is unworkable. You may not want to admit

it, but this is amnesty.

And I will yield my time to anybody else who wants to define "amnesty" further.

Chairman Smith. Anybody else who wants to use that word? No takers.

The gentlewoman from California yields back her time.

The question is on the amendment.

All in favor, say, "Aye."

Opposed, "Nay."

In the opinion of the chair, the nays -- a rollcall vote has been requested, and the clerk will call the roll.

The Clerk. Mr. Smith?

Chairman Smith. No.

The Clerk. Mr. Smith votes no.

Mr. Sensenbrenner?

[No response.]

The Clerk. Mr. Coble?

Mr. Coble. No.

The Clerk. Mr. Coble votes no.

Mr. Gallegly?

Mr. Gallegly. No.

The Clerk. Mr. Gallegly votes no.

Mr. Goodlatte?

[No response.]

The Clerk. Mr. Lungren?

Mr. Lungren. No.

The Clerk. Mr. Lungren votes no.

Ms. Waters. I didn't hear Mr. Lungren.

The Clerk. Mr. Chabot?

[No response.]

The Clerk. Mr. Issa?

[No response.]

The Clerk. Mr. Pence?

[No response.]

The Clerk. Mr. Forbes?

[No response.]

The Clerk. Mr. King?

Mr. King. Aye.

The Clerk. Mr. King votes aye.

Mr. Franks?

Mr. Franks. No.

The Clerk. Mr. Franks votes no.

Mr. Gohmert?

Mr. Gohmert. Aye.

The Clerk. Mr. Gohmert votes aye.

Mr. Jordan?

[No response.]

The Clerk. Mr. Poe?

[No response.]

The Clerk. Mr. Chaffetz?

Mr. Chaffetz. No.

The Clerk. Mr. Chaffetz votes no.

Mr. Griffin?

Mr. Griffin. No.

The Clerk. Mr. Griffin votes no.

Mr. Marino?

Mr. Marino. No.

The Clerk. Mr. Marino votes no.

Mr. Gowdy?

Mr. Gowdy. No.

The Clerk. Mr. Gowdy votes no.

Mr. Ross?

Mr. Ross. No.

The Clerk. Mr. Ross votes no.

Ms. Adams?

[No response.]

The Clerk. Mr. Quayle?

Mr. Quayle. No.

The Clerk. Mr. Quayle votes no.

Mr. Conyers?

[No response.]

The Clerk. Mr. Berman?

Mr. Berman. Aye.

The Clerk. Mr. Berman votes aye.

Mr. Conyers?

Mr. Conyers. Aye.

The Clerk. Mr. Conyers votes aye.

Mr. Nadler?

[No response.]

The Clerk. Mr. Scott?

Mr. Scott. Aye.

The Clerk. Mr. Scott votes aye.

Mr. Watt?

Mr. Watt. Aye.

The Clerk. Mr. Watt votes aye.

Ms. Lofgren?

Ms. Lofgren. Aye.

The Clerk. Ms. Lofgren votes aye.

Ms. Jackson Lee?

Ms. Jackson Lee. Aye.

The Clerk. Ms. Jackson Lee votes aye.

Ms. Waters?

Ms. Waters. Aye.

The Clerk. Ms. Waters votes aye.

Mr. Cohen?

[No response.]

The Clerk. Mr. Johnson?

Mr. Johnson. Aye.

The Clerk. Mr. Johnson votes aye.

Mr. Pierluisi?

Mr. Pierluisi. Aye.

The Clerk. Mr. Pierluisi votes aye.

Mr. Quigley?

Mr. Quigley. Aye.

The Clerk. Mr. Quigley votes aye.

Ms. Chu?

Ms. Chu. Aye.

The Clerk. Ms. Chu votes aye.

Mr. Deutch?

Mr. Deutch. Aye.

The Clerk. Mr. Deutch votes aye.

Ms. Sanchez?

Ms. Sanchez. Aye.

The Clerk. Ms. Sanchez votes aye.

Chairman Smith. The gentleman from Wisconsin?

Mr. Sensenbrenner. Aye.

The Clerk. Mr. Sensenbrenner votes aye.

Mr. Poe?

Mr. Poe. Aye.

The Clerk. Mr. Poe votes aye.

Mr. Nadler?

Mr. Nadler. Aye.

The Clerk. Mr. Nadler votes aye.

Mr. Chabot?

Mr. Chabot. How am I recorded?

The Clerk. Not recorded, sir.

Mr. Chabot. No.

The Clerk. Mr. Chabot votes no.

Mr. Berman. Mr. Chairman, is this the -- is this the Medicare Part D bill?

Mr. Watt. Can we insist on the rules at this point?

Chairman Smith. We are going to give Members who are not in the room an opportunity to get here. I think there are several --

Mr. Watt. Can we insist on the rules at this point, Mr. Chairman?

Chairman Smith. We are going -- as we have done many times in the past, we are going to wait to see if there are any other Members who wish to be recorded.

Mr. Watt. How long? How long?

Chairman Smith. The gentleman from California?

The Clerk. Not recorded, sir.

Mr. Issa. No.

The Clerk. Mr. Issa votes no.

Ms. Jackson Lee. Mr. Chairman, how am I recorded?

The Clerk. Not recorded, ma'am.

Ms. Jackson Lee. Pardon me?

The Clerk. Not recorded, ma'am.

Ms. Jackson Lee. Aye.

The Clerk. Ms. Jackson Lee has voted aye.

Ms. Jackson Lee. You said what? Pardon me? I am recorded as what?

The Clerk. As voting aye.

Ms. Jackson Lee. Thank you very much.

RPTS MCKENZIE

DCMN BURRELL

[1:25 p.m.]

Chairman Smith. The gentleman from California.

Mr. Gallegly. How am I recorded?

The Clerk. Mr. Gallegly has voted no.

Mr. Gallegly. Aye.

The Clerk. Mr. Gallegly votes aye.

Chairman Smith. The clerk will report.

The Clerk. Mr. Chairman, 19 members voted aye, 12 members voted nay.

Chairman Smith. A majority having voted in favor of the amendment, the amendment is agreed to. Are there other amendments?

Is Ms. Jackson Lee in the room? We passed over several of your possible amendments earlier. I didn't know if you wanted to offer them or not.

Ms. Jackson Lee. I do wish to offer them.

Chairman Smith. The gentlewoman from Texas, Ms. Jackson Lee is recognized for the purpose of offering an amendment.

Ms. Jackson Lee. Mr. Chairman, I want to bring up amendment No. 143.

Chairman Smith. The clerk will report the amendment No. 143.

The Clerk. Amendment to H.R. 2885 offered by Ms. Jackson Lee.

Page 59 after line 21, insert the following and redesignate --

[The amendment of Ms. Jackson Lee follows:]

***** INSERT 4-1 *****

Chairman Smith. Without objection, the amendment will be considered as read. The gentlewoman is recognized to explain her amendment.

Ms. Jackson Lee. Thank you very much, Mr. Chairman. My amendment adds a new category of unfair immigration-related employment practices for willingly using the verification system in ways that could lead to discrimination. It is well documented by examples of employees who happen to have unique names to have been wrongly described as a nonstatus person. This amendment will ensure that H.R. 2885 does not increase discrimination and make it harder for foreign-born U.S. citizens and lawful immigrants to find work in this tough economy.

H.R. 2885 significantly increases penalties on employers and individuals who do not use the verification program or misrepresent information. The emphasis then or the burden will be on those employers being right. That means that they are going to err on the side of excluding everyone. But the bill does nothing to prohibit employers from willfully misusing E-Verify by violating essential worker protections, such as an example of an individual who was status, with a Social Security number, was denied employment and had to take leave from that interview or from that hiring to go and document their status at the Social Security office.

The amendment is necessary to make sure the bill doesn't make it harder for American workers to find and keep jobs in these tough economic times, particularly in this time of classifying and isolating groups. Without penalties for unfair immigration-related employment

practices, bad apple employers would be able to exploit, underpay and discriminate against employees without fair consequences. For those types of employees, this amendment provides a tangible stick to ensure program compliance.

According to the Westat 2007 study, many supervisors assumed that all employees who received TNCs were unauthorized workers and therefore required them to work longer hours and in poorer conditions. The Westat 2009 study found that despite a prohibition against taking adverse actions against persons who receive TNCs, more than one-third of employers surveyed admitted taking actions, such as reducing pay, restricting work assignments, and just plain training.

I believe this is a good addition to legislation that will widely open the process of E-Verify, subject many, many employees to the concept that they may not be status and wrongly identify them as such and therefore discriminate against them either in pay or conditions.

Last year Representative King spoke on the House floor in defense of S.B. 1070, Arizona's anti-immigrant bill, and we know that unfortunately that bill had its serious problems in how individuals would be assessed. I know that my colleague would enjoy the idea that we now have a provision that will help make sure that discrimination does not exist in any form in immigration legislation that may go through this committee and through this House.

This amendment is needed to dissuade employers from tapping into any form of discrimination. I ask my colleagues to support this amendment.

With that, Mr. Chairman, I yield back.

Chairman Smith. Thank you, Ms. Jackson Lee. The gentleman from California, Mr. Gallegly, recognized.

Mr. Gallegly. Thank you, Mr. Chairman. And I rise in opposition to this amendment. Often people raise the specter of employers discriminating against employees based on race or ethnicity. However, if you are concerned about discrimination in employment verification, E-Verify is the solution and not the problem. When employers use E-Verify, they do not have discretion of discrimination. The computer systems behind E-Verify do not care about ethnicity. They just determine whether the applicant is eligible to work, and they determine this for all hires, not just new hires of a certain ethnicity. This takes the discretion and, thus, the opportunity to discriminate clearly out of the process.

The other forms of discrimination often mentioned are that people who need time to correct problems with their records will be fired or that employers will only selectively apply E-Verify to some employees. E-Verify prohibits both practices. Employers must allow workers time to contact Social Security or DHS to cure any problems with the worker's records.

Further, the bill already contains anti-discrimination language requiring employers to run the system on all employees if they would like to use the system on one employee.

Penalties already exist in the Immigration and Nationality Act and in the Legal Workforce Act for all of the actions the amendment

seeks to penalize. What this amendment really does is create duplicative penalties for employers who utilize E-Verify. The additional penalties would be for unfair immigration-related practices.

Therefore, the result of this amendment is not to avoid discrimination but rather to make businesses fear using the system. The penalties and anti-discrimination provisions are sufficient.

Hence, I strongly ask my colleagues to join me in strong opposition to this amendment. And I yield back.

Chairman Smith. Thank you, Mr. Gallegly. The gentlewoman from California, Ms. Lofgren, is recognized.

Ms. Lofgren. Mr. Chairman, I would urge that we accept this thoughtful amendment. Not every employer or every employee, for that matter, is a perfect person. And so as we craft our measures, we need to at least be alert to the possibility that there are some on all sides of the deal who may not be exactly perfect. This amendment would make it an unfair employment practice to willingly fail to notify a worker, which we know already happens from the studies that we have done. To take an adverse employment action based on a TNC to require a person to self-check his or her employment eligibility in the system as a condition, I think that this is -- you know, we talk about -- and my colleagues on the other side of the aisle talk a lot about people who aren't authorized to work. But this is about people who are authorized to work. This is about Americans who never before have had to ask permission from the Federal Government to accept a job. And now this

bill, if it goes through, is going to have a new scheme where every American who, until today, was free to accept a job, is going to have to do a "mother, may I" to the Federal Government. We ought to at least make sure that there is some protection in the bill for that "mother, may I" situation. And without this amendment, we are not really going to get to where we need to be.

So I thank the lady for offering her amendment, and I urge members to support it. I yield to the gentlelady.

Ms. Jackson Lee. I thank the gentlelady for her articulation of the core of the amendment. And I just want to highlight even the language inside the amendment. I don't understand why my good friend from California would insist on not enhancing the anti-discriminatory practices that could happen in any era of immigration. We didn't have these laws when the Irish came to our shores or the Italians came to our shores, who were looked upon and stigmatized as immigrants. And even as they took the status of U.S. citizens, their accents and their names might have caused them to be perceived as individuals who were not Americans.

In the instance of this E-Verify, we too have a very multicultural society, with different names and different accents, who are American citizens. This provides a small measure of effort, which is one -- when you fail to notify an individual of a receipt of a tentative nonverification of an individual's identity or work eligibility, then you are prohibited from doing so. It will be classified as an unfair immigration-related employment practice. And then secondarily as

well, to take an adverse employment action, including rescinding an offer of employment, terminating, et cetera, against an individual due to receipt of a tentative nonverification.

It is a simple process that could be helpful to all of us. And I yield back to the gentlelady, asking my colleagues to support this amendment.

Ms. Lofgren. I yield back, Mr. Chairman.

Chairman Smith. The question is on the amendment. All in favor say aye. Opposed nay.

Ms. Lofgren. Roll call.

Chairman Smith. A roll call vote has been requested. The clerk will call the roll.

The Clerk. Mr. Chairman.

Chairman Smith. No.

The Clerk. Mr. Smith votes no.

Mr. Sensenbrenner?

[No response.]

The Clerk.

Mr. Coble?

[No response.]

The Clerk. Mr. Gallegly?

Mr. Gallegly. No.

The Clerk. Mr. Gallegly votes no.

Mr. Goodlatte?

[No response.]

The Clerk. Mr. Lungren?

[No response.]

The Clerk. Mr. Chabot?

Mr. Chabot. No.

The Clerk. Mr. Chabot votes no.

Mr. Issa?

[No response.]

The Clerk. Mr. Pence?

Mr. Pence. No.

The Clerk. Mr. Pence votes no.

Mr. Forbes.

[No response.]

The Clerk. Mr. King?

[No response.]

The Clerk. Mr. Franks?

Mr. Franks. No.

The Clerk. Mr. Franks votes no.

Mr. Gohmert?

[No response.]

The Clerk. Mr. Jordan?

[No response.]

The Clerk. Mr. Poe?

Mr. Poe. No.

The Clerk. Mr. Poe votes no.

Mr. Chaffetz?

[No response.]

The Clerk. Mr. Griffin?

[No response.]

The Clerk. Mr. Marino?

Mr. Marino. No.

The Clerk. Mr. Marino votes no.

Mr. Gowdy?

Mr. Gowdy. No.

The Clerk. Mr. Gowdy votes no.

Mr. Ross?

[No response.]

The Clerk. Mrs. Adams?

Mrs. Adams. No.

The Clerk. Mrs. Adams votes no.

Mr. Quayle.

Mr. Quayle. No.

The Clerk. Mr. Quayle votes no.

Mr. Conyers?

[No response.]

The Clerk. Mr. Berman?

Mr. Berman. Aye.

The Clerk. Mr. Berman votes aye.

Mr. Nadler?

[No response.]

The Clerk. Mr. Scott?

Mr. Scott. Aye.

The Clerk. Mr. Scott votes aye.

Mr. Watt?

Mr. Watt. Aye.

The Clerk. Mr. Watt votes aye.

Ms. Lofgren?

Ms. Lofgren. Aye.

The Clerk. Ms. Lofgren votes aye.

Ms. Jackson Lee?

Ms. Jackson Lee. Aye.

The Clerk. Ms. Jackson Lee votes aye.

Ms. Waters?

[No response.]

The Clerk. Mr. Cohen?

[No response.]

The Clerk. Mr. Johnson?

Mr. Johnson. Aye.

The Clerk. Mr. Johnson votes aye.

Mr. Pierluisi.

Mr. Pierluisi. Aye.

The Clerk. Mr. Pierluisi votes aye.

Mr. Quigley?

[No response.]

The Clerk. Ms. Chu?

Ms. Chu. Aye.

The Clerk. Ms. Chu votes aye.

Mr. Deutch?

[No response.]

The Clerk. Ms. Sanchez?

Ms. Sanchez. Yes.

The Clerk. Ms. Sanchez votes aye.

Chairman Smith. The gentleman from North Carolina.

Mr. Coble. No.

The Clerk. Mr. Coble votes no.

Chairman Smith. The gentleman from Utah.

Mr. Chaffetz. No.

The Clerk. Mr. Chaffetz votes no.

Chairman Smith. The gentleman from Wisconsin.

Mr. Sensenbrenner. No.

The Clerk. Mr. Sensenbrenner votes no.

Chairman Smith. The gentleman from California.

Mr. Lungren. No.

The Clerk. Mr. Lungren votes no.

Chairman Smith. The gentleman from Arkansas.

Mr. Griffin. No.

The Clerk. Mr. Griffin votes no.

Chairman Smith. The gentleman from Virginia.

Mr. Goodlatte. No.

The Clerk. Mr. Goodlatte votes no.

Chairman Smith. The gentleman from Iowa.

Mr. King. No.

The Clerk. Mr. King votes no.

Chairman Smith. The gentleman from Texas.

Mr. Gohmert. No.

The Clerk. Mr. Gohmert votes no.

Chairman Smith. The gentleman from Michigan.

Mr. Conyers. Aye.

The Clerk. Mr. Conyers votes aye.

Chairman Smith. The clerk will report.

The Clerk. Mr. Chairman, 10 members voted aye, 18 members voted nay.

Chairman Smith. The majority voted against the amendment. The amendment is not agreed to. The gentlewoman from California, Ms. Lofgren, is recognized.

Ms. Lofgren. Mr. Chairman, I am offering Lofgren number 140.

Chairman Smith. The clerk will report the amendment.

The Clerk. Amendment to H.R. 2885 offered by Ms. Lofgren.

Page 22 at the end of line 23 --

[The amendment by Ms. Lofgren follows:]

***** INSERT 4-2 *****

Ms. Lofgren. I ask unanimous consent that the amendment be considered as read.

Chairman Smith. Without objection, the amendment will be considered as read. And the gentlewoman from California is recognized to explain the amendment.

Ms. Lofgren. Mr. Chairman, I understand there is at least some possibility that this amendment might be acceptable to the majority, and I hope that is the case.

The amendment requires employers who intend to screen a person before the first day of work to notify the Secretary, as is currently required under the Federal acquisition regulation for reverification. It also requires employers who intend to voluntarily recertify their entire workforce to notify the Secretary and requires employers to treat all workers the same.

Now the current E-Verify rules prohibit employers from prescreening applicants, and this bill eliminates that, which means that people who are authorized to work, large numbers of Americans, could lose out on jobs because of database errors or even employer misconduct.

By requiring employers to notify the Department of Homeland Security in advance of prescreening job applicants or reverifying existing workers, the amendment will encourage necessary oversight and help prevent authorized workers from being erroneously fired or having job offers withheld or rescinded.

This amendment extends an important protection that U.S. workers

have under current law. And here is where I think maybe we find some common ground. The Bush administration was the one that put in the Federal acquisition rule. Federal contractors are permitted to reverify their workforce only if they notify the Secretary of the Department of Homeland Security. And according to the Civilian Agency Acquisition Council and the Defense Acquisition Regulations System, this requirement -- and I quote -- best prevents opportunities for discrimination or the appearance of discrimination.

Notification of the Department is a key tool to monitor that employers are following program rules and that American workers don't lose their jobs because of employer misconduct. If the bill's sponsors are serious about protecting American workers from adverse decisions, I hope that they will accept this amendment which, as I say, is part of existing law going back to the administration of President George Bush.

With that, I would yield back my time and hope that we can come together and adopt this amendment.

Chairman Smith. Thank you, Ms. Lofgren. I will recognize myself in opposition to the amendment.

I oppose this amendment because it places unnecessary burdens on employers that will discourage them from making full use of E-Verify. Federal law prohibits employers from knowingly hiring and/or employing illegal immigrants. But the principal tool in place to help ensure compliance with those laws is the error-prone, paper-based I-9 system. Using that system, an employer simply has to determine if an identity

or work authorization document reasonably appears on its face to be genuine. This subjective process has allowed an estimated 7 million illegal immigrants to work in the U.S.

E-Verify is the best way we have to help ensure that a prospective employee is work-eligible and it is the best tool we have to help ensure that American jobs go to legal workers. 82 percent of likely voters support it, according to a recent Rasmussen poll. 78 percent of black voters agree, 72 percent of other minorities, primarily Hispanics, and 73 percent of Democrats.

The Legal Workforce Act does not require employers to go through the burdensome process of reverifying their entire current workforce. However, employers still have the option of verifying their current workforce.

The Legal Workforce Act also allows employers to use E-Verify at the job offer stage. If employers have to wait until after they hire a person to confirm work eligibility, they will invest training resources in and pay a salary to an employee who is not work-authorized and will have to be released.

This amendment requires an employer to notify the Department of Homeland Security Secretary if they understandably use E-Verify to check the work eligibility of an individual to whom they have offered a job or the work eligibility of their current workforce. The notification required by this amendment unnecessarily burdens businesses that choose either of these options and thus will discourage their use.

The E-Verify system should be made as simple and user-friendly as possible. If employers are required to take unnecessary extra steps to do something that is not required by law, they would be less inclined to take that action. This amendment could require an employer to notify DHS hundreds or even thousands of times, assuming they have hundreds or thousands of employees, if they choose either option since a notification would be for each employee. And many employers believe notification will put a target on their backs. The last thing employers want is for this administration to target them for investigation to make sure they are not using E-Verify in a discriminatory manner simply because they want to check the entire current workforce.

Twenty-three million Americans are unemployed or have given up looking for work. Twelve percent of Californians can't find a job. The Legal Workforce Act will help put Americans, particularly these Americans, back to work. This amendment undermines the bill by discouraging companies from using E-Verify. And I urge my colleagues to oppose the amendment.

Are there other members who wish to be heard on the amendment?
The gentleman from Iowa, Mr. King.

Mr. King. Thank you, Mr. Chairman. I want to speak to this issue because I have some background experience in this type of language that we have used. And it emerged for me back in 1997 and 1998, as I was busy helping to write the Iowa workplace drug testing laws. And in those, there was an almost identical philosophy that just copies and

pastes into this E-Verify requirement and that identical philosophy was this, that if you were going to drug test a prospective employee, the question became, do you test them after you put them on your payroll and go through all the expenses and have them in their records and then find out they have illegal drugs in their system and then you have to dismiss them? We rolled this thing back and forth. And as an employer I have a certain perspective; and that is, I would like to be able to do the testing as a condition of employment. So we wrote that in, and we wrote the language of modified job offer. This language is conditioned on final verification of the identity and employment eligibility of the employee. I think this is very good and solid language. I know that it was something that I would have liked to have seen written into the SAVE Act of the gentleman that introduced that last year.

We had that discussion again in this Congress. And from my standpoint, it is this: If you have two employees in front of you and one of them appears to be a minority and one of them appears not to be a minority and they are of all equal qualifications, if you can't verify that they are legal, you have to hire them first, then you are going to err on the side of the person that appears not to be a minority and you are going to be biased in favor of hiring the nonminority appearing individual applicant, if all other things are equal.

On the other hand, if you have two equal applicants in front of you and you can offer the job to the one that appears to be a minority on the condition that they pass E-Verify, you are a lot more likely

to offer the employment to the individual that is a minority. The language that has been drafted in previous pieces of legislation I believe discriminates inadvertently. The intentions are good. And the discussion can go on either side. But I think it inadvertently discriminates against minorities. That is the result of it. So if you can provide it with a modified job offer or upon final verification of the identity, that is the right language. It is in the underlying bill. This amendment seeks to upset that.

And I would also make the point that, you know we seem to be having things creep into our amendments and sometimes into our language of our legislation that operates under the presumption that employers are, as a matter of practice, discriminators. I will tell you that if they are going to discriminate, they are not going to discriminate in an obvious overt fashion, but they will discriminate in the hiring. That is a judgment call. And whatever you do, you cannot legislate against a judgment call. You can't define closely enough that call of one applicant -- he interviewed perhaps better than the other applicant. As I said, two equally qualified individuals. If you want to discriminate, you will do so then, and that doesn't happen most of the time. When it does, you can't legislate against it.

But I think this provision that is in the bill is essential to the success of the underlying E-Verify legislation that is there in that. It sets it up so that an employer can say to an applicant, all other things look good here. You may have to go off to a drug test or any other precondition of employment. But if you pass E-Verify,

you have got a job. Once that statement is made, you qualify with the language that is in here, it is the right thing to do.

Therefore, I oppose the gentlelady's amendment and urge a "no" vote on the amendment. I thank the chairman. I yield back.

Chairman Smith. I thank you, Mr. King. Do other members wish to be heard?

Ms. Jackson Lee. Mr. Chairman?

Chairman Smith. The gentlewoman from Texas is recognized.

Ms. Jackson Lee. This is a commonsense approach. It mentions the Department of Homeland Security in just notifying them. I am not sure why we would have opposition to it. I would hope my colleagues would support the gentlelady's amendment.

I yield back.

Chairman Smith. The question is on the amendment. All in favor say aye. Opposed nay. In the opinion of the chair, the noes have it. The amendment is not agreed to.

Are there other amendments that members wish to offer?

Ms. Jackson Lee. I have an amendment, Mr. Chairman.

Chairman Smith. The gentlewoman from Texas, Ms. Jackson Lee is recognized.

Ms. Jackson Lee. The amendment is No. 031, Mr. Chairman.

Chairman Smith. The clerk will report the amendment.

The Clerk. Amendment to H.R. 2885 offered by Ms. Jackson Lee, page 47, line two, insert after this paragraph --

[The amendment of Ms. Jackson Lee follows:]

***** INSERT 4-3 *****

Chairman Smith. Without objection, the amendment will be considered as read. The gentlewoman is recognized to explain her amendment.

Ms. Jackson Lee. Thank you very much, Mr. Chairman. And again, I would hope that this would be another commonsense resolution of the possibility of discrimination. This is going to be a huge program, layers and layers of individuals coming into the system, employers of all levels of capacity in terms of participating in this program and many employers with good intentions, but many that may suffer not from -- I will give them the benefit of the doubt -- not from bad intentions but untrained employees, bad technology. So there is a strong possibility that one could run into a wave of discrimination and a misuse of the E-Verify program.

So this is a checks and balances process. Random employer audits will help ensure employer compliance with program rules and protect workers from adverse employment actions.

I think it is quite perplexing to think that we want to pass a program like this but we are intimidated by oversight, checks and balances. And this is not, as I have indicated, a statement of characterizing America's employers and particularly their good intentions. But what can go wrong will go wrong. And why not provide that buffer of security for the potential misuse of the E-Verify program.

Specifically, what this will allow is the individual audits and the reports on those audits. Congress can be responsible for ensuring

that the program is working well. Noncompliance with program rules would almost certainly increase if all employers were required to use the system, and it would also increase if you are in States that have already put in law laws that really add to the interpretation of an immigrant as nonstatus and, therefore, subject them to discriminatory practices just because of who they are.

So I would ask my colleagues to support this amendment which provides the oversight necessary of this particular program and provides the oversight necessary that Congress should demand and any program that will really saturate the system and lull itself to be subject to any series of discriminatory practices. I ask my colleagues to support the amendment.

I yield back.

Chairman Smith. I recognize myself in opposition to the amendment.

It creates additional authorities for the Department of Justice Office of Special Counsel for Unfair Immigration-Related Employment Practices. But the OSC already conducts investigations aimed at the prevention of immigration-related discrimination by employers. This amendment is a solution looking for a problem. Specifically, the amendment requires OSC to conduct annual audits of E-Verify use. Those audits include the use of testers to determine whether employers use E-Verify properly, the use of random audits to determine employer compliance with civil liberties and civil rights protections and periodic audits of employers for which OSC receives complaints.

OSC was created by the Immigration Reform and Control Act of 1986 specifically to investigate charges and issue complaints under Section 274(b) of the Immigration and Nationality Act. Section 274(b) sets out prohibitions on unfair immigration-related employment practice. So OSC is already tasked with doing exactly what the goal of this amendment accomplishes, prosecuting immigration-related discrimination violations.

But this amendment goes one step further, to burden businesses. It requires the use of testers to check if employers are using the verification system properly. According to the Equal Employment Opportunity Commission, testers are individuals who apply for employment which they do not intend to accept for the sole purpose of uncovering unlawful discriminatory hiring practices. The EEOC further states that testers are matched to appear equally qualified with respect to their employment histories, educational backgrounds, references, and other relevant factors. So a tester applies for a job, and the employer takes the time to review the tester's resume, check their references, interview them, and offer them the job. In the meantime, the employer stops advertising the job opening and reviewing other applicants' information. But the tester then refuses the job offer and the employer has wasted time, money, and other resources on an individual who never intended to take the job in the first place.

How is this fair to employers who just want to stay in business and meet payroll for their employees? Current law already provides the means to ensure employer compliance with E-Verify not only through

the OSC but also through the Department of Homeland Security, which is specifically tasked with enforcement of immigration laws, including those related to the current E-Verify system in the Legal Workforce Act.

The point of the Legal Workforce Act is to put Americans back to work. There is no room in the bill for any provision that makes it harder for the unemployed to find jobs. I oppose the amendment and urge my colleagues to do the same.

Are there other members who wish to speak on the amendment?

Ms. Jackson Lee. Mr. Chairman.

Chairman Smith. The gentlewoman from Texas, Ms. Jackson Lee.

Ms. Jackson Lee. Would you yield? I think your time is still on. The question I have is whether or not the chairman perceives an opportunity for any enhanced language on this question of potential discrimination. I have heard your response. But the intent of the amendments that I have offered and intend to offer is to provide not an extraordinary burden on our employers as much as it is to say that there is the great opportunity for discrimination or unfair treatment. Is there a determination by the chair and by this legislation that because of the status of these immigrants they do not deserve that protection?

Chairman Smith. If the gentlewoman would yield.

Ms. Jackson Lee. I would be happy to yield to the chair.

Chairman Smith. There are many places in this bill where we tried to address discrimination. No one believes in discrimination. But

as I mentioned, there are all kinds of procedures in place now to try to prevent it and, if it occurs, to punish it. I tend to believe those procedures are sufficient. But I am also happy to discuss the subject further with the gentlewoman from Texas in case there are other ways to perhaps make sure there is no discrimination without unnecessarily burdening the employers.

Ms. Jackson Lee. Mr. Chairman, let me just do this inquiry further. Do I perceive that we have an agreement on the fact that we both would oppose discriminatory practices as it relates to this legislation?

Chairman Smith. The gentlewoman is correct.

Ms. Jackson Lee. Then I am interested, Mr. Chairman, that we always make these statements of working with each other going to the floor. I am interested in thinking about withdrawing this amendment, Mr. Chairman, to take up your serious offer to look at the language that I believe is constructive in my amendment and to find a way to add this language in a constructive manner. If we both agree that the bill should have anti-discriminatory practices and we both agree that we are against discrimination, I am suggesting that we have the opportunity to work on language that can be admitted into this bill.

Chairman Smith. If the gentlewoman would yield.

Ms. Jackson Lee. I would be happy to yield.

Chairman Smith. I agree with what you just said. If we can find additional language that will enhance the prospects of preventing discrimination or ferreting out discrimination that has occurred

without burdening employees, I would be happy to work with the gentlewoman to achieve that.

Ms. Jackson Lee. Well, at this point in time, Mr. Chairman, I will ask unanimous consent to withdraw this amendment on the basis -- and I guess we are yielding back and forth -- if you would be so kind to indicate that your offer is such that we will work with serious intent on this idea of language for this issue that I think is important.

Chairman Smith. The gentlewoman is correct. And without objection, the amendment is withdrawn.

Ms. Jackson Lee. Thank you. I yield back.

Chairman Smith. Are there other amendments?

Ms. Lofgren. I have an amendment.

Chairman Smith. The gentlewoman from California Ms. Lofgren.

Ms. Lofgren. I have an amendment, 38.

Chairman Smith. The clerk will report the amendment.

The Clerk. Amendment to H.R. 2885 offered by Ms. Lofgren. Page 36, insert after line --

[The amendment of Ms. Lofgren follows:]

***** COMMITTEE INSERT *****

Chairman Smith. Without objection, the amendment will be considered as read. The gentlewoman is recognized to explain the amendment.

Ms. Lofgren. Mr. Chairman, this amendment requires the Department of Homeland Security, in consultation with the National Institute of Standards and Technology, to certify that E-Verify meets necessary data security and quality control measures that protect U.S. workers from identity theft and breaches of privacy. It prevents implementation until the personal information is safeguarded. Now this amendment delays that so that appropriate administrative technical and physical safeguards can be put in place. And I really believe -- you know, I have problems with the bill overall, as I have made clear. But implementing the act without necessary data security measures places really every American at risk, and the risk isn't theoretical.

Although the Department of Homeland Security has invested in some internal security improvements, it continues to be open to significant security vulnerabilities and has been compromised by outside forces seeking to manipulate the immigration system.

In 2007, it was reported that the FBI was investigating a technology firm with a \$1.7 billion DHS contract after it failed to detect cyber break-ins traced to a Chinese language Web site. A State Department audit from 2008 found there was a widespread lack of control on the personal data of 127 million citizens and that numerous weaknesses existed, such as lack of policies and procedures regarding

access to military records. In the State of Minnesota, E-Verify records pertaining to 37,000 persons were improperly disclosed by the State's E-Verify vendor. The Minnesota Governor subsequently halted the State's participation in the program.

And here is the problem: Anyone posing as an employer can access basic pilot E-Verify and all its data. DHS does not screen those who enroll in the program to verify that they are bona fide employers.

Now this E-Verify bill is the beginning. It lays the groundwork for a national identification database. According to the Heritage Foundation, E-Verify would run afoul of legitimate privacy concerns since both the government and employers would have access to massive databases of information which would surely tempt some to traffic in identity theft. Once our most important identifying information has been collected and made vulnerable to abuse, the citizens will be at the mercy of hackers and identity theft spoofer. The information that is at risk includes names, addresses, dates of birth, Social Security numbers, passport numbers, driver's license numbers, military ID numbers, and this personal information, collected through E-Verify, could be used to facilitate identity theft and credit card abuse.

So whatever you think of the underlying bill -- and I have problems with the bill -- if you are going to move forward, it would be a nightmare to fail to put into place adequate security measures for this massive database which, as we say, is the beginning of the national identification system for the United States.

So I strongly urge all of my colleagues, no matter what you feel

about the underlying bill, to support this amendment just out of basic decency to protect the privacy of Americans and their data.

With that, Mr. Chairman, I yield back.

Chairman Smith. Thank you, Ms. Lofgren. I will recognize myself in opposition to the amendment.

E-Verify has been in operation since 1997 and now handles millions of transactions every year. There have been no problems with the unauthorized disclosure of personal information. Clearly, the E-Verify system already has appropriate safeguards in place, so there is no need for this amendment. In fact, it might indefinitely delay implementation of E-Verify.

With the 9 percent unemployment rate, American workers cannot afford such a delay. So I urge my colleagues to oppose the amendment.

Are there other members who wish to be heard?

Ms. Jackson Lee. Yes, Mr. Chairman.

Chairman Smith. The gentlewoman from Texas, Ms. Jackson Lee.

Ms. Jackson Lee. Mr. Chairman, I will offer a similar refrain. I think the gentlelady and myself serve on the Homeland Security Committee and have seen with the overlap of jurisdiction repeated invasions of individual privacy and particularly with the level of security, the penetrating of our cybersecurity.

I think, again, if I might say with the same refrain, this is a commonsense amendment. I would ask my colleagues to support it, and I would be happy to yield to the gentlelady.

Ms. Lofgren. I don't want to unduly delay this, but this is

simply not correct that there have been no problems with the existing system. In Minnesota, for example, the 37,000 individuals whose data was breached and the suspension of the program is a consequence of that hacking.

And as I said, I don't agree with this underlying bill. I have made that clear from the beginning. But even if you are for the bill -- I mean, there is nothing in here to keep somebody who wants to do mischief from saying they are an employer and getting access to the data of every American. That should be guarded against wherever you are on the underlying bill.

I am no longer on the Homeland Security Committee. I served on that committee from its inception, as a select committee until this year when I was fortunate enough to go back to the Science Committee that also has jurisdiction over some of this stuff. This is a serious, real problem. It is not being advanced in any way to deter implementation.

NIST is the apolitical group that everybody acknowledges is the expert on technology in the Federal Government. We have asked that they be solicited for their view because we don't want this to be politicized. But this is a legitimate problem. And if we were to move forward with this in its current state, we are going to have huge problems. We are going to have identity theft. We are going to have data breaches, and I think that those who support the bill without this protection are going to have egg all over their face.

And I would thank the gentlelady for yielding.

Chairman Smith. The question is on the amendment. All in favor say aye. All opposed say nay. In the opinion of the chair, the nays have it. The amendment is not agreed to.

Are there other amendments?

Ms. Jackson Lee. Mr. Chairman, I have an amendment at the desk.

Chairman Smith. The gentlewoman from Texas, Ms. Jackson Lee, is recognized.

Ms. Jackson Lee. Amendment No. 10.

Chairman Smith. The clerk will report the amendment.

The Clerk. Amendment to H.R. 2885 offered by Ms. Jackson Lee. Page 15, line six, strike individual and insert individuals or take other --

[The amendment of Ms. Jackson Lee follows:]

***** COMMITTEE INSERT *****

Chairman Smith. Without objection, the amendment will be considered as read. And the gentlewoman is recognized.

Ms. Jackson Lee. I thank the chairman very much.

Again, it is tracking my concern of the overwhelming responsibilities that employers will have. And I do want to clarify my posture in this particular legislation and indicate to my colleagues and to the chairman, I can work with an E-Verify system that is part of a comprehensive response to immigration reform and that also takes into account the extensiveness of a program now being introduced in a more widespread utilization that we have, to include some of the concerns that businesses have made. I know there are some who have been supporting this. Certainly I have engaged with businesses who are quite concerned with how heavy a responsibility this will be, that takes into account the potential for errors, the potential of the Federal agencies not being able to be responsive.

So this amendment prohibits employers from taking adverse employment actions against individuals short of termination or a rescission of offers of employment based upon tentative nonconfirmation which we probably will see a lot of those.

Under the bill employers are essentially free to withhold pay and restrict training and work assignments from American workers due to errors. The way the bill is currently drafted, an employer who receives a TNC for prospective hire is required to inform the individual of the TNC. That allows the individual who may well be a U.S. citizen to fix any errors so that he or she is not fired or passed over for

another worker. But the bill provides no penalty for violating this requirement, essentially rendering it meaningless.

Let me just say that we know that employers are good citizens and that, Mr. Chairman, you have written this bill to entrust this responsibility to the good citizens. But that is not a given. It is not an absolute. It is not a mandate to say that all employers must be good citizens.

Since this bill has been put into place, you obviously are concerned that there are employers who are hiring individuals. And it has certainly come to our attention that some of them utilize the concept of independent contractors and they are still doing it today. So you have no documentation, as the person is even working in construction, maybe in ag, or working in a restaurant. There are independent contractors. No documentation whatsoever.

So we know that we have to deal with employers at all levels. And as currently drafted, as I indicated, employers can withhold TNCs from Americans and take adverse employment actions against them based on those TNCs without being subject to any penalty. And if we really care about American workers, we should support this amendment.

I would ask my colleagues to expand their thinking and that no bill is written in perfection and this allows a gaping hole that should be corrected. We want the program ultimately to work, as I would like it to work under the comprehensive perspective. I think you can't piecemeal immigration reform, but you can't piecemeal this legislation and not guarantee the protection of the worker.

With that, I ask my colleagues to support the amendment.

Chairman Smith. The gentleman from California, Mr. Gallegly, is recognized.

Mr. Gallegly. Thank you, Mr. Chairman. I stand in opposition to this amendment.

The language is vague, and the language is problematic. Requirements of the Legal Workforce Act are written to make sure employers have a clear understanding of their responsibilities. This amendment unnecessarily muddies the waters. The Legal Workforce Act allows an employer to make a job offer conditional on a worker's clearance through E-Verify, and the bill prohibits an employer from rescinding the job offer until E-Verify issues a final nonconfirmation of the work eligibility. That is a fair standard for the employer and the employee.

The amendment says that an employer cannot take other adverse employment actions against a person with a job offer because of a tentative nonconfirmation. This is a very vague concept. I am not sure precisely what it means. What other adverse actions can an employer take against someone to whom they have made a job offer? I am therefore concerned that the amendment will have very unintended consequences.

With 14 million Americans out of work, including 17 percent of the African American community, 11 percent of the Latinos, we should enact laws that encourage employers to create jobs. We should not force employers to comply with very vague concepts. And based on that,

Mr. Chairman --

Ms. Jackson Lee. Would the gentleman yield?

Mr. Gallegly. Based on that, I would oppose this amendment. And I would yield, yes.

Ms. Jackson Lee. I thank the gentleman very much for yielding.

I think the bill indicates that an employee can be already hired and working and a TNC can come. TNC of course allows for the employee to seek verification. But in the meantime, even though the bill mentions the possibility of not injuring that employee, it is not precise. The language, Mr. Gallegly, that I have is that it talks about adverse actions, and adverse actions are not unclear, keeping a check, having someone unemployed and they are, in fact, a citizen.

I would just ask you the question, and I would hope that the language is so, if you will, helpful and not overbearing that we allow the language to be in to be clear that we should not expect adverse actions.

Mr. Gallegly. Reclaiming my time, I would just ask -- because I really believe this is very vague. Could you explain to me what adverse action could be taken, not just hypothetically but realistically? There seems to be no specificity here.

Ms. Jackson Lee. Well, let me just give you an example. I think that might be very helpful and to share with you one that we have here. One witness testified about an American citizen who applied for a position with a temporary agency in California who was turned away because E-Verify was unable to confirm her work authorization. The

employer did not advise her of her right to contest the finding and violated the law by asking her to show additional documents. She was unemployed for over 4 months without health insurance and was diagnosed with a serious illness during that time.

This amendment would add a provision prohibiting employers from taking adverse employment actions against individuals simply for receiving TNCs for health care --

Mr. Gallegly. Reclaiming my time, I would hope the gentlelady knows that is already prohibited and very clear in the legislation.

I would yield back and ask my colleagues to oppose the amendment.

Ms. Lofgren. Mr. Chairman?

Chairman Smith. The gentlewoman from California is recognized.

Ms. Lofgren. I would like to strike the last word.

I would just say that I don't think, as a matter of law, that the provision is at all vague. I think there is certainly substantial case law to flush out the language. And I would yield to the gentlelady to further discuss that element.

Ms. Jackson Lee. I thank the gentlewoman.

And the gentleman from California was right to ask specifics, and I gave an example. But let me suggest that common law indicates that adverse employment actions would include being fired, demotion, cut in pay, no advancement, no training. I think it is very clear employers know what adverse action would be. And I think this would clarify and make this as balanced for the employer.

The question is, is this a one-sided initiative? All of the plus

on the employer's side and all of the negatives that are already going to be, if you will, in a questionable position, all the negatives on the employee's side? This only evens it out and respects the employee and the employer.

And I would ask my colleagues to support this very simple amendment that would give a balance to this legislation.

Chairman Smith. The gentlewoman from California yields back her time. The question is on the amendment. All in favor say aye. Opposed nay.

In the opinion of the chair the noes have it. The amendment is not agreed to. Are there other amendments?

The gentlewoman from California, Ms. Lofgren.

Ms. Lofgren. I have an amendment at the desk that is filed as Berman 3. It is the same as King 246.

Chairman Smith. We are trying to find the amendment. This is not an amendment that was prefiled. It was filed this morning?

Ms. Lofgren. Yes. But it is identical to King 246 that was prefiled. So members would have notice.

Chairman Smith. Okay. The clerk will report the relevant amendment. The clerk will suspend. We are trying to make sure we can identify it.

Ms. Lofgren. Mr. Chairman, if they can't find Berman 3, since it is identical to Mr. King's, perhaps I can just offer that amendment. The amendment that is filed is King 246.

Chairman Smith. The clerk will report the amendment. What I

want to check on is to see whether Mr. King has to agree to the gentlewoman offering his amendment or not.

Mr. King. I have no objection, Mr. Chairman.

Chairman Smith. And the clerk has the correct amendment, Mr. King's amendment? The clerk will report the amendment.

The Clerk. Amendment to H.R. 2885 offered by Ms. Lofgren of California.

[The amendment of Ms. Lofgren follows:]

***** INSERT 4-4 *****

Chairman Smith. Without objection, the amendment will be considered as read. And the gentlewoman from California is recognized to explain the amendment.

Ms. Lofgren. Mr. Chairman, this amendment strikes the bill's section that preempts States and localities from adopting their own employment verification law. Now over the past few years, dozens of States have adopted laws requiring businesses to use the E-Verify. An attempt to bring down Arizona's E-Verify law just recently failed in the United States Supreme Court. The Court held that Arizona could require all of its employers to use E-Verify and that decision has led to new laws in several States.

As I am sure the chairman knows, there are many in our country who have strong opposition to H.R. 2885 because they feel it undercuts what they are doing in their own States, and that would include Arizona State Senator Russell Pierce, who was the author of the Arizona's S.B. 1070, as well as our own colleague Congressman Lou Barletta, the former mayor of Hazleton, Pennsylvania, who worked, when he was in local government, on these matters.

I think that we have very diverse views in the country about how to proceed on these issues. I certainly don't agree with Arizona, but I respect that the Court has made a decision on this element. They have preempted certain other elements. Right now I don't think there are elements that would be permitted. But as to verification, the United States Supreme Court has made a determination that States have the ability to move forward in this measure. I think that given the

diverse viewpoint -- and I realize I had a chance to talk to Mr. King earlier. He and I don't agree on very much, and probably we don't agree on why we agree on this. I don't want to put words in his mouth. He can speak for himself. But I think that we ought to go with what the Supreme Court has said on this, especially given the divisiveness that this has caused in the United States.

This is my opinion. I don't think that the mandate, as written in this bill, is necessarily superior to what the States would do. And I would rather defer to the States on this subject.

I offered this amendment because I think it has the opportunity to unify this committee in a way that few amendments have, and I am hopeful that we will be able to come together and adopt this amendment. Well, it is not every day that Mr. King and I come together in the same spot. So that may be an indicator of how this committee can come together on this very divisive subject and go ahead and adopt this amendment.

RPTS BLAZEJEWSKI

DCMN ROSEN

[2:23 p.m.]

Ms. Lofgren. So I don't know if other members on my side of the aisle, I know Mr. Berman has filed -- whether he wishes to add his comments. If so, I would be happy to yield him time. Mr. Berman?

Mr. Berman. I thank you. And the bill, the bill before us overturns a Supreme Court decision by inserting Federal preemption on the right of States to condition their business licenses and their permits for businesses on utilizing E-Verify. The Supreme Court by 5-3 rejected the argument that that was preempted. This bill overturns that Court decision, and therefore nullifies the right of States to try and deal with this issue of people authorized to work in their States.

Now, if I thought this Congress was serious about dealing with comprehensive immigration reform -- we have got a broken system here. It has been broken for years. We know it. And instead of getting some serious effort to try and deal with it and fix it and make it straight and stop, really effectively stop illegal immigration for the future and deal with the millions of people now in this country who aren't authorized to work and create a sensible temporary guest worker program, and have a meaningful employer verification system in the context of all these things, if we have abandoned all that, and this is the solution, the notion we are going to preempt the States' rights

to deal with the problems when we have abdicated our willingness to deal with it I think is wrong, so I am very strongly supporting the striking of this preemption clause, not overturning the Supreme Court decision, and letting Arizona and other States that want to deal with this issue of who is going to get business permits in their States. Until we step up to the plate and do the job, I don't think we should be preempting anybody who is trying to address this issue. I support the amendment.

Ms. Lofgren. Thank you, Mr. Berman, and with that, I would yield back the balance of my time.

Chairman Smith. Okay, the gentlewoman has yielded back, and I will recognize myself in opposition to the amendment.

Article I, Section 8, Clause 4 of the Constitution provides that Congress shall have power to "establish a uniform rule of naturalization." The Supreme Court has long found that this provision of the Constitution grants Congress plenary power over immigration policy. As the Court ruled in *Galvan vs. Press*, "the formulation of policies pertaining to the entry of aliens and their right to remain here is entrusted exclusively to Congress, has become about as firmly embedded in the legislative and judicial tissues of our body politic as any aspect of our government."

The 10th Amendment states the power is not delegated to the United States by the Constitution nor prohibited by it to the States nor reserved to the States respectively or to the people. Preemption of State and local laws in the realm of immigration policy is entirely

consistent with the common sense reading of the Constitution. The Founding Fathers understood that immigration is a subject just like foreign policy where the law may need to be uniform throughout the States. It is also entirely compatible with the Constitution for Congress to seek the assistance of States in enforcing immigration laws. One example is the 287(g) program which allows State and local law enforcement officials to help enforce Federal immigration laws. But Congress should set the parameters for a consistent immigration policy, and that is exactly what Section 6 of this bill helps achieve.

Section 274(a) of the Immigration and Nationality Act currently preempts State or local laws from imposing most criminal or civil sanctions for employing illegal immigrants. Section 6 of the Legal Workforce Act preempts those same State or local laws; however, it maintains the ability of a State or locality to enact sanctions that relate to business licenses or similar benefits conditional on good faith compliance with E-Verify.

American businesses need one Federal standard for E-Verify use and enforcement. Without one standard, employers who do business in multiple States may be subject to thousands of different enforcement procedures since not only States but some localities are enacting E-Verify requirements. There is no reason businesses should be forced to comply with 52 different laws, all aimed at the same thing, preventing illegal immigrants from wrongfully getting jobs.

Some claim that a State-by-State approach is the best way to ensure that businesses use E-Verify, but without one Federal standard,

most U.S. businesses will never be required to use E-Verify. Seventeen States currently have E-Verify requirements, but in only three of those States are all employees required to use the system, and it is not enforced. In the other 14 States, only State contractors or State agencies or employers who have a certain threshold number of employees are required to use it. So the vast majority of employers in those 14 States continue to use the current error-prone, unreliable I-9 system to verify their employees' work eligibility.

Other States have enacted laws restricting the use of E-Verify. The California governor is about to sign a bill making it clear that businesses can opt out of E-Verify, and the Illinois legislature wanted to bar employers in the State from using E-Verify as well. There will always be States that refuse to enact E-Verify requirements, and illegal immigrants in those States will continue to get American jobs. We have to protect all American workers, not just those in the few States that will enact or enforce E-Verify laws.

Section 6 of the Legal Workforce Act balances legitimate business interests and legitimate immigration enforcement interests to ensure that U.S. employers use E-Verify and that U.S. jobs are available for the 23 million unemployed and underemployed Americans and legal immigrants. So I oppose the amendment and urge my colleagues to do the same.

Mr. Nadler. Mr. Chairman.

Chairman Smith. The gentleman from New York, Mr. Nadler, is recognized.

Mr. Nadler. I thank the chairman. I think this amendment is a very good amendment. I commend the gentlelady for introducing it, and I yield to the gentleman from California.

Mr. Berman. Thank you very much for yielding, and Mr. Chairman, we have an E-Verify bill here that gives special breaks to agriculture even with the amendment, that allows farm labor contractors to do things and not comply with E-Verify, that limits E-Verify only to new employees and doesn't cover existing employees. We are not dealing with the regularization of the workforce, we are not dealing with border enforcement, we are not dealing with a temporary worker program. So it is a patchwork proposal. If the State of Arizona -- and you say they are not enforcing it. That is interesting. Even though they passed a law they are not asking their employers to, as a condition of getting a business license, to utilize E-Verify? I am sure people from Arizona would be interested in knowing that.

But what if a State says I don't want to just limit it to the existing -- to new employees? I want to include existing employees. I don't want to give agriculture an extra year of time. I don't want farm labor contractors to skirt around this issue. Why would we want to preempt the State's ability to do something that is not inconsistent with this bill but goes beyond or fills a loophole or plugs up. They may not want to make the same political deals that this bill seeks to make in terms of the balance of forces around the Congress, and I don't think, given our unwillingness to tackle comprehensive legal immigration reform or in agriculture, ag jobs, or in terms of young

people who came there not of their own volition, the GMAC, we are not going to deal with any of those things in this Congress, then I don't think we have any business stopping the States from deciding how best they can deal with these issues.

Chairman Smith. Does the gentleman yield back his time?

Mr. Nadler. I yield back.

Chairman Smith. Okay. Are there other members who wish to be recognized? The gentleman from Iowa, Mr. King.

Mr. King. Thank you, Mr. Chairman. I want to say of the preemption language, when I first sat down and read through the bill, one of those little philosophical, not very big red flags flipped up, and while I have got to go back and examine that, I want to examine it within the constitutional questions, and I want to examine it within practicality questions, and examine it within maybe the intended and unintended consequences, and what are all the pieces of this? So I have had a long time to think this thing through, and I was looking for a way to step away from this because I know it is very controversial.

Here are the principles that emerged for me, and one of them is -- it may not be exactly on point, and I will say it is not, but when you look at Federal Court precedent, and I have long made this argument to local law enforcement, you have the right to enforce Federal immigration law, and I have cited a number of cases, but the one I often cite is U.S. v. Santana Garcia, 10th Circuit 2001, where that decision says that State and local police officers have, and I quote, "at this point, implicit authority within their respective jurisdictions to

investigate and make arrests for violations of Federal law including immigration law."

So we have a precedent out here, a principle that we want local law enforcement to enforce Federal law, and then I take that principle and I go back and I read through the language that is in the bill, and I see that it limits the States, they can't pass a law that enforces the E-Verify other than to effect the licenses, and they can verify that they are -- actually their employers are using E-Verify, or at least that they say that they are, but it is a very limited preemption, and in that -- and my concern is that, one of them, SB 1070, Arizona's immigration law that is before the Federal Court, and again, it is not exactly on point, but this language, if it is approved by the Congress, then puts a chilling effect on that decision. It indicates that Congress does want to limit local law enforcement's effort and support in enforcing immigration law.

We need the support of local government to enforce our immigration laws. If they are eager enough to step up and pass their own State statute, and provided it either mirrors Federal law or stays within the limits of Federal law, then I say thanks, we need your help. We have an administration that has demonstrated that enforcing their low priority cases which they consider to be anyone who is -- for whom it is inconvenient to be deported and whom they are not afraid will cause them a political heartburn, they are not going to deport. That is the executive amnesty that the administration just announced in the last few weeks. They have taken the stand that if you came into this country

illegally, regardless of the means that you got here, if you have a dependent child, if you have a family member in the military, if you are involved in education, we are not going to deport you unless we think that you are a serious danger to our society, and that would bring to point the President's own uncle who was picked up with a 1.4 percent blood alcohol content after he had been adjudicated for deportation. I believe he will end up with the same kind of asylum that the Department of Homeland Security granted President Obama's aunt, and they have 300,000 who have been adjudicated for deportation.

Now the administration is going to go find the ability, staff ability to scour those 300,000 who have been adjudicated and find a way for some, maybe many of them, to stay in the United States with some path to citizenship. I think we need a lot of help and support from the States. I think the pressure from the States has been very useful to bring us to this point in this discussion.

The executive branch's executive enforcement. I don't disagree with the chairman from the constitutional perspective, Article I, Section 8, to establish a uniform rule of naturalization, but it doesn't say the exclusive authority over immigration law, it says a uniform rule of naturalization. We have expanded that, but in all other areas of immigration law there is not a preemption that prohibits the States from engaging. It is only this.

And so I would want to send the message to the States, step up, do what our Founding Fathers asked you to do, assist in and be the laboratory experiment for enforcement of immigration law in such a way

that if the Federal Government will not, and I mean this by the executive branch. We have all been in the business of seeking to embarrass the administration into enforcing immigration law. If they won't do their job, I want the States to be able to do that and the local government, and so for that reason, I support the gentleman's amendment and I would yield back the balance of my time.

Chairman Smith. Are there other Members who wish to be heard on the amendment? If not, the question is on the amendment. All in favor say aye. Aye. All opposed say nay. No. In the opinion of the chair the nays have it.

Ms. Lofgren. I would like a roll call, Mr. Chairman.

Chairman Smith. And the clerk will call the roll.

The Clerk. Mr. Smith.

Chairman Smith. No.

The Clerk. Mr. Smith votes no.

Mr. Sensenbrenner?

[No response.]

The Clerk. Mr. Coble?

[No response.]

The Clerk. Mr. Gallegly?

Mr. Gallegly. No.

The Clerk. Mr. Gallegly votes no.

Mr. Goodlatte?

Mr. Goodlatte. No.

Mr. Lungren?

Mr. Lungren. No.

The Clerk. Mr. Lungren votes no.

Mr. Chabot?

The Clerk. Mr. Issa?

[No response.]

The Clerk. Mr. Pence?

[No response.]

The Clerk. Mr. Forbes?

[No response.]

The Clerk. Mr. King?

Mr. King. Aye.

The Clerk. Mr. King votes aye.

Mr. Franks?

[No response.]

The Clerk. Mr. Gohmert?

[No response.]

The Clerk. Mr. Jordan?

Mr. Jordan. No.

The Clerk. Mr. Jordan votes no.

Mr. Poe?

[No response.]

The Clerk. Mr. Chaffetz?

[No response.]

The Clerk. Mr. Griffin?

Mr. Chaffetz. No.

The Clerk. Mr. Griffin votes no.

Mr. Marino?

Mr. Marino. No.

The Clerk. Mr. Marino votes no.

Mr. Gowdy?

Mr. Gowdy. No.

The Clerk. Mr. Gowdy votes no.

Mr. Ross.

[No response.]

The Clerk. Mrs. Adams?

Mrs. Adams. No.

The Clerk. Mrs. Adams votes no.

Mr. Quayle?

Mr. Quayle. No.

The Clerk. Mr. Quayle votes no.

Mr. Conyers?

[No response.]

The Clerk. Mr. Berman?

Mr. Berman. Aye.

The Clerk. Mr. Berman votes aye.

Mr. Nadler?

Mr. Nadler. Aye.

The Clerk. Mr. Nadler votes aye.

Mr. Scott?

Mr. Scott. Aye.

The Clerk. Mr. Scott votes aye.

Mr. Watt?

[No response.]

The Clerk. Ms. Lofgren?

Ms. Lofgren. Aye.

The Clerk. Ms. Lofgren votes aye.

Ms. Jackson Lee?

Ms. Jackson Lee. Aye.

The Clerk. Ms. Jackson Lee votes aye.

Ms. Waters?

[No response.]

The Clerk. Mr. Cohen.

Mr. Cohen. Aye.

The Clerk. Mr. Cohen votes aye.

Mr. Johnson?

Mr. Johnson. Aye.

The Clerk. Mr. Johnson votes aye.

Mr. Pierluisi?

Mr. Pierluisi. Aye.

The Clerk. Mr. Pierluisi votes aye.

Mr. Quigley?

Mr. Quigley. Aye.

The Clerk. Mr. Quigley votes aye.

Ms. Chu?

Ms. Chu. Aye.

The Clerk. Ms. Chu votes aye.

Mr. Deutch?

Mr. Deutch. Aye.

The Clerk. Mr. Deutch votes aye.

Ms. Sanchez?

Ms. Sanchez. Aye.

The Clerk. Ms. Sanchez votes aye.

Mr. Issa. Mr. Chairman, how am I recorded? No.

The Clerk. Mr. Issa votes no.

Chairman Smith. The gentleman from Utah.

Mr. Chaffetz. No.

The Clerk. Mr. Chaffetz votes no.

Chairman Smith. The gentleman from North Carolina.

Mr. Coble. No.

The Clerk. Mr. Coble votes no.

Chairman Smith. The gentleman from Ohio.

Mr. Chabot. No.

The Clerk. Mr. Chabot votes no.

Chairman Smith. The gentleman from Wisconsin.

Mr. Sensenbrenner. No.

The Clerk. Mr. Sensenbrenner votes no.

Chairman Smith. The gentleman from Texas.

Mr. Poe. No.

The Clerk. Mr. Poe votes no.

Chairman Smith. The gentleman from Florida.

Mr. Ross. No.

The Clerk. Mr. Ross votes no.

Chairman Smith. Okay, the gentleman from Arizona.

Mr. Franks. Aye.

The Clerk. Mr. Franks votes aye.

Chairman Smith. The clerk will report.

Mr. Gohmert. May I ask how I am recorded?

The Clerk. Mr. Gohmert?

Mr. Gohmert. No.

The Clerk. Mr. Gohmert votes no.

Chairman Smith. The clerk will continue to report.

Ms. Lofgren. Mr. Chairman, how am I recorded?

Chairman Smith. The clerk will respond to the gentlewoman from California who asked how she was recorded.

The Clerk. Ms. Lofgren has voted aye.

Chairman Smith. The clerk will report.

Ms. Waters. Mr. Chairman, how am I recorded?

Chairman Smith. The gentlewoman from California, Ms. Waters.

Ms. Waters. Aye.

The Clerk. Ms. Waters votes aye.

Chairman Smith. The clerk will report.

The Clerk. Mr. Chairman, 16 members voted aye, 18 members voted nay.

Chairman Smith. Okay. A majority having voted against the amendment, the amendment is not agreed to.

Are there other amendments?

Ms. Lofgren. Yes. Go ahead. Yeah.

Chairman Smith. Are there other amendments?

Mr. Deutch. Mr. Chairman?

Chairman Smith. The gentleman from Florida Mr. Deutch.

Mr. Deutch. I have an amendment at the desk.

Chairman Smith. The clerk will report the amendment.

The Clerk. Amendment to H.R. 2885 offered by Mr. Deutch of Florida, page 20, beginning on line 25.

[The amendment of Mr. Deutch follows:]

***** INSERT 5-1 *****

Chairman Smith. The clerk will suspend. Let me make sure that the gentleman from Florida wants that particular amendment.

Mr. King. Mr. Chairman, reserve a point of order.

Mr. Deutch. Mr. Chairman, Number 127 on the --

Mr. King. Reserve a point of order.

Chairman Smith. Who reserves a point of order?

Mr. King. Mr. Chairman.

Chairman Smith. I guess that the gentleman from Iowa reserves a point of order. The gentleman from Florida is -- the clerk will report the amendment.

The Clerk. Amendment to H.R. 2885 offered by Mr. Deutch of Florida, page 20, beginning on line 25.

Chairman Smith. Without objection, the amendment will be considered as read. A point of order has been reserved against the amendment, and the gentleman from Florida is recognized to explain the amendment.

Mr. Deutch. Thank you, Mr. Chairman. Mr. Chairman, this, other than the Legal Workforce Act, the mandatory E-Verify provisions don't apply to the agriculture industry for 3 years? My amendment changes the 3-year phase-in period by requiring the agricultural industry to comply with the mandatory E-Verify provisions only when a new program for admitting foreign workers to provide agricultural services is enacted. Without a new agricultural guest worker program, the mandatory E-Verify provisions in this bill would devastate the agriculture sector of our economy, including my own State of Florida.

As has occurred in Georgia when they passed a mandatory E-Verify bill, passage of a nationwide mandatory bill would cause massive numbers of migrant labor force in the agriculture industry to leave the fields. An American Farm Bureau study has estimated the effect on the agriculture industry of losing a significant portion of its migrant labor force. The Bureau found this lost labor force could cost between 5 and 9 billion dollars in annual production and a decline of 1.5 to \$5 billion in net farmer income. The losses from my State of Florida would be massive, between 560 million and \$1 billion in lost production.

The only State whose agricultural industry would be hit harder than Florida would be California. Such impacts to the agricultural industry would end any hopes of Florida and other States recovering from the economic recession. We can't afford, Mr. Chairman, to take the country backwards. It would be irresponsible for Congress to cut off the labor supply for agriculture without having a viable working agricultural guest worker program in existence, and while this committee, I know, is scheduled to mark up a new guest worker program, H.R. 2847, there is no guarantee this revised program will be in place when E-Verify becomes mandatory.

It is well recognized that the current H-2A agricultural guest worker program is broken. However, the bill we are marking up after the Legal Workforce Act, the American Specialty Agriculture Act, will not resolve the serious problems in the program, and it would, in fact, exacerbate the problems that now plague our guest worker program for agricultural services. I oppose many of the provisions in the American

Specialty Agriculture Act, including that it ignores undocumented workers already in the country, fails to resolve the status of these workers, sets a cap of 500,000 guest workers, limits worker protections by restricting guest worker access to legal assistance, and requires arbitration and mediation before filing a lawsuit. Other serious concerns as well. But the primary problem with the American Specialty Agriculture Act is that it is being considered as a separate bill from the Legal Workforce Act.

Considering these two bills separately ensures there is no guarantee a new program for agricultural workers will be enacted when a mandatory E-Verify program goes into effect. As an alternative to this approach of considering the mandatory E-Verify bill separately, I encourage the committee to consider the bill that my colleague, Mr. Berman, will be introducing, the Agricultural Labor Market Reform Act of 2011. Congressman Berman's bill is a sensible approach that in a single bill resolves the pressing problems in the H-2A program while ensuring that our Nation's agricultural industry uses E-Verify when hiring a work force. Short of taking up that bill, we must protect our farmers by having the agricultural sector begin compliance of E-Verify provisions only once there is a viable legal guest worker visa system in place.

Implementation of a mandatory E-Verify program without ensuring enactment of a new guest worker program would have a ruinous impact on our Nation's agricultural industry, and I urge adoption of my amendment as the most modest way to avert this looming disaster. Thank

you, Mr. Chairman, and I yield back the balance of my time.

Chairman Smith. Thank you, Mr. Deutch. Does the gentleman from Iowa insist on his point of order?

Mr. King. Yes, I do, Mr. Chairman.

Chairman Smith. Okay.

Mr. King. Mr. Chairman, this amendment is not germane because it delays implementation until Congress has enacted a new agricultural worker program. Amendments that make an implementation contingent upon Congress enacting a separate program are, per se, nongermane. Therefore, I regret that I must insist on my point of order, the amendment is not germane.

Chairman Smith. Thank you, Mr. King. Does the gentleman from Florida wish to speak on the point of order?

Mr. Deutch. Thank you, Mr. Chairman. Mr. Chairman, this amendment indeed holds off the mandatory E-Verify program until there is a sensible plan in place. That was the reason, I believe, for the 3-year phase-in for agricultural workers. There is no -- it is impossible to know that within that 3-year period there will be any such program in place. This amendment ensures that there will.

Chairman Smith. Thank you, Mr. Deutch. The chair is prepared to rule --

Mr. Berman. Mr. Chairman --

Chairman Smith. -- on the point of order. Does the gentleman from California --

Mr. Berman. On the point of order.

Chairman Smith. -- wish to be heard on the point of order?

Mr. Berman. On the point of order.

Chairman Smith. Okay.

Mr. Berman. I am curious, had the chairman decided to deal with the issue of agriculture in the context of this bill, not through the sort of, pardon the expression, amnesty-type provisions, but through a program to adjust the status of the millions who are now picking our crops to provide temporary workers for future shortages with protections to make it an effort not to undercut the wages of the poorest paid workers in our society, would a bill that did both, E-Verify and that have been germane? I just -- and appropriate, had it been introduced in that form, that is my question if you would care to answer it.

Chairman Smith. Are there other members who wish to be heard on the point of order? If not, the chair is prepared to rule on the point of order. In the opinion of the chair, the amendment is nongermane.

Are there other amendments to the bill? The gentleman from New York, Mr. Nadler.

Mr. Nadler. Thank you, Mr. Chairman. I have an amendment at the desk, number 24.

Chairman Smith. This is also --

Mr. Nadler. Which I am offering with Ms. Lofgren.

Chairman Smith. -- known as number 34 as well. Okay.

Mr. Nadler. We had two numbers, Mr. Chairman.

Chairman Smith. The clerk will report the amendment.

[The amendment of Mr. Nadler and Ms. Lofgren follows:]

***** INSERT 5-2 *****

The Clerk. Amendment to H.R. 2885 offered by Mr. Nadler and Ms. Lofgren. Add at the end of the bill the following, Section 12, Effective Date.

Mr. Gallegly. Mr. Chairman.

Chairman Smith. The gentleman --

Mr. Gallegly. Mr. Chairman, I reserve a point of order.

Chairman Smith. Point of order has been reserved. And with that objection, the amendment will be considered as read, and the gentleman from New York is recognized to explain the amendment.

Mr. Nadler. Thank you, Mr. Chairman. I ask unanimous -- Mr. Chairman, as members know, part of the process for verifying that people are eligible to work in E-Verify is the match-up of employee names and Social Security numbers against records from the Social Security Administration, the SSA. By making E-Verify mandatory for all employers, the underlying bill would increase the number of persons who would need to have their Social Security number verified from the thousands into the millions. This would greatly increase the workload of the Social Security Administration.

In 2007, SSA testified to Congress that making E-Verify mandatory would require 3.6 million workers to either go to SSA or to correct their records or to lose their jobs, 3.6 million. The impact on SSA's budget would be significant. According to a 2008 Congressional Budget Office analysis, mandating E-Verify would cost SSA more than \$9 billion over the first 10 years, nearly 10 percent of its overall budget. This would be particularly problematic since SSA has been underfunded. In

fact, as part of the continuing resolution for fiscal year 2011, the agency was funded at \$955 million below what the President requested in his budget. Even under normal circumstances, the typical government agency could not handle a drastic increase in workload without the creation of problems and delays unless it received a corresponding increase in resources. SSA is not facing normal circumstances. The addition of the burdens of E-Verify is going to make a very bad situation untenable. SSA has an enormous backlog of claims, mostly disability claims, people who claim they are disabled and are entitled to Social Security disability. In fiscal year 2010, the agency handled a record 3,161,000 initial disability claims. There are long backlogs in SSA processing because of record filings.

As of June 2011, there are over 532,000 SSA claims, more than half a million, most of which are for disability programs that are pending for as many as 270 days. There are another 214,000 claims in the backlog which have been pending for over 270 days. In other words, three-quarters of a million. And while SSA has made progress in reducing processing claims, times for claims, as of June it took 1 year on average to process a disability claim. Adding E-Verify to its burden will put a huge roadblock in the way of reducing the backlog and delays in claim processing.

So this isn't an immigration question, this is a question of subjecting people who are disabled to huge delays over and above the average year delay now because of the extra workload. These are backlogs and delays faced mainly by U.S. citizens who are disabled,

who cannot work, and who are simply trying to obtain the Social Security benefits to which they are entitled. One of these disability benefits, the Social Security disability insurance, or SSDI program, provides benefits to disabled workers under the age of 65 and to their spouses, surviving disabled spouses, and children based on the disabled worker's former earnings. Almost 10-1/2 million people are receiving these benefits.

The other benefit, supplemental security income or SSI, provides cash payments assuring a minimum income for elderly, blind, or disabled individuals who are extremely poor. At the end of 2000 of June, more than 8 million individuals received SSI payments. Of these, more than 6.8 million are entitled to benefits on the basis of disability or blindness. It does not make sense to try to solve one problem -- employers hiring undocumented workers -- by creating another problem, burdening an already overburdened agency and severely impeding the ability of people unable to work to obtain government assistance.

My amendment would make sure this does not happen. It would allow the changes made by the underlying bill to go into effect only when the average processing time of initial disability applications is 100 days or less. The average time for a reconsideration of an initial decision on a disability application is 100 days or less, and the average time with respect to a disability hearing decision is 270 days or less.

Passing this amendment will ensure that we do not put an

additional intolerable burden on disabled Americans by adding to the burden of the SSA implementing the E-Verify program until the SSA has improved processing times for adjudicating disability cases. If we judge that putting E-Verify into effect more quickly than under this amendment is so important, we can increase the budget for the SSA so that they could meet the increased budget, the increased workload, and still meet these time requirements for disability judgments. This will allow us to protect the ability of poor disabled Americans to act as benefits needed to keep them afloat. Making sure we don't delay access to such critical programs is all the more important in today's troubled economy.

If we pass the bill but we don't pass this amendment or something like it, we will be saying to millions and millions of disabled Americans, we don't care about you, we are going to let your disability claims languish for years because we are deliberately putting a burden on the agency that we know it cannot meet without delaying your applications for years. That would be inhuman, and that has nothing to do with immigration and everything to do with American citizens who are in need of government assistance because they are physically unable to work. I ask all members to support the Nadler-Lofgren amendment, and I yield back the balance of my time.

Chairman Smith. Thank you, Mr. Nadler. Does the gentleman from California insist on his point of order?

Mr. Gallegly. Mr. Chairman, I do insist on my point of order. This amendment is not germane because it makes effectiveness of the

bill contingent on something completely unrelated to employment eligibility verification. The amendment states that the bill will not go into effect until processing times for disability claims reach certain levels. Processing times for disability claims are completely unrelated to the E-Verify system, resulting in an unrelated contingency. I, therefore, insist on the point of order that this amendment is not germane, and I yield back.

Chairman Smith. Thank you, Mr. Gallegly. Does the gentleman from New York want to speak on the point of order?

Mr. Nadler. Yes, I do. It is very difficult to understand how one can say that processing time for disability claims are completely unrelated to E-Verify when the implementation of E-Verify will greatly increase those processing times. This amendment is directly related to a foreseeable and inevitable consequence of implementing this bill and seeks to ameliorate the harmful effect of implementing the bill without making provision for this.

Now, the E-Verify is based on Social Security numbers and on implementation by the Social Security Administration, and it can hardly be said that the ability of the Social Security Administration to do the job that it is mandated by law to do and to do the job that we would be adding to it is not related. So I believe this is germane.

Chairman Smith. Thank you, Mr. Nadler. The chair is prepared to rule, and for the reasons given by the gentleman from California and by the parliamentarian, in the opinion of the chair the amendment is not germane.

Let me just take a minute here to clarify where we are. We are in the cluster of amendments now that deal with delaying implementation of the legislation. Before we continue, I just wanted to see if there are any other amendments related to agriculture, a previous cluster of amendments, or related to preemption that might be offered. Otherwise we will continue with the amendments dealing with implementation, and after that, penalties.

Ms. Lofgren. Mr. Chairman, I have Lofgren 131, but I am redrafting it because of the change made earlier in the bill, but I do hope after we have redrafted it, so it doesn't relate to measures that we have changed, to offer it.

Chairman Smith. Okay. If the gentlewoman would yield, is that the only amendment under the category of agriculture that you expect to offer?

Ms. Lofgren. So long as the bill remains as it is.

Chairman Smith. Okay. And let's see, under agriculture. And are there -- and -- okay. Then that takes us, we will continue with the amendments related to delaying implementation. We will go to penalties after that. When the gentlewoman from California has her amendment ready, we will deal with that.

Let me reassure members that just because we have finished with a category, they still have the right at some point to offer amendments if they so choose.

Are there any other amendments now?

Mr. Nadler. Mr. Chairman.

Chairman Smith. The gentleman from New York, Mr. Nadler, is recognized.

Mr. Nadler. We just did number 24. I have two more amendments, number 25 and 27, so I will offer amendment -- I have an amendment at the desk which I am offering with Ms. Lofgren numbered Nadler-Lofgren 25.

Chairman Smith. Okay.

Mr. Gallegly. Mr. Chairman.

Chairman Smith. The gentleman from California.

Mr. Gallegly. I reserve a point of order.

Chairman Smith. Okay, the clerk will read the amendment. I am not clear which amendment we are talking about, Mr. Nadler.

Mr. Nadler. Number 35.

Chairman Smith. Oh, it is number 35, okay. The clerk will report the amendment.

[The amendment of Mr. Nadler and Ms. Lofgren follows:]

***** INSERT 5-3 *****

The Clerk. Amendment to H.R. 2885 offered by Mr. Nadler and Ms. Lofgren. Page 19, line 16, strike on the date and all that follows through line --

Chairman Smith. Without objection, the amendment will be considered as read, and the gentleman from New York is recognized to explain his amendment.

Mr. Nadler. Thank you, Mr. Chairman. Similar to the prior amendment, this amendment is also designed to prevent E-Verify from causing a disaster at the Social Security Administration, resulting in the inability of that administration to serve its core function, which is to administer the Social Security disability claims.

I have already explained the backlog in delays at SSA in terms of claims processing, most of which are for disability claims, and the many Americans unable to work who must wait to receive benefits. There is no doubt that this problem would be worsened if SSA is forced to divert resources to matching up names and numbers with mandatory E-Verify. In order to prevent the public benefits disaster, this amendment slows down the implementation of E-Verify until the Social Security Administration is able to get a handle on delays in disability processing.

As members may recall, the underlying bill phases in E-verify over a period of time, based on the size of the employer. This amendment says that if there is -- that if there is an increase of over 25 percent in the average processing times of Social Security disability insurance benefit applications or appeals, the effective dates would be delayed

until that increase is eliminated.

In other words, if we find that E-Verify has the impact that we fear it may or will, a drastic increase in the time it takes to process and adjudicate disability claims, we would delay its further implementation until SSA can reduce those delays. This is a commonsense provision to make sure we don't put at risk the lives of Americans who can least afford to wait longer and longer for needed assistance, and I hope everyone will support this amendment.

And, again, let me say, we often hear from Republicans that there oughtn't to be unfunded mandates. Well, this is an unfunded mandate on the Social Security Administration. It is an unfunded mandate on an agency of government whose job it is to adjudicate claims of disability from poor people, old people, sick people, disabled people who cannot work. It is overburdened already, and this is a huge mandate of an entirely new job without any resources to do that job. It is simply inhuman and wrong to do that.

Now, the Republicans who always talk about unfunded mandates should understand what an unfunded mandate this is, and unless it is desired that people who need disability insurance, who need -- who are disabled should have to wait for years as a result of this, then either we will see an increase in funding to take with -- this bill it has been estimated will cost employers \$2.7 billion, government billions of dollars, and if we really want to do this, we should at least put the money in to make sure it can be done instead of simply saying to the agency, here, don't do your regular job. Or maybe they will do

their regular job but they will never get around to the E-Verify, in which case it will take years for employers to get employees. But one or the other is going to be the result. So this amendment says, okay, the priority is disability, and this will go into effect -- if, in fact, the disability times go up by 25 percent, we will stop implementing E-Verify until we get it down to what it is now, which is long enough, which is a way of saying until we get more resources or more efficiencies in because you can't simply put a whole new job on an already overburdened agency and expect it to fulfill its two jobs, the old one and the new one, so I urge the adoption of the amendment.

Chairman Smith. Thank you, Mr. Nadler. Does the gentleman from California insist on his point of order?

Mr. Gallegly. Yes, Mr. Chairman, I do insist on the point of order. This amendment is not germane because it makes the effectiveness of various parts of the bill contingent on something completely unrelated to the employment eligibility verification. The amendment delays the roll-out of various portions of the verification system of implementation of the earlier steps, has resulted in increased processing times for Social Security disability insurance benefits or appeals. Processing times for disability claims are completely unrelated to the E-Verify system, resulting in an unrelated contingency. Therefore, I insist on the point of order, that is, this amendment, and this amendment is not germane.

Chairman Smith. Thank you, Mr. Gallegly. Does the gentleman from New York want to speak on the point of order?

Mr. Nadler. Yes, I do. I would simply observe, as I did on the prior amendment, it is hard to say that this is completely unrelated when you are taking an agency which has one job, and has had that job for 70 years, and now you are giving it a second complete job, you can't say it is unrelated, that imposing this bill is unrelated to its ability to do that job. And this simply regulates how you will phase in the second job so you don't destroy the first job. It is hardly unrelated.

And a ruling that is unrelated is really saying we don't care about the disabled, we don't care about the Social Security Administration, or we don't care about E-Verify, we just want to give the illusion that we are doing it because we know they will never be able to implement the law.

Chairman Smith. Okay. Does the gentleman yield back his time?

Mr. Nadler. I yield back.

Chairman Smith. Thank you, Mr. Nadler. The chair is prepared to rule on the point of order. In the opinion of the chair, the amendment is nongermane.

We are going to recess for a series of I think as many as four votes and then come back after the recess and continue and perhaps complete the markup. We are over halfway through the amendments, and we hope to finish up later tonight. So we will stand in recess until immediately after the last in this series of votes.

[Recess.]

RPTS WALKER

DCMN BURRELL

[4:04 p.m.]

Chairman Smith. The Judiciary Committee will reconvene, and the clerk will call the roll to make sure we have a working quorum.

The Clerk. Mr. Chairman.

Chairman Smith. Present.

The Clerk. Mr. Sensenbrenner?

[No response.]

The Clerk. Mr. Coble?

[No response.]

The Clerk. Mr. Gallegly?

Mr. Gallegly. Here.

The Clerk. Mr. Goodlatte?

[No response.]

The Clerk. Mr. Lungren?

[No response.]

The Clerk. Mr. Chabot?

[No response.]

The Clerk. Mr. Issa?

[No response.]

The Clerk. Mr. Pence?

[No response.]

The Clerk. Mr. Forbes?

[No response.]

The Clerk. Mr. King?

Mr. King. Here.

The Clerk. Mr. Franks?

Mr. Franks. Here.

The Clerk. Mr. Gohmert?

[No response.]

The Clerk. Mr. Jordan?

[No response.]

The Clerk. Mr. Poe?

[No response.]

The Clerk. Mr. Chaffetz?

[No response.]

The Clerk. Mr. Griffin?

[No response.]

The Clerk. Mr. Marino?

[No response.]

The Clerk. Mr. Gowdy?

[No response.]

The Clerk. Mr. Ross?

[No response.]

Mr. Gowdy. Yes, ma'am, here.

The Clerk. Mrs. Adams?

Mrs. Adams. Here.

The Clerk. Mr. Quayle?

[No response.]

The Clerk. Mr. Conyers?

[No response.]

The Clerk. Mr. Berman?

[No response.]

The Clerk. Mr. Nadler?

[No response.]

The Clerk. Mr. Scott?

Mr. Scott. Here.

The Clerk. Mr. Watt?

Mr. Watt. Here.

The Clerk. Ms. Lofgren?

[No response.]

The Clerk. Ms. Jackson Lee?

[No response.]

The Clerk. Ms. Waters?

[No response.]

The Clerk. Mr. Cohen?

[No response.]

The Clerk. Mr. Johnson?

[No response.]

The Clerk. Mr. Pierluisi?

Mr. Pierluisi. Present.

The Clerk. Mr. Quigley?

[No response.]

The Clerk. Ms. Chu?

[No response.]

The Clerk. Mr. Deutch?

[No response.]

The Clerk. Ms. Sanchez?

[No response.]

The Clerk. Mr. Coble?

Mr. Coble. Here.

The Clerk. Mr. Marino?

Mr. Marino. Here.

The Clerk. Mr. Sensenbrenner?

Mr. Sensenbrenner. Here.

The Clerk. Ms. Lofgren?

Ms. Lofgren. Here.

The Clerk. Mr. Quayle?

Mr. Quayle. Here.

Chairman Smith. Did the clerk call the gentleman from Wisconsin's name?

The Clerk. Yes, sir.

Chairman Smith. Okay. The clerk will report.

The Clerk. Mr. Chairman, 14 members responded present.

Chairman Smith. Okay. A working quorum is present. We will proceed to consider amendments, and are there any further amendments?

The gentlewoman from California, Ms. Lofgren.

Ms. Lofgren. Mr. Chairman, I have Lofgren number 36.

Chairman Smith. Lofgren number 36, okay. The clerk will report the amendment.

The Clerk. Amendment to H.R. 2885 offered by Ms. Lofgren. Add at the end of the bill the following: Section 12, effective date. Notwithstanding any other provision in this section, this act and the amendments made by this act shall not take effect in any references in any amendments made by section 2 --

[The amendment of Ms. Lofgren follows:]

***** COMMITTEE INSERT *****

Chairman Smith. Without objection, the amendment will be considered as read and the gentlewoman is recognized to explain the amendment.

Ms. Lofgren. Mr. Chairman, this amendment has to do with the utility of the E-Verify system. Basically, it holds the expansion of the system at abeyance until the Department can confirm that the erroneous confirmations are under 25 percent.

Now, why would that be? We know from previous studies funded by the Department of Homeland Security that over half of the people who aren't authorized to work, they are undocumented aliens. Over half of those people are confirmed as authorized to work anyhow by the E-Verify system. In fact, the last time this was studied, a majority of the people who were unauthorized were actually verified by the E-Verify system, 54 percent.

So the majority has argued -- I don't think their analysis is correct -- that we have to identify the unauthorized and that individuals who are authorized would then step forward. That theory will only work if, in fact, the E-Verify system identifies people who are aren't authorized.

Now, why does this happen this way? There are individuals who use incorrect documents. We have database errors. We have a whole variety of errors, but the whole point is you have got this massive expansion of the government. We have the estimate by Bloomberg that it will cost small businesses \$2.6 billion to implement this system, and a majority of the people not authorized to work are approved by

the system. I mean, that is pathetic.

So the amendment says you can't implement -- you can't impose those \$2.6 billion in costs on small businesses. You can't engage in this massive intrusion into the American workplace unless you can certify that you are going to catch at least 75 percent of the unauthorized workers screened by the program.

I would hope that we would approve this initiative. You know, if we don't, it shows that we really don't care about verifying lawful workers or not. I mean, to move forward on this when a majority of the people who are unauthorized are actually certified able to work doesn't make any sense.

So I recommend this amendment, both for those who have trouble with the underlying bill but certainly for those who are in favor of the goals of the bill. This is in furtherance of that, and with that, I would yield back the balance of my time.

Chairman Smith. Thank you, Ms. Lofgren. I recognize myself in opposition to the amendment.

It is unworkable and is solely designed to indefinitely delay implementation of the E-Verify requirement for U.S. businesses. In addition, the amendment prevents fixing the very problem it mentions. Without question, some individuals will use stolen identities to obtain confirmation of work eligibility.

The gentlewoman from California cites part of a 2009 study regarding identity theft in E-Verify as proof of the extent of identity theft. Even if the study were accurate, half of all illegal workers

would be detected, which is a major improvement. However, the study's estimate was based entirely on speculation. The study did not find one illegal immigrant who was confirmed by E-Verify. In fact, the study even admits that, quote, any estimate of the level of identity theft will be very imprecise, end quote.

This amendment delays implementation of E-Verify and all other provisions of this bill until the Secretary of Homeland Security certifies that fewer than 25 percent of illegal immigrants are confirmed as work eligible by E-Verify. Unfortunately, statistics regarding the number of illegal immigrants who fall into this category are inherently unverifiable since they are all estimates. No one can even cite for certain how many illegal immigrants are in the United States or in the United States workforce or in virtually any other category.

So knowing exactly when fewer than 25 percent of illegal immigrants are confirmed as work eligible by E-Verify is simply not possible. This amendment is simply designed to delay and prevent the use of E-Verify, a free, quick, and easy-to-use system that has the support of many in the business community and 82 percent of Americans, including 78 percent of black Americans, 72 percent of other minorities, primarily Hispanics, and 73 percent of Democrats.

To the extent there is an identity theft loophole in E-Verify, H.R. 2885 contains several provisions that combat it. For instance, it requires the Department of Homeland Security to create a program to lock a Social Security number that is subject to unusual multiple

use so that if the owner attempts to get a job they are alerted that the Social Security number may have been compromised.

The bill also requires DHS to create a program to allow an individual to lock their own Social Security number for employment eligibility purposes. The Legal Workforce Act requires the Department of Homeland Security to establish a voluntary pilot program combining a biometric identifier and E-Verify. The bill institutes tough criminal penalties on immigrants and employers who engage in identity theft.

This amendment would not only prevent the implementation of E-Verify but also all of the measures in H.R. 2885 that reduce identity theft. Anyone interested in ensuring that illegal immigrants are not confirmed as work eligible would support this bill's implementation.

So I oppose the amendment and urge my colleagues to do the same.

Are there other members who wish to be heard? If not, the vote is on the amendment. All in favor say aye. All opposed nay.

In the opinion of the Chair, the noes have it and the amendment is not agreed to.

Are there other amendments, particularly in regard to implementation? If not, we will move to amendments related to penalties. And are there any amendments on that subject?

Mr. Scott. Mr. Chairman, I would like to delay consideration on that until we get to the other provisions.

Chairman Smith. Okay. We will come back to the gentleman from Virginia's amendments in that case. Are there other amendments to be

considered?

Mr. Scott, would you like for us to wait any longer? Otherwise we might well proceed to final passage.

Okay. A reporting quorum being present --

Mr. King. Mr. Chairman.

Chairman Smith. The gentleman from Iowa.

Mr. King. I do have an amendment at the desk. I couldn't figure out which category we were in. If you are ready to go to final passage, I would like the opportunity to offer the amendment.

Chairman Smith. Okay. The gentleman from Iowa is recognized for the purpose of offering an amendment.

Mr. King. And that is chronological order number 40 and it is King 243.

[The amendment of Mr. King follows:]

***** INSERT 6-1 *****

Chairman Smith. I think this is King amendment 243; is that correct?

Mr. King. Yes, it is.

Chairman Smith. Okay. The clerk will report the amendment.

The Clerk. Amendment to H.R. 2885 offered by Mr. King of Iowa.

Mr. King. Mr. Chairman, I ask unanimous consent the amendment be considered as read.

Chairman Smith. Without objection, the amendment will be considered as read and the gentleman is recognized to explain the amendment.

Ms. Lofgren. Reserve a point of order.

Chairman Smith. The gentlewoman from California reserves a point of order.

Mr. King. Thank you, Mr. Chairman. This is an amendment that addresses the provision that employers have a voluntary verification of all employees. The language in the bill requires that that be mandatory for the employer to -- if he chooses to voluntarily run an employee through E-Verify, under the language in the underlying bill, the employer is required to run every employee through E-Verify.

And I just remember the chairman's statement in a previous amendment in addressing a rebuttal to a Democrat amendment said this means employers will not have to go through the time-consuming process of verifying each individual employee.

That is exactly what this amendment does. It means that employers will not have to go through the time-consuming process of

verifying each individual employee. If my amendment is adopted, then it strikes the requirement that an employer use all of the -- examine all of the employees or run all employees through E-Verify, and there are a lot of different ways to look at this.

One of them would be if you are an employer with a single employee, no problem. If you have two employees, then you have a 50 percent waste in your test perhaps, and by the time you get to 10,000 employees, it becomes a heavy, heavy regulatory burden and so onerous that employers will, I believe, not opt in to the voluntary E-Verify. And if we want them to volunteer into -- you know, we could have taken this debate and written this bill with mandatory E-Verify for current employees, too. We could have set this up on a cycle where an employer had to run all of their employers through on a cycle, maybe with a similar philosophy of what was offered with the ag employees, 36-month exemption. Maybe we could have set it up where one-third of your current employees would need to be tested every year through E-Verify but we didn't do that.

This bill allows for employers to voluntarily check their current employees; otherwise, they are grandfathered in. That is almost a similar philosophy that the gentleman from California discussed on the ag workers, except that when you make it mandatory to test every employee, you might have a company that has employees in all 50 States. You might have one State that is a problem and you know it and you can't opt in under the bill to test the employees in a single State. You might have a single employee and you can't test them even though you

might have knowledge that they are illegal.

And the reason that this language is in here is because there is some legal advice that argues that there is a liability for discrimination, and they want to protect employers from that liability. I say, as an employer, you should be able to make the decision yourself. There is a liability involved with hiring illegals, too, and an employer of good conscience should be able to use the good tools of E-Verify and be able to examine any employee at any time.

And during the hearing that we had here before the Judiciary Committee, the discussion was brought up and the argument was made that an employer would discriminate, and I made the point that the computer doesn't know what race the employee is. There are only two outcomes that can come from an E-Verify test. One of them is the verification that they can lawfully work in the United States. The other outcome is the lack of verification that they can legally work in the United States, and I have said the computer doesn't know what race they are.

The response that came was but the employer does. Yes, that is usually true but the employer also knows when they hire the employee, and so if the employer is going to discriminate, they will discriminate at the hiring process. I spoke about it earlier. That is not a quantifiable kind of an offense. It is a judgment call. One might have interviewed better than the other one, but if they lawfully can work in the United States, they cannot be discriminated against by an E-Verify test.

The only thing that can happen from an employer voluntarily

selecting 1 percent, 50 percent or 100 percent of their employees at any given time is that we get voluntary cooperation and voluntary compliance with the full intent of the E-verification law that is here before us.

And so my amendment strikes that requirement which is an onerous regulation of the employers. If you are a restaurant chain, you would have to test everybody in all your restaurants in all of our States, for example, but if this amendment is adopted, this means that employers will not have to go through the time-consuming process of verifying each individual employee. It is the purpose of this amendment.

I urge its adoption, and I yield back the balance of my time.

Chairman Smith. I thank the gentleman from Iowa. Are there other members who wish to be heard on this amendment? The gentlewoman from California, Ms. Lofgren.

Ms. Lofgren. Mr. Chairman, I would note that I withdraw my reservation. Obviously the amendment is germane. I do oppose it, however.

The amendment would permit discrimination on impermissible criteria such as foreign appearance, national or ethnic origin, and would disproportionately harm Asian Americans and Latinos and other communities that are perceived to have a greater number of undocumented individuals.

I would just note that one Atlanta chef recently said when he put out an ad for a cook he received 50 applicants. He admits that because of Georgia's anti-immigrant law he threw out all the ones that looked

to be Mexican. I don't know those folks are legal or not, he said. I just didn't even want to have to think about it.

That was unlawful discrimination plain and simple, and if we omit penalties for selective E-verification, we are basically going to give employers like this a government blessing to selectively E-Verify any existing employee who looks Mexican or who may otherwise seem to be different than the employer.

So I would urge that we oppose this amendment.

I yield back.

Chairman Smith. Are there other members who wish to be heard? I recognize myself in opposition to the amendment.

I oppose the amendment as it is currently written. It is not to say that we couldn't agree on better substitute language, but I oppose it because it leaves employers with no protection against discrimination claims if they use E-Verify for their current workforce and I will explain that.

The Legal Workforce Act requires employers to use E-Verify to check the work eligibility of new hires. However, the bill does allow employers to voluntarily use E-Verify to check the employment eligibility of their entire current workforce. In order to guard against claims that employers are singling out certain workers in a discriminatory manner for an E-Verify check, H.R. 2885 requires that if an employer chooses to use E-Verify for some current employees, he must E-Verify for all current employees.

The provision that this amendment strikes provides a standard

that employers can use to help protect themselves from discrimination claims. If an employer verifies all of their current workforce, the Office of Special Counsel for immigration related to unfair employment practices, the OSC, will not be able to claim that the employer acted in a discriminatory manner. Business groups such as U.S. Chamber of Commerce oppose this amendment. They want the protection provided by a uniform nondiscriminatory rule.

I understand and appreciate the argument of the gentleman from Iowa, and I agree with him that in an ideal world if an employer in good faith suspected that one of their employees was illegal they should be able to use E-Verify for just that employee. In reality, though, every day employers take precautions to help ensure that they are not subject to frivolous lawsuits. The requirement in this bill helps protect employers so they can focus on creating jobs for the 23 million Americans who are unemployed or underemployed.

So I oppose this amendment as it is now written and urge my colleagues to do the same. I yield back the balance of my time.

Are there other members who wish to be heard?

Mr. Goodlatte. Mr. Chairman.

Chairman Smith. The gentleman from Virginia, Mr. Goodlatte.

Mr. Goodlatte. Thank you, Mr. Chairman.

Chairman Smith. If Mr. Goodlatte will suspend for a second, I was going to see if there was anyone on the other side who wished to speak first. If not, the gentleman from Virginia.

Mr. Goodlatte. Thank you, Mr. Chairman. Mr. Chairman, I

understand the concerns raised by the chairman, and I think the point made by the gentleman from Iowa has merit, and I wonder if there is some middle ground here where in order to make it clear that it is not being done for discriminatory purposes you could have a smaller class of people, instead of just the entire employment of a large company.

If, for example, it is a chain of restaurants, if you do it at one restaurant, can you be required to check everybody in that one restaurant as opposed to everybody in that entire corporation, or if you have a series of manufacturing plants, if you check somebody in one plant, would you then just have to check the employees -- all of the employees in that plant instead of again that entire corporation.

Because the way it is written is so onerous in terms of using it in the very positive and ameliorative fashion of using information by an employer to determine whether an employee is lawfully working for the company, it seems to me we ought to make it easier to do it while still maintaining the fact that it shouldn't be used for the discriminatory purposes that the gentlewoman from California said.

Chairman Smith. If the gentleman from Virginia would yield?

Mr. Goodlatte. I would yield.

Chairman Smith. The gentleman has pointed out what I think is a possible solution or possible mutually agreeable substitute language. We have been looking at ways to accomplish exactly what the gentleman from Virginia has suggested. We just haven't been able to settle upon what we think is appropriate language yet. I am hoping that we might do so between now and the House floor.

Mr. King. If the gentleman would yield?

Mr. Goodlatte. I would be happy to yield.

Mr. King. I thank the gentleman. Blessed are the peace makers, and we have looked at the alternative language and I wasn't satisfied with the alternative language either, but I think the gentleman from Virginia has offered another addition that could come with that language that has to do with geographic similarity. I was concerned about job categories that went across the Nation. If you could couple that with the geographic territory so that it didn't have to become all 50 States, if it could be in your employees in a county or a State added to the job categories, I think we can arrive at language that perhaps would be useful to bring to the floor.

I would offer that and yield back to the gentleman from Virginia.

Mr. Goodlatte. I don't know whether that -- is it possible the gentleman would be willing to withdraw the amendment on the commitment to work together to try to accomplish this?

Mr. King. It is possible.

Chairman Smith. I will ask the question, again, if the gentleman from Virginia will yield?

Mr. Goodlatte. Happy to yield.

Chairman Smith. Would the gentleman, in order not to prejudice his case, consider withdrawing his amendment?

Mr. King. Well, I would request if the gentleman would yield.

Mr. Goodlatte. I would be happy to yield.

Mr. King. I don't know how my case would be prejudiced in either

case, but I would suggest this, that dialogue that we have had here informs me as a path I think we can define a policy that we can agree on, and I have that level of confidence, and so I would ask unanimous consent to withdraw my amendment.

Chairman Smith. Without objection, the amendment would be withdrawn.

Mr. Goodlatte. I yield back.

Chairman Smith. We will now proceed -- I thank the gentleman for yielding back.

If there are no other amendments, we will proceed to final passage. A reporting quorum being present, the question is on reporting the bill, as amended, favorably to the House. Those in favor say aye. Opposed, no. Louder, but not the majority. In the opinion.

Mr. Conyers. Roll call.

Chairman Smith. Roll call vote has been requested and the clerk will call the roll.

The Clerk. Mr. Chairman.

Chairman Smith. Aye.

The Clerk. Mr. Smith votes aye.

Mr. Sensenbrenner?

Mr. Sensenbrenner. Aye.

The Clerk. Mr. Sensenbrenner votes aye.

Mr. Coble?

Mr. Coble. Aye.

The Clerk. Mr. Coble votes aye.

Mr. Gallegly?

Mr. Gallegly. Aye.

The Clerk. Mr. Gallegly votes aye.

Mr. Goodlatte?

Mr. Goodlatte. Aye.

The Clerk. Mr. Goodlatte votes aye.

Mr. Lungren?

[No response.]

The Clerk. Mr. Chabot?

Mr. Chabot. Aye.

The Clerk. Mr. Chabot votes aye.

Mr. Issa?

[No response.]

The Clerk. Mr. Pence?

Mr. Pence. Aye.

The Clerk. Mr. Pence votes aye.

Mr. Forbes?

[No response.]

The Clerk. Mr. King?

Mr. King. Aye.

The Clerk. Mr. King votes aye.

Mr. Franks?

Mr. Franks. Aye.

The Clerk. Mr. Franks votes aye.

Mr. Gohmert?

[No response.]

The Clerk. Mr. Jordan?

[No response.]

The Clerk. Mr. Poe?

Mr. Poe. Yes

The Clerk. Mr. Poe votes aye.

Mr. Chaffetz?

Mr. Chaffetz. Aye.

The Clerk. Mr. Chaffetz votes aye.

The Clerk. Mr. Griffin?

Mr. Griffin. Aye.

The Clerk. Mr. Griffin votes aye.

Mr. Marino?

Mr. Marino. Aye.

The Clerk. Mr. Marino votes aye.

Mr. Gowdy?

Mr. Gowdy. Aye

The Clerk. Mr. Gowdy votes aye

Mr. Ross?

Mr. Ross. Aye.

The Clerk. Mr. Ross votes aye.

Mrs. Adams?

Mrs. Adams. Aye.

The Clerk. Mrs. Adams votes aye.

Mr. Quayle?

Mr. Quayle. Aye.

The Clerk. Mr. Quayle votes aye.

Mr. Conyers?

Mr. Conyers. No.

The Clerk. Mr. Conyers votes no.

Mr. Berman?

Mr. Berman. No.

The Clerk. Mr. Berman votes no.

Mr. Nadler?

Mr. Nadler. No.

The Clerk. Mr. Nadler votes no.

Mr. Scott?

Mr. Scott. No.

The Clerk. Mr. Scott votes no.

Mr. Watt?

Mr. Watt. No.

The Clerk. Mr. Watt votes no.

Ms. Lofgren?

Ms. Lofgren. No.

The Clerk. Ms. Lofgren votes no.

Ms. Jackson Lee?

Ms. Jackson Lee. No.

The Clerk. Ms. Jackson Lee votes no.

Ms. Waters?

[No response.]

The Clerk. Mr. Cohen?

[No response.]

The Clerk. Mr. Johnson?

Mr. Johnson. No.

The Clerk. Mr. Johnson votes no.

Mr. Pierluisi?

Mr. Pierluisi. No.

The Clerk. Mr. Pierluisi votes no.

Mr. Quigley?

Mr. Quigley. No.

The Clerk. Mr. Quigley votes no.

Ms. Chu?

Ms. Chu. No.

The Clerk. Ms. Chu votes no.

Mr. Deutch?

Mr. Deutch. No.

The Clerk. Mr. Deutch votes no.

Ms. Sanchez?

[No response.]

Chairman Smith. Gentleman from Virginia.

Mr. Forbes. Yes.

The Clerk. Mr. Forbes votes yes.

Chairman Smith. Gentleman from California.

Mr. Issa. Yes.

The Clerk. Mr. Issa votes yes.

Gentleman from Texas.

Mr. Gohmert. Yes.

The Clerk. Mr. Gohmert votes yes.

Chairman Smith. Gentleman from Ohio.

Mr. Jordan. Yes.

The Clerk. Mr. Jordan votes yes.

Chairman Smith. We got two yeses on the gentleman from Ohio.

Did you hear the other gentleman?

The Clerk. Mr. Chabot?

Mr. Chabot. Yes.

Chairman Smith. Yes, Mr. Chabot.

The Clerk. Mr. Chabot voted yes.

Chairman Smith. Gentleman from California.

Mr. Lungren. A conditional yes.

The Clerk. Mr. Lungren votes yes.

Ms. Lofgren. Mr. Chairman?

Chairman Smith. The gentlewoman from California, Ms. Waters.

Did she register how she was going to vote?

The Clerk. Ms. Waters?

The Clerk. Final passage.

Ms. Waters. No.

The Clerk. Ms. Waters votes no.

Chairman Smith. Are there other members who wish to record their vote on final passage? Clerk will report.

The Clerk. Mr. Chairman, 22 members voted yes, 13 members voted

no.

Chairman Smith. Majority having voted in favor, the amendment is agreed to.

If members will stay here just for a minute, I want to make an announcement after we finish this.

Without objection, the bill will be reported as a single amendment in the nature of a substitute and called for in the amendment adopted. Staff is authorized to make technical and conforming changes. Members will have 2 days to submit views.

Let me say to all members we hope to take up with the agreement of the ranking member, Mr. Conyers, two noncontroversial, bipartisan bills on which we do not expect recorded votes. Members are welcome to stay, but we would like to get through these two other bills fairly quickly, and let me, if I can, tell members what the names of the two bills are.

We have the National Guard and Reservist Debt Relief Extension Act of 2011 offered by -- and the second is House Joint Resolution 70 to amend the Missouri-Illinois interstate compact. And the ranking member has suggested we take them en bloc, which we do.

I know members are leaving. Let me thank them for their attention today for their interest in such an important subject, and we will see them soon at another markup. We will continue with this markup to consider these two bills together.

Mr. Conyers. Mr. Chairman?

Chairman Smith. Ranking member is recognized, gentleman from

Michigan, Mr. Conyers.

Mr. Conyers. I ask that H.R. 2192, the National Guard and Reservist Debt Relief Extension Act, and House Joint Resolution 70, which would memorialize the compact between Missouri and Illinois be brought forward at this time.

Chairman Smith. Okay. Pursuant to notice, I call up H.R. 2192 for purposes of markup. The clerk will report that bill as well as H.J. Res. 70 to amend the Missouri-Illinois interstate compact. The clerk will report the bills.

The Clerk. H.R. 2192, to exempt for an additional 4-year period from the application of the means test prevention --

[The information follows:]

***** COMMITTEE INSERT *****

Chairman Smith. Without objection, the bills will be considered as read and en bloc, and I will begin by recognizing the ranking member, gentleman from Michigan, Mr. Conyers, for his statements on the bills.

Mr. Conyers. Thank you, Mr. Chairman, and my colleagues, H.J. Res. 70 memorializes congressional consent to an amendment to the compact between the States of Missouri and Illinois, providing that bonds issued by the bi-State development agency may mature up to a 40-year period. This is a bipartisan measure supported by my colleagues from both the States.

This amendment reflects a reality that whereas 30-year maturity periods were fairly routine when this compact was created in 1949, financial instruments increasingly now have much longer maturity dates, and so the amendment here changes the resolution to have maturity dates of up to 40 years.

Mr. Sensenbrenner. Will the gentleman yield?

Mr. Conyers. Of course.

Mr. Sensenbrenner. Section 2 of the bill provides retroactivity of this act to this joint resolution to August 30, 1950. And why do we have a 60-year lookback for this? Were there bonds that were issued that had 40-year maturities that shouldn't have had them?

Chairman Smith. Would the gentleman from Michigan yield?

Mr. Conyers. Of course.

Chairman Smith. I would like to respond to the gentleman from Wisconsin. I do have an amendment to fix the problem that the gentleman refers to, and we expect to fix the problem on the way to the House

floor.

Mr. Sensenbrenner. Well, the gentleman from Michigan has the time, but I will offer an amendment if somebody can write it down when he yields back and we will get it done now.

Chairman Smith. Let's continue with opening statements while an amendment is being prepared for Mr. Sensenbrenner.

Mr. Conyers. Could I comment briefly on the National Guard?

Chairman Smith. The gentleman continues to be recognized.

Mr. Conyers. Yes. H.R. 2192 is another bipartisan measure that I am pleased to bring forward. The National Guard and Reservist Debt Relief Extension Act merely extends a limited exemption from the Bankruptcy Code's means test for certain members of the National Guard and Reserve components. There is a real need for this bill because a lot of our brave men and women called into active service encounter financial difficulties. As was testified at a 2008 hearing before the Courts, Commercial and Administrative Law Subcommittee about the need for this exemption, some 56 percent of enlisted military personnel report difficulty with family finances, and 47 percent of our servicemembers say they are in over their head with their own expenses.

And so what we are doing is trying to correct this by making this exemption from a permanent fixture of the Bankruptcy Code when this 4-year extension expires. We are trying to give them a little longer break, and so that is the gist of both of these measures.

I urge their consideration, and I would be happy to accept an amendment from Mr. Sensenbrenner or the chairman himself in terms of

H.J. Res. 70.

Chairman Smith. Thank you, Mr. Conyers. I recognize myself briefly for an opening statement to say that I associate myself with the remarks by the ranking member in regard to both the bill offered by our Judiciary colleagues Mr. Cohen and Mr. Forbes and also by our colleague in the House, Mr. Clay, and I will yield the balance of my time to the gentleman from Virginia, Mr. Forbes.

Mr. Forbes. Mr. Chairman, thank you and I just would like to voice my support of H.R. 2192. As we all know, September 11 changed everything and especially for our Reservists and for our Guardsmen. In fact, we shifted from a strategic Reserve to an operational Reserve where essentially we will never fight another war that our Reserve and our Guard components aren't fully integrated and a part of the battle. In fact, a lot of people don't realize that 79 percent of the units dealing with medical services for our entire Army now are from Reservists and Guardsmen, 79 percent for transportation, 75 percent for medical services.

Oftentimes these guys give up jobs where they are making a lot more money to do what -- we just had a hearing earlier today where we had the generals from the Guard, from the Reserves and the Air Guard who talked about the transformation that has taken place where many of us remember just 10 or 15 years ago when somebody was in the Reserves or the Guard and you asked them why, they said because all they had to do is do a weekend of training a month and 2 weeks of really not doing too much during that period of time. And if you look at the

charts, there has been an enormous transformation now where the men and women fighting know that they are going to fight and they want to do it because they know they are part of a team that is fighting to defend this country. They know they are risking their lives, and they want do it, but oftentimes they suffer when they come back financial difficulties. And this doesn't take them away. It simply helps them and gives them a small break at that.

And we hope that by the time this sunset expires those combat operations will have subsided and we won't need it anymore, and with that, Mr. Chairman, I yield back the balance of my time.

Chairman Smith. Mr. Forbes, thank you for your work, and if Mr. Cohen were here, I would thank him as well. Oh, he is here. Pardon me. The gentleman from Tennessee is recognized.

Mr. Cohen. You are welcome and thank you. This is an important bill for the National Guardsmen and the Reservists who have volunteered to help us. They do often, as was mentioned by Mr. Forbes and Chairman Smith and Ranking Member Conyers, give up much to serve our country. It is the least we can do to pass this and extend it to 2015, and if they have the unfortunate circumstance where they have to go into bankruptcy, they should have the least amount of burden possible to get into bankruptcy court and get the relief that is offered.

It is a crime that any of them ever have to go into bankruptcy, but if they have that situation and it comes to that in serving our country, we should make it easier. They can have great difficulties in getting together the facts and materials while they are on duty to

file the paperwork, and there has been a GAO study that shows this is an effective program without problems, and I would certainly appreciate a positive vote and thank the chairman for scheduling it.

Appreciate his thanks, and I yield the balance of my time.

Chairman Smith. Thank you, Mr. Cohen. Are there any amendments on either bill?

Mr. Sensenbrenner. I have an amendment to the joint resolution at the desk.

Chairman Smith. The clerk will report the amendment.

The Clerk. Amendment to H.J. Res. 70, offered by Mr. Sensenbrenner.

[The amendment offered by Mr. Sensenbrenner follows:]

***** COMMITTEE INSERT *****

Chairman Smith. Without objection, the amendment will be considered as read, and the gentleman from Wisconsin is recognized.

Mr. Sensenbrenner. This amendment simply strikes section 2. It might be misdrafted. If it is would some people say it ought to be drafted better between here and the floor?

I urge the adoption of this amendment and yield back the balance of my time.

Chairman Smith. In consultation with the ranking member, we both agree with the amendment. Without objection, all in favor of the amendment say aye. Opposed, no. The majority of the members having voted in favor of the amendment, the amendment is agreed to.

I have an amendment at the desk to H.J. Res. 70 as well, and the clerk will report the amendment.

The Clerk. Amendment to H.J. Res. 70 offered by Mr. Smith of Texas, page 2, line 11, strike December 17 --

[The amendment offered by Chairman Smith follows:]

***** COMMITTEE INSERT *****

Chairman Smith. Without objection, the amendment would be considered as read, and I recognize myself to explain the amendment.

This amendment corrects a minor drafting error to H.J. Res. 70, section (1)(b), gives an effective date of December 17, 2010, more than 9 months ago. With this amendment, H.J. Res. 70 will be effective upon the date of enactment. I understand that the resolution's sponsor Mr. Clay, who I believe was with us earlier here today, does not object to this.

So I urge my colleagues to support this amendment, look forward to reporting this resolution out of committee.

Any discussion on the amendment? If not, all in favor say aye. Opposed, nay. The amendment is agreed to.

We will now go to final passage. A reporting quorum being present, the question is on reporting both bills en bloc, as amended, favorably to the House. Those in favor say aye. Opposed, no.

The ayes have it, and the bills, as amended, are ordered reported favorably.

Without objection, the bill will be reported as a single amendment in the nature of a substitute incorporating the amendments adopted. Staff is authorized to make technical and conforming changes. Members have 2 days to submit their views.

Once again, I thank the members -- before we finally adjourn I hear a voice.

Mr. Cohen. Yes, voice from the wilderness.

Chairman Smith. Gentleman from Tennessee.

Mr. Cohen. Let me ask a question. Is this particular way that our wall now is shaped a creation of God? Is this artwork presented by the virtual --

Chairman Smith. If the gentleman will yield, that crack occurred as a result of the earthquake in Washington, but that crack is due only to the earthquake. There is no crack in the determination of the Judiciary Committee members. This is good legislation passed.

I want to also say that we expect this crack to be repaired.

Mr. Cohen. Oh, no. I was going to ask you to preserve it. I think it is pretty. Kind of reminds me of the Denver airport.

Chairman Smith. We are not going to have a vote on this, but we do expect it to be repaired next week.

Mr. Sensenbrenner. Would the gentleman from Tennessee yield?

Mr. Cohen. I yield.

Mr. Sensenbrenner. Why is the Democratic side cracked up when the Republican side is not?

Mr. Cohen. Because God is on our side.

Chairman Smith. Thank you all. We stand adjourned.

[Whereupon, at 4:46 p.m., the committee was adjourned.]