2012 Amendment to E-Verify Ordinance:
Supplemental Explanation and Supporting Data

This proposed amendment to the Lawful Hiring Compliance Ordinance (E-Verify Ordinance) would add sections 2.80.015, 2.80.016, and 2.80.017, for purposes of responding to the State Legislature's passage of AB 1236, which banned local government contractor E-Verify requirements.

The additions would (1) make inoperative and suspend enforcement of the city contractor E-Verify requirement, (2) preserve the requirement of E-Verify use by the city for its newly-hired employees, (3) preserve suspension of city contractual obligations pending city contractor desistance from federally-determined unlawful hiring of unauthorized aliens, (4) assert, in the findings, traditional rule of law principles that are applicable to immigration law enforcement and E-Verify, and (5) state, in the findings, the reasons why the City Council disagrees with the State Legislature's ban on local government E-Verify requirements.

What follows are all of the sections/subsections that are now proposed to be added to the 2010 amended version of the ordinance, in bold, with an explanation or pertinent references set forth immediately after the various subsections. (The remainder of the ordinance, which is the 2010 amended version in its entirety, may be found in the newly proposed amended ordinance itself.)

The main purpose of this paper is to provide supporting data for the facts stated in the City Council findings. Most of the quotations of American presidents may be found in their full context at *www.presidency.ucsb.edu*. Facts set forth in the findings for which no particular reference is given were, for the most part, related to our researcher in personal conversations; these sources will be provided to council members upon request.

Sec. 2.80.015. - Suspension of certain provisions: Findings.

The City Council finds and declares as follows:

(a) A central tenet of the American political tradition--the ideal our nation's Founders called "a government of laws and not of men," and which we today call "the rule of law"--is under assault. Some of the particular principles that constitute the general principle of the rule of law are being challenged most particularly in the area of enforcement of our country's immigration laws.

(b) The government of the United States in recent decades has been grossly negligent in its enforcement of our immigration laws. Given the current annual goal of deporting 400,000 illegal immigrants, and the 11 million figure for those estimated to be present, it would take 27 years to restore compliance with the immigration laws if during those years no new migrants were able to enter or remain in the United States unlawfully.

"The number of illegal immigrants in the United States trickled down slightly to 11.5 million as of January 2011, according to statistics released by the Obama administration on an issue likely to play a big role in the U.S. presidential campaign. The U.S. Department of Homeland Security estimated the number has remained largely stable - just down from 11.6 million in 2010 - citing the high U.S. unemployment rate, improved economic conditions in Mexico and increased border enforcement....States along the Southwest border with Mexico topped the list with the most immigrants illegally in the country, with about 2.83 million in California, followed by almost 1.8 million in Texas, the DHS Office of Immigration Statistics report said." ("Number of illegal immigrants in U.S. is stable: DHS," Reuters, *www.reuters.com*, March 24, 2012.)

U.S. immigration authorities under the Obama administration set a goal of 400,000 deportations for the year ending September 30, 2010. ("ICE officials set quotas to deport more illegal immigrants," *The Washington Post*, March 27, 2010, *www.washingtonpost.com*, 3/31/10; "Tough Q&A for first lady," *The Orange County Register*, May 20, 2010, News 4.)

"Obama administration officials say they forcibly removed a record number of people last year, some 396,906 in all, including 216,608 criminal immigrants, or about 55% of the total. ICE has removed 147,044 criminal illegal immigrants this fiscal year, officials said. That is behind last year's rate by approximately 12,000, or 9%." ("U.S. steps up deportation efforts for criminal immigrants," *Los Angeles Times*, May 26, 2012, *articles.latimes.com*.)

"The vast majority of the American public is not racist or 'playing politics' in worrying about out-of-control illegal immigration. The enforcement of existing federal immigration law has become a joke." (Victor Davis Hanson, "Obama's demagoguery on immigration historic," *www.ocregister.com*, May 19, 2011.)

"Illegal immigration is, by its nature, a breakdown in the rule of law. Indeed, the magnitude of today's problem betrays a systemic breakdown in the rule of law. The illegal workers don't respect our immigration and identification laws, but they're hardly alone. Employers who wink as they hire them or have other companies hire them; government agencies that haven't enforced existing immigration laws; middle-class folks who hire illegals to landscape their properties or nibble on fruit made cheap by illegal laborers -- all are complicit as well in the collapse of the rule of law." (David Reinhart, "So is this what you call compassion?," June 25, 2007, *politicalmavens.com*, 7/14/07.)

(c) In 2007, the City of Mission Viejo adopted, and in 2010 it amended, its Lawful Hiring Compliance Ordinance requiring use by the city and city contractors of the Basic Pilot Program, now denominated E-Verify.

The city's Lawful Hiring Compliance Ordinance (No. 07-247) was adopted unanimously by the City Council on March 19, 2007. It required use of the Basic Pilot program (later renamed E-Verify) (1) for city employees and (2) by city contractors pursuant to new or

renewed contracts for services for over $30,000 (increased from $15,000 by Ordinance No. 07-260 in September 2007).

(d) E-Verify is a supplemental screening system made available by the federal government to employers to screen newly hired employees for eligibility to work in the United States. E-Verify uses an Internet connection to federal government records to determine work eligibility. It has been shown to be detecting nearly half of those persons not lawfully present in the United States who, by means of felony document fraud and perjury, evade detection by the federally-mandated Form I-9 document-based screening process.

The Westat study released in early 2010 showed that E-Verify accurately detects the status of unauthorized workers almost half of the time. For the time period studied (April-June 2008), an estimated 6.2% of those run through E-Verify were unauthorized, and an estimated 46% of those unauthorized employees received final nonconfirmations. (Those who escape detection do so primarily by means of identity theft and fraud.)

All new employees, at the time of hire, complete a portion of Form I-9, attesting under penalty of perjury that the employee is a citizen, national, lawful permanent resident, or alien authorized to work in the United States. The employer then examines the employee's identity and employment eligibility document(s) and completes its section of the Form I-9, attesting under penalty of perjury that the document(s) appear(s) to be genuine.

Federal law provides for imprisonment and/or fines for false statements or use of false documents in connection with the completion of Form I-9. Under federal law, knowing use of forged or falsely made documents prescribed as evidence for employment constitutes a felony punishable by a fine or imprisonment for up to 10 years. (18 USC §1546, 18 USC §3559(a).)

Perjury is a felony punishable by a fine or imprisonment for up to five years. (18 USC §1621, 18 USC §3559(a).)

(e) The city adopted its ordinance based upon stated findings that a just society requires enforcement of and compliance with democratically enacted laws; that governmental entities should promote compliance with the law and should avoid actions and policies that encourage disrespect for and violation of the law and reward lawbreakers at the expense of law-abiding people and businesses; that federal law regulates immigration and justifiably requires that certain conditions be met for a person to be authorized to work or reside in the United States; that the welfare of the public and, in particular, law-abiding persons and business entities, is served and promoted by governmental policies and procedures that deter and prevent legally unauthorized employment; and that among such policies and procedures are those that ensure verification of eligibility for employment consistent with federal law.

Taken from the findings of Ordinance No. 07-247 (not included in the municipal code).

(f) In adopting the ordinance, the City Council was implementing its conviction that, consistent with public policy intended to be realized through federal immigration law, all American jobs should go to legal residents rather than aliens not lawfully admitted to the United States. At the same time, the issue was considered in the broader context of (1) our nation's traditional commitment to the rule of law, and (2) decades of lax enforcement of the immigration laws by the Executive Branch of the federal government. In first introducing the measure, the council member who proposed it said: "The rule of law is in fact what this country was founded upon, and what makes this country work as well as it does."

A Mission Viejo resident who spoke to the City Council at the second reading of the ordinance, who had himself lost his job to an illegal alien, said: "Our borders are porous. Anybody can get into this country, and they are taking jobs away from American citizens....So please pass this law. It's a start." (Mission Viejo City Council Meeting, Public Comments on proposed Lawful Hiring Compliance Ordinance, March 19, 2007.)

Another Mission Viejo resident said: "People are talking about cheap labor. There's nothing cheap about cheap labor. It's a pay-me-now or pay-me-later situation. Either we pay a few dollars more for labor now and hire real American citizens that we've forgotten about, or we pay the extra burdens in the schools, and the jails, and the hospitals..." (Mission Viejo City Council Meeting, Public Comments on proposed Lawful Hiring Compliance Ordinance, March 19, 2007.)

From the start, the issue was considered in the broader context of the rule of law and the substantial failure of the federal government to enforce immigration laws. Upon proposing the ordinance, its sponsor, Council Member John Paul Ledesma, said: "The rule of law is in fact what this country was founded upon, and what makes this country work as well as it does. Now, no set of laws, obviously, no matter what you do, is going to be perfect or utopian in any way. That's never going to happen. But the fact of the matter is this country was built on rule of law and respects the law, without which our system of government would simply crumble. And I think this is sending a positive message, a proactive message. As far as I know we'll be the first city in the state of California to pass this. But I believe a school district has already passed a similar ordinance." (Mission Viejo City Council Meeting, March 5, 2007.)

The other council members likewise viewed the proposal in this broader context. Council Member Lance MacLean said: "It is already the law of the land....Yes, we do have a moral obligation to uphold the law....This is not going to create any immigration raids. It is not going to do anything along those lines, which again fall into the purview of the federal government. It's a simple adhering to our federal laws that exist today and have existed for a long time." Council Member Trish Kelley said: "It is right and appropriate that we should comply with the law, and this provides a tool that helps us to be able to do that." Council Member Frank Ury said: "I am the son of an immigrant, who immigrated here in the late '50s, early '60s, and he came from Eastern Europe, and there was a set of

rules...And if the laws were good enough for him...there's no reason why they shouldn't apply to everybody today." Mayor Gail Reavis said: "My grandparents immigrated from Cuba....This has nothing to do with the color of anybody's skin. This is the rule of law in this country." (Mission Viejo City Council Meeting, discussion on proposed Lawful Hiring Compliance Ordinance, March 19, 2007.)

(g) The United States was founded as a republic, a representative democracy, based on the concept of the rule of law--"a government of laws and not of men." The rule of law--effecting equal obligations and equal rights--is the central concept of our democratic system. Definitions of the rule of law stress the supremacy of law: the supremacy of regular power as opposed to arbitrary power. The rule of law means that everyone in the nation is subject to the law, and the law is subject to the nation's citizens. Defined more fully, it means that everyone in the nation is morally--"under God"--subject to just laws, and the law is subject to the nation's citizens morally--"under God"--exercising their political sovereignty so as to impose just laws.

"The first question that offers itself is whether the general form and aspect of the government be strictly republican. It is evident that no other form would be reconcilable with the genius of the people of America; with the fundamental principles of the Revolution; or with that honorable determination which animates every votary of freedom to rest all our political experiments on the capacity of mankind for self-government. If the plan of the convention, therefore, be found to depart from the republican character, its advocates must abandon it as no longer defensible....If we resort for a criterion to the different principles on which different forms of government are established, we may define a republic to be, or at least may bestow that name on, a government which derives all its powers directly or indirectly from the great body of the people, and is administered by persons holding their offices during pleasure for a limited period, or during good behavior." (James Madison, *The Federalist*, No. 39.)

"The full experiment of a government democratical, but representative, was and still is reserved for us….The introduction of this new principle of representative democracy has rendered useless almost everything written before on the structure of government…" (Thomas Jefferson, to Tiffany, August 26, 1816.)

"This new Nation was to be a democracy based on the concept of the rule of law." (Harry S. Truman, June 27, 1950.)

"The rule of law--equal for all--is the central concept of our democratic system." (George H.W. Bush, April 21, 1989.)

"The government of the United States has been emphatically termed a government of laws, and not of men." (Chief Justice John Marshall, *Marbury v. Madison* (1803) 5 U.S. (1 Cranch) 137.)

"The historic phrase 'a government of laws and not of men' epitomizes the distinguishing character of our political society. When John Adams put that phrase into the Massachusetts Declaration of Rights he was not indulging in a rhetorical flourish. He was expressing the aim of those who, with him, framed the Declaration of Independence and founded the Republic." (Justice Felix Frankfurter, *United States v. United Mine Workers* (1947) 330 U.S. 258, 307.)

"My fellow Americans, our long national nightmare is over. Our Constitution works. Our great Republic is a government of laws and not of men." (Gerald R. Ford, August 9, 1974.)

Black's Law Dictionary (Ninth Edition, Bryan A. Garner, ed., St. Paul, MN: West, 2009, p. 1448) defines rule of law in its broad sense as: "The supremacy of regular as opposed to arbitrary power <citizens must respect the rule of law>. Also termed *supremacy of law*."

"Among those ideas thought distinctive of modern ideals of good governance is that of the 'rule of law,' or a 'government of laws, not men.' The essence of the idea is that the law is a system of principles or rules to which all individuals--including those who govern--are subject. Even the sovereign is subject to the constraints of the law, as distinguished from arbitrary personal preference or whim." (Robert Hockett, *Little Book of Big Ideas: Law*, Chicago: Chicago Review Press, 2009, p. 10.)

"Here, in essence, is the meaning of the rule of law as it arises from the proposition that all men are created equal: Those who live under the law have an equal right in the making of the law, and those who make the law have a corresponding duty to live under the law." (Harry V. Jaffa, *A New Birth of Freedom: Abraham Lincoln and the Coming of the Civil War*, Lanham, Maryland: Rowman & Littlefield, 2000, p. 336.)

The rule of law in the American political tradition is not merely procedural, but is a natural law or higher law theory, having substantive moral or political content--in its various formulations encompassing such universal principles as human dignity, equality, morality, fairness, justice, limited government, law flowing from collective agreement, and consent. (*West's Encyclopedia of American Law*, Vol. 9, St. Paul: West Group, 1998, p. 89; Vernon Bogdanor, ed., *The Blackwell Encyclopedia of Political Institutions*, Oxford: Basil Blackwell Ltd., 1987, pp. 547-548; Steven P. Croley, "The Majoritarian Difficulty: Elective Judiciaries and the Rule of Law," 690 *University of Chicago Law Review* 689, 698, n. 25 (1995); "rule of law," in Paul Barry Clarke and Joe Foweraker, eds., *Encyclopedia of Democratic Thought*, New York: Routledge, 2001, p. 396.)

(h) We affirm the centrality of the rule of law to the American Creed. We reverence the Declaration of Independence and the Constitution of the United States, and we reverence our nation's Founders and the heroes who for more than two centuries have sustained the Founders' achievement. We believe that American political philosophy, especially as embodied in the founding documents, may be justly understood to have four great themes, or to be structured with four essential

pillars: God/divine sovereignty, Freedom/human rights, Democracy/consent of the governed, and Law/the rule of law. Government by law ranks among "our great civilized ideas: individual liberty, representative government, the rule of law under God." Of all the contributions that America has made to human progress, there may be none that is more important than the advance of the ideal of law as a check upon power.

"Americans, it is often said, are a people defined by and united by their commitment to the political principles of liberty, equality, democracy, individualism, human rights, the rule of law, and private property embodied in the American Creed." (Samuel P. Huntington, *Who Are We? The Challenges to America's National Identity*, New York: Simon & Shuster Paperbacks, 2004, p. 46.)

The centrality of the rule of law to the American Creed is suggested in Paul Johnson, *A History of the American People* (1998) (excerpt quoted in *www.sheilaomalley.com*, 8/24/07): "Next to religion, the concept of the rule of law was the biggest single force in creating the political civilization of the colonies. This was something they shared with all Englishmen. The law was not just necessary - essential to any civil society - it was noble. What happened in courts and assemblies on weekdays was the secular equivalent of what happened in church on Sundays. The rule of law in England, as Americans were taught in their schools, went back even beyond Magna Carta, to Anglo-Saxon times, to the laws of King Alfred and the Witanmagots, the ancient precursor of Massachusetts' Assembly and Virginia's House of Burgesses."

In the 1830s, Alexis de Tocqueville and Gustave de Beaumont saw a paradox between "the most extended liberty" characteristic of American society and the rigor and discipline of the American penitentiary. A legal historian says "this was not, perhaps, a paradox at all. Here was a society embarked on what seemed at the time a radical experiment: popular government. All obvious forms of authority had been dethroned. There was no monarchy, no established church, no aristocracy. Instead there was only law. Essentially, people were supposed to govern themselves; the law entrusted them with power. Not everybody could handle the freedom, the power, the trust. Something had to be done about these people. One rotten apple spoils the barrel. Criminals, through their criminality, betrayed the American experiment. The strict regime of the penitentiary was what they needed--and deserved." (Lawrence M. Friedman, *A History of American Law*, Third Edition, New York: Simon & Shuster, 2005, p. 221.)

American political theory may be justly understood to have four great themes, or to be structured with four essential pillars: GOD/divine sovereignty, FREEDOM/human rights, DEMOCRACY/consent of the governed, and LAW/the rule of law. Our beliefs on these subjects answer very basic questions: beliefs respecting God explain life's destiny and purpose, the grounds for morality, and the meaning of freedom; freedom concerns the purpose of government; democracy concerns the kind of government; law concerns the method of government. Government by law ranks among what Ronald Reagan called "our great civilized ideas: individual liberty, representative government, the rule of law under God." (January 26, 1982.)

"Religion, at its fundamental level, offers a set of postulates about the universe and man's place therein, including a theory of human nature, its origin, its potentials, and its destination. Religion deals with the meaning and purpose of life, with man's chief good, and the meaning of right and wrong. Thus, religious axioms and premises provide the basic materials political philosophy works with. The political theorist must assume that men and women are thus and so, before he can figure out what sort of social and legal arrangements provide the fittest habitat for such creatures as we humans are. So, some religion lies at the base of every social order." (Edmund A. Opitz, *Religion: Foundation of the Free Society*, Irvington-on-Hudson, NY: The Foundation for Economic Education, Inc., 1994, p. 13.)

"In American political theory, sovereignty rests, of course, with the people, but implicitly, and often explicitly, the ultimate sovereignty has been attributed to God. This is the meaning of the motto, 'In God we trust,' as well as the inclusion of the phrase 'under God' in the pledge to the flag. What difference does it make that sovereignty belongs to God? Though the will of the people as expressed in majority vote is carefully institutionalized as the operative source of political authority, it is deprived of an ultimate significance. The will of the people is not itself the criterion of right and wrong. There is a higher criterion in terms of which this will can be judged; it is possible that the people may be wrong." (Robert N. Bellah, "Civil Religion in America," in William G. McLoughlin and Robert N. Bellah, *Religion in America*, Boston: Beacon Press, 1968, pp. 6-7.)

"The doctrine of natural law and natural rights enshrined in the Declaration is a doctrine of natural *and* divine right....The American people, in declaring themselves independent of Great Britain and of any mortal power, did so in accordance with laws of nature that were God's laws, to which they declared themselves subject in the very act of independence....For the Founding Fathers and for Lincoln, the attempt to find the nearest earthly approximation to divine rule, to 'reason unaffected by desire,' is by means of the rule of law. The republican form of government, embodying the rule of law, is grounded in the idea of human equality. The proposition that all men are *created* equal implies...a right that is both natural and divine. This is given emphasis in the assertion that all human beings are endowed *by their Creator* with the rights that belong to them by nature. Republican government understands itself to be in accordance with a natural order that is in itself in harmony with the divine government of the universe." (Harry V. Jaffa, *A New Birth of Freedom: Abraham Lincoln and the Coming of the Civil War*, Lanham, Maryland: Rowman & Littlefield Publishers, 2000, pp. 122-123, footnotes omitted.)

"And can the liberties of a nation be thought secure when we have removed their only firm basis, a conviction in the minds of the people that these liberties are the gift of God?" (Thomas Jefferson, *Notes on Virginia*, Q. XVIII, 1785.)

"Despotism can do without faith, but liberty cannot....How can society fail to perish if, as political bonds are loosened, moral bonds are not tightened? And what is to be done with a people that is its own master, if it is not obedient to God?" (Alexis de Tocqueville,

1835, *Tocqueville: Democracy in America*, Translated by Arthur Goldhammer, New York: The Library of America, 2004, p. 340 (Vol. I, Part II, Chapter 9: On the Principal Causes That Tend to Maintain the Democratic Republic in the United States).)

"Now the *virtue* which had been infused into the Constitution of the United States, and was to give to its vital existence the stability and duration to which it was destined, was no other than the consecration of those abstract principles which had been first proclaimed in the Declaration of Independence--namely, the self-evident truths of the natural and unalienable rights of man, of the indefeasible constituent and dissolvent sovereignty of the people, always subordinate to a rule of right and wrong, and always responsible to the Supreme Ruler of the universe for the *rightful* exercise of that sovereign, constituent, and dissolvent power." (John Quincy Adams, *The Jubilee of the Constitution: A Discourse*, April 30, 1839, New York: Samuel Colman, 1839, p. 54.)

"The story of man's advance from savagery to civilization is the story of reason and morality displacing brutal force. While law is reason systematized, it is more than reason alone. A great justice of our Supreme Court said long ago, 'The law is the witness and external deposit of our moral life. Its history is the history of the moral development of the race.'" (John F. Kennedy, January 25, 1963.)

"American democracy is rooted in the Judeo-Christian tradition and in British history. Democracies emphasize the value of the *individual*, and early American colonists emphasized *liberty* over other goals of government. (Byron M. Jackson, *Encyclopedia of American Public Policy*, Santa Barbara: ABC-CLIO, 1999, p. xvi.)

"Democracy today, as reflected in the government structures created by national constitutions, requires decision making based on majority rule, with protection for minority rights and individual freedoms and guarantees to ensure state protection of life, liberty, and property, as well as access to the country's political processes. Above all, democracy requires strict adherence to the rule of law to ensure rational government. Key concepts that undergird democracy are individualism, liberty, equality, and fraternity." ("Constitutionalism," in Robert L. Maddex, *The Illustrated Dictionary of Constitutional Concepts*, Washington, D.C.: Congressional Quarterly Inc., 1996, p. 68.)

"The institution makers of this period [1776 to 1787] were able to draw on a heritage of political wisdom and experience obtained from the mother country and from 180 years of political development between the founding of the Virginia colony and the Constitutional Convention of 1787. It has been said that the American experience is unique in 'the continuity of its political and constitutional aspects with the experience and institutions of the past.' Providing this continuity where the concepts of *rule of law* and *self-government*, which formed the core of the American consensus and the foundation of our political development." (Emmette S. Redford, et al., *Politics and Government in the United States*, Harcourt, Brace & World, Inc., 1968, p. 44, footnote omitted.)

"On September 17, 1787, in Independence Hall, Philadelphia, our Founding Fathers adopted the Constitution of the United States. With this great document as its

cornerstone, our country has become the finest example in all history of the principle of government by law, in which every individual is guaranteed certain inalienable rights. The strong beliefs of its authors in the worth of the individual and the rights to be enjoyed by all citizens have made the Constitution not only an enduring document but one which finds new life with the passing of years and continues to inspire freedom-seeking people all over the world." (Jimmy Carter, July 23, 1979.)

"The crucial role of the law in American history has been apparent to all observers, from Alexis de Tocqueville to the present day. The true American contribution to human progress has not been in technology, economics, or culture; it is been the development of the notion of law as a check upon power. American society has been dominated by law as has no other society in history. Struggles over power that in other countries have called forth regiments of troops, in this country call forth battalions of lawyers." (Bernard Schwartz, *The American Heritage History of The Law in America*, New York: McGraw-Hill Book Company, 1974, pp. 7-8.)

(i) Law subject to the rule of law is the mechanism of genuine democracy: it is the basic means of doing self-government, the principal instrument by which we guide cooperation toward the common good so as to live together in harmony "with liberty and justice for all."

"The rule of law is all that stands between civilization and barbarism, for, as Locke said, 'where there is no law, there is no freedom.' Most important, the purpose of law is not to diminish but to enlarge freedom." (Margaret Thatcher, September 24, 1994.)

President Kennedy said "law is the strongest link between man and freedom, and by strengthening the rule of law we strengthen freedom in our own country and contribute by example to the goal of justice under law for all mankind." (April 7, 1961.)

"Justice is the end of government. It is the end of civil society. It ever has been and ever will be pursued until it be obtained, or until liberty be lost in the pursuit." (James Madison, *The Federalist*, No. 51.) "Justice is the fundamental law of society." (Thomas Jefferson, to Du Pont De Nemours, 1816, *The Jeffersonian Cyclopedia*, No. 4224, *books.google.com*, 6/4/10.) "The object of law is to secure justice." (Elizabeth Cady Stanton, Address on the Divorce Bill, 1861, in Daniel J. Boorstin, ed., *An American Primer*, New York: Mentor Books, 1968, p. 394.) "EQUAL JUSTICE UNDER LAW." "JUSTICE THE GUARDIAN OF LIBERTY." (Inscriptions on the U.S. Supreme Court Building, Washington, D.C., in Brian Burrell, *The Words We Live By*, New York: The Free Press, 1997, p. 220.)

(j) Law functions--it results in the compliance with democratic law that constitutes ordered liberty--through two chief mechanisms, or motivators: (1) moral respect for the law, and (2) enforcement of the law. The American political tradition and its underlying religious tradition hold that each of us has a serious moral obligation to obey the law. Our nation's Founders and statesmen insisted that each of us has a

duty of respect or reverence for the law. No one is above the law. Everyone has a duty to obey the law, and a right to obedience of the law by others.

Our Founders and statesmen insisted upon what Washington called "inviolable respect to the laws" (January 8, 1790), what Jefferson called "a reverence for law" (to Colvin, September 1810), what Madison (*The Federalist*, No. 49) and Lincoln (January 27, 1838) called "reverence for the laws," what Theodore Roosevelt (December 3, 1906) and Franklin D. Roosevelt (September 27, 1934) and Dwight D. Eisenhower (September 24, 1957) called "respect for law."

"The very idea of the power and the right of the people to establish government presupposes the duty of every individual to obey the established government." (George Washington, *Farewell Address*, 1796.)

"Let every American, every lover of liberty, every well wisher to his posterity, swear by the blood of the Revolution, never to violate in the least particular, the laws of the country; and never to tolerate their violation by others." (Abraham Lincoln, January 27, 1838.)

"The one all-important element in good citizenship in our country is obedience to law." (Theodore Roosevelt, September 1, 1895.)

"No man is above the law and no man is below it; nor do we ask any man's permission when we require him to obey it. Obedience to the law is demanded as a right; not asked as a favor." (Theodore Roosevelt, December 7, 1903.)

"In a republic the first rule for the guidance of the citizen is obedience to law....Those who want their rights respected under the Constitution and the law ought to set the example themselves of observing the Constitution and the law....Those who disregard the rules of society are not exhibiting a superior intelligence, are not promoting freedom and independence, are not following the path of civilization, but are displaying the traits of ignorance, of servitude, of savagery, and treading the way that leads back to the jungle." (Calvin Coolidge, March 4, 1925.)

It may be that respect for the law plays a much greater role in maintaining social order than threats and applications of force by law enforcement authorities. (Ronald L. Akers and Christine S. Sellers, *Criminological Theories: Introduction, Evaluation, and Application*, Los Angeles: Roxbury Publishing Company, 2004, pp. 21-22.)

(k) One essential principle of the rule of law is that proscriptive laws must include sanctions--punishment for disobedience. A legal sanction, to be effective, must be at least the equivalent of what the offender gained or expected to gain from the offense, and it usually must be that and something more. The offender's gains from the offense must be confiscated from him upon apprehension or conviction. If the sanction is something less than the equivalent of the contemplated gains of the offense, the offender will calculate that by committing the offense he will come out

ahead even if he is apprehended and punished. The contemplated gain of illegal immigration is presence in the United States, with the opportunities such presence provides. The indispensable, minimum sanction needed to deter and prevent illegal entry and illegal presence is removal from the United States, with the resulting elimination of the opportunities presented. With anything less, there is little deterrence, and immigration lawbreaking pays: the lawbreaker knows he will come out ahead, even after being apprehended and paying the prescribed penalty.

"A LAW, by the very meaning of the term, includes supremacy. It is a rule which those to whom it is prescribed are bound to observe. This results from every political association. If individuals enter into a state of society, the laws of that society must be the supreme regulator of their conduct." (Alexander Hamilton, *The Federalist*, No. 33.)

"Government implies the power of making laws. It is essential to the idea of a law, that it be it attended with a sanction; or, in other words, a penalty or punishment for disobedience. If there be no penalty annexed to disobedience, the resolution or commands which pretend to be laws will, in fact, amount to nothing more than advice or recommendation." (Alexander Hamilton, *The Federalist*, No. 15.)

"The consequences of committing the crime consist of rewards (what psychologists call 'reinforcers') and punishments; the consequences of not committing the crime (i.e., engaging in noncrime) also entail gains and losses. The larger the ratio of the net rewards of crime to the net rewards of noncrime, the greater the tendency to commit the crime." (James Q. Wilson, Richard J. Herrnstein, *Crime & Human Nature*, New York: Simon & Shuster, Inc., 1985, p. 44.)

If the government does not take away what the immigration lawbreaker gained by breaking the law, but lets him keep his ill-gotten gains, and instead substitutes a lesser sanction, then for that lawbreaker the sanction is similar to a mere "cost of doing business." And what is missing is the primary means by which law enforcement achieves results: deterrence--both "specific" as to the individual and "general" as to the public. There is no real immigration *law*. And without immigration laws to protect a nation's borders, the nation has no real borders.

(l) Where the moral obligation to obey the law is not subscribed to in theory or adhered to in practice, law enforcement, with its physical and deterrent effects, assumes its supplemental role. One of the principles most basic to the rule of law is congruence between the rules as announced and their actual administration. The laws that are enacted must be enforced. This requirement that officials apply the enacted rules has, in fact, been asserted to be the essence of the rule of law. The sanctions provided in proscriptive laws must actually be applied to the proscribed behavior. The duty of the government to enforce the laws is co-equal with the duty of citizens to obey them.

President Hoover said that "the processes of criminal-law enforcement are simply methods of instilling respect and fear into the minds of those who have not the

intelligence and moral instinct to obey the law as a matter of conscience." (April 22, 1929.)

Among the principles, or qualities, or characteristics, or constitutive elements of the rule of law is "congruence between the rules as announced and their actual administration," congruence between declared rule and official action. (Lon Fuller, *The Morality of Law*, New Haven: Yale University Press, 1964, p. 39.)

In fact, legal theorist Lon Fuller has described the requirement that officials apply the rules enacted as the essence of the rule of law. "Imagine that officials were not required to apply the enacted rules, but were free to evaluate conduct in light of their best judgment. Clearly, such behavior is antithetical to a system of social planning. Plans are supposed to settle in advance what is to be done; if officials are not required to apply those norms they deem mistaken, then the norms cannot bring about the results that plans are designed to achieve. The Rule of Law, we can say, is the Rule of Social Planning: its value derives entirely from the benefits that social planning generates and is best served when legal structures maximize these benefits." (Scott J. Schapiro, *Legality*, Cambridge: Harvard University Press, 2011, p. 396.)

According to Thomas Jefferson, "The execution of the laws is more important than the making of them." (Quoted in Charles Maurice Wiltse, *The Jeffersonian Tradition in American Democracy*, New York: Hill and Wang, Inc., 1960, p. 165; also, *The Jeffersonian Cyclopedia*, *etext.lib.virginia.edu*, No. 4494.)

"Among the difficulties encountered by the convention, a very important one must have lain in combining the requisite stability and energy in government with the inviolable attention due to liberty and to the republican form....Energy in government is essential to that security against external and internal danger and to that prompt and salutary execution of the laws which enter into the very definition of good government. Stability in government is essential to national character and to the advantages annexed to it, as well as to that repose and confidence in the minds of the people, which are among the chief blessings of civil society. An irregular and mutable legislation is not more an evil in itself than it is odious to the people; and it may be pronounced with assurance that the people of this country, enlightened as they are with regard to the nature, and interested, as the great body of them are, in the effects of good government, will never be satisfied till some remedy be applied to the vicissitudes and uncertainties which characterize the State administrations." (James Madison, *The Federalist*, No. 37.)

"The duty of citizens to support the laws of the land is co-equal with the duty of their Government to enforce the laws which exist....Our whole system of self-government will crumble either if officials elect what laws they will enforce or citizens elect what laws they will support. The worst evil of disregard for some law is that it destroys respect for all law. For our citizens to patronize the violation of a particular law on the ground that they are opposed to it is destructive of the very basis of all that protection of life, of homes and property which they rightly claim under other laws. If citizens do not like a

law, their duty as honest men and women is to discourage its violation; their right is openly to work for its repeal." (Herbert Hoover, March 4, 1929.)

(m) A corollary to the principle of enforcement is that the executive authority of government must faithfully execute *all* of its jurisdiction's laws: each law to one degree or another, with the degree of enforcement of each being prioritized--on a principled basis--as necessitated by any inadequacy of enforcement resources obtainable from the legislative authority.

The executive authority must enforce *all* of its jurisdiction's laws: it must enforce *each* law to one degree or another. The Constitution's take care clause (Article II, Section 3) "expresses the fundamental mission of the executive branch: to enforce the law." (Linda R. Monk, *The Words We Live By*, New York: Hyperion, 2003, p, 84.) It requires of the Executive faithful execution of "the Laws," without qualification. A president will govern constitutionally if he can honestly say that "all laws will be faithfully executed, whether they meet my approval or not....Laws are to govern all alike--those opposed as well as those who favor them." (Ulysses S. Grant, March 4, 1869.)

But even a president who meets his implied duty of requesting from Congress the requisite means for enforcement of all the laws will likely be faced with insufficient resources, requiring a (principled, not political) prioritization, an assignment of the laws into various categories of higher and lower enforcement priority, with the laws properly belonging in the lowest priority category intended to be enforced to at least some degree, so as to have at least some physical and deterrent effect, and to warrant their still being considered to be laws. Neither the rule of law nor the Constitution allow for "cafeteria" law enforcement, a picking and choosing that can result in the complete absence of enforcement of one or more laws. If any one law is expendable, so are they all.

(n) Just as citizens and other residents may not elect what laws they will obey, the executive authority may not elect which laws it will enforce. The executive authority may not pick and choose which laws to enforce such that there results a complete absence of enforcement of one or more laws. The executive may not substitute its own policy preferences for the will of the people as expressed in legislation. The government of the United States was established to get rid of arbitrary, discretionary executive power. Any concept of presidential nullification of congressional statutes by means of nonenforcement is contrary to the constitutional mandate of Article II, Section 3 that the president take care that the laws be faithfully executed, and to the Article I, Section 1 vesting of all legislative powers in the Congress, and to the constitutional doctrine of separation of powers.

"Our constitution does not contain the absurdity of giving power to make laws, and another power to resist them....The laws of the United States must be executed. I have no discretionary power on the subject--my duty is emphatically pronounced in the constitution." (Andrew Jackson, December 10, 1832.)

"As a citizen may not elect what laws he will obey, neither may the Executive elect which he will enforce. The duty to obey and to execute embraces the Constitution in its entirety and the whole code of laws enacted under it." (Benjamin Harrison, March 4, 1889.)

The executive authority must not substitute its policy preferences for the will of the people as expressed in legislation. "I do not deal with public sentiment. I deal with the law. How I might act as a legislator or what kind of legislation I should advise has no bearing on my conduct as an executive officer charged with administering the law....I am an officer of the law, and I recognize the public sentiment that is embodied in the law." (Theodore Roosevelt, President of the Police Commission of New York, Statement to the Press, *New York Sun*, June 20, 1895, *www.theodore-roosevelt.com*.)

"The government of the United States was established to get rid of arbitrary, that is, discretionary executive power. If we return to it, we abandon the very principles of our foundation, give up the English and American experiment and turn back to discredited models of government." (Woodrow Wilson, April 13, 1908.)

A president's effective repeal of a law of Congress by refusal to enforce it is rightly considered not only a violation of the take care clause, but an unconstitutional usurpation of the power of Congress to make laws pursuant to Article I, Section 1 ("All legislative powers herein granted shall be vested in a Congress of the United States..."). In the Massachusetts Constitution of 1780 (Article XXX), drafted principally by John Adams, there was a prohibition of violations of separation of powers by any of the three branches of the Commonwealth's government "to the end it may be a government of laws and not of men." (The Founders' Constitution, *http://press-pubs.uchicago.edu*.) Thomas Jefferson was defending the principle of separation of powers between "the legislative, executive, and judiciary departments" when he said that "(a)n *elective despotism* was not the government we fought for." (*Notes on Virginia*, Q. XIII, 1785.)

(o) Given the significant support that E-Verify has received from quarters in both major political parties, E-Verify ought not to be considered a partisan issue. And it is here acknowledged that most people on each side of the major divisions on the illegal immigration issue are people of sincerity and good will. But government is an influential teacher, by word and by example, and it is an inescapable fact that tolerating lawbreaking and rewarding lawbreaking, when doing so is not necessary, constitute governmental ratification of lawbreaking, and send a baneful message, at odds with our tradition, that people do not have a serious moral obligation to obey the law.

"A new Rasmussen Reports national telephone survey finds that 61% of Likely U.S. Voters favor a law in their state that would shut down companies that knowingly and repeatedly hire illegal immigrants....Eighty-Two percent (82%) think businesses should be required to use the federal government's E-Verify system to determine if a potential employee is in the country legally. Twelve percent (12%) disagree and oppose such a requirement....The U.S. Chamber of Commerce joined with the Obama administration in

the unsuccessful Supreme Court challenge of Arizona's employer sanctions law. But then 68% of voters believe that government and big business work together against the interests of consumers and investors....Ninety-one (91%) of Republicans think businesses should be required to check that potential employees are here legally, but there is less GOP support (72%) for a state law that would close companies that knowingly and repeatedly hire illegal immigrants. Most Democrats and voters not affiliated with either party support both efforts but not as strongly." ("Rasmussen Poll: 82% of Likely Voters Support E-Verify," *www.alzucaro.com*, June 18, 2011.)

Although the most consistent support for Basic Pilot/E-Verify has come from Republicans, Democrats were early proponents of the concept of state mandates. In Arizona, "Democrats and Republicans alike" proposed licensing sanctions against employers improperly hiring illegal workers, which could be avoided by use of electronic verification. ("State finally may step in where feds have feared treading," *azcentral/com/arizonarepublic*, January 11, 2006.) Legislation was proposed by "top Arizona Democrats" requiring use of electronic verification. ("Migrant bills put pressure on hirers," *azcentral.com/arizonarepublic*, January 19, 2006.) In the Arizona House, every Republican and nearly half of the Democrats voted for an affidavit procedure that would encourage all Arizona employers to protect themselves by using the federal registry. ("Penalties for hiring migrants advance," *azcentral.com/arizonarepublic*, March 16, 2007.) The Arizona Senate legislated mandatory use of the Basic Pilot Program by employers with the support of six of the ten Democrats voting. ("State Senate Oks penalties for employers who hire illegal workers," *azcentral.com/arizonarepublic*, May 24, 2007.) On July 2, 2007, Arizona's Democratic governor signed legislation requiring all Arizona employers to use the Basic Pilot Program. Critics asserted the law was unconstitutional, denounced it as "a crippling blow to Arizona business," and predicted it "will be disastrous for the state of Arizona." ("Napolitano signs immigrant bill targeting employers," *azcentral.com/arizonarepublic*, July 2, 2007.) (The U.S. Supreme Court upheld the Arizona law by a 5 to 3 vote in *Chamber of Commerce v. Whiting*, 563 U.S. __ (2011). The critics' dire predictions have yet to materialize.)

The Obama administration has followed the Bush administration in supporting enhancements and improvements to E-Verify, promoting increased voluntary use of E-Verify by businesses, and asserting E-Verify's accuracy and effectiveness. (See E-Verify at *www.dhs.gov*.) While it has not supported state and local E-Verify requirements, the administration defended, successfully, the E-Verify requirement for federal contractors. (*Chamber of Commerce v. Napolitano*, 648 F.Supp. 726 (Dist. Court, D. Maryland, 2009).)

"If we fail to do all that in us lies to stamp out corruption we can not escape our share of responsibility for the guilt. The first requisite of successful self-government is unflinching enforcement of the law and the cutting out of corruption." (Theodore Roosevelt, December 7, 1903.)

"Decency, security and liberty alike demand that government officials shall be subjected to the same rules of conduct that are commands to the citizen. In a government of laws,

existence of the government will be imperiled if it fails to observe the law scrupulously. Our Government is the potent, the omnipresent teacher. For good or for ill, it teaches the whole people by its example. Crime is contagious. If the Government becomes a lawbreaker, it breeds contempt for law; it invites every man to become a law unto himself; it invites anarchy." (Justice Louis D. Brandeis, dissent in *Olmsted v. United States* (1928) 277 U.S. 438, 485.)

"Free government has no greater menace than disrespect for authority and continual violation of law. It is the duty of a citizen not only to observe the law but to let it be known that he is opposed to its violation." (Calvin Coolidge, December 6, 1923.)

"To palliate crime is to be guilty of its perpetration." (William Lloyd Garrison, "No Compromise with Slavery," *Selections from the Writings in Speeches of William Lloyd Garrison*, Boston: R.F. Wallcut, 1852, p. 140, in *books.google.com*, 5/1/10.)

(p) There are a myriad of factors that affect the rate of crime, which at any given time is either increasing or decreasing. One of the major factors is what government teaches through rewards and punishments. When our government rewards breaches of the law or effectively penalizes compliance with the law, it impairs respect for the law. To every small degree we diminish respect for the law we engender more lawbreaking, and more people become victims of crime. From a comparison of the degrees of freedom, safety, and prosperity that exist in countries that adhere to the rule of law to the degrees of freedom, safety, and prosperity that exist in countries where corruption predominates, it is obvious that it is detrimental to the common good to attempt to help people in need by methods that degrade the principle of the rule of law. Compassion is truly humane not when it focuses just on those in need and how proposed remedial action will redound to their benefit, but when it focuses, as well, on the consequences of the proposed remedy for everyone. Policies that have the effect of diminishing adherence to the law and to the rule of law, however well-intentioned they might be, are ultimately not humane.

The rule of law to which the United States is committed encompasses the concept of criminal justice that "guilt shall not escape or innocence suffer." (*United States v. Nixon* (1974) 418 U.S. 683, 708-709, 94 S.Ct. 3090, 41 L.Ed.2d 1039.)

"Legislatures and courts are the formal instruments for setting just penalties, but they must conform to the prevailing consensus on what is fair or the legal system loses legitimacy. Deviating from the consensus in either direction damages society. An excessively cruel system of law may control the behavior of its citizens even more strictly than a just one, but people will surely hate it, may resist submitting to it, and, if the occasion ever arises, may try to overthrow it. Too lax a system of law will fail to satisfy the public desire for justice and thereby risk vigilantism. It will fail to deter and to educate morally, and it will impair the public's sense of respect for the law. Inconsistent enforcement of laws will also seem unjust and fail to serve the purposes of the law, from incapacitation to retribution...." (James Q. Wilson and Richard J. Herrnstein, *Crime & Human Nature*, New York: Simon & Shuster, Inc., 1985, pp. 506-507.)

Senator Fred Thompson said: "The importance of the rule of law cannot be overstated. In our country the rule of law is the foundation for every institution. In many countries, the chief drawback to the formation of a prosperous and civil society is the absence of the rule of law." (Roger Pilon, ed., *The Rule of Law in the Wake of Clinton*, Washington, DC: CATO Institute, 2000, p. 111.)

It is the poor and the powerless who are the greatest beneficiaries of, and the most dependent upon, the rule of law and the ethic of adherence to the rule of law. Andrew Jackson was comparing law-abiding and scofflaw cultures when he told John Quincy Adams: "In general, the great can protect themselves, but the poor and humble, require the arm and the shield of the law." (*Correspondence of Andrew Jackson*, Vol. 3, John Spencer Bassett, ed., New York: Kraus Reprint Co., 1969, p. 115.)

"The law is the only sure protection of the weak and the only efficient restraint upon the strong. When impartially and faithfully administered, none is beneath its protection and none above its control." (Millard Fillmore, December 2, 1850.)

"Increasingly, it is recognized that law itself is the foundation for the private market in the prosperous modern nation....Only a legal system that gives incentives to the production and exchange of the resources that people need or want creates the potential for prosperous nations....Unfortunately, the rule of law is an ideal rather than a complete fact in even the most democratic nation....Still, in a democracy well-educated voters who understand the importance of the rule of law can hold to account lawmakers who excessively favor special interests." (O. Lee Reed, et al., *The Legal & Regulatory Environment of Business*, 13th Edition New York: McGraw-Hill/Irwin, 2005, pp. 2-4.)

"Countries whose governments are ineffectual, arbitrary, or corrupt can remain poor despite an abundance of natural resources, because neither foreign nor domestic entrepreneurs want to risk the kinds of large investments which are required to develop natural resources into finished products that raise the general standard of living...A study by the World Bank concluded that 'across countries there is strong evidence that higher levels of corruption are associated with lower growth and lower levels of per capita income.'...For fostering economic activities and the prosperity resulting from them, laws must be reliable, above all. If the application of the law varies with the whims of kings or dictators, with changes in democratically elected governments, or with the caprices or corruption of appointed officials, then the risks surrounding investments rise, and consequently the amount of investing is likely to be much less than purely economic considerations would produce in a market economy under a reliable framework of laws." (Thomas Sowell, *Basic Economics*, Third Edition, New York: Basic Books, 2007, pp. 366-369.)

"For millennia, history has taught that civilization and human progress depend on the rule of law. That lesson is evident today in nations around the world in which law barely exists. To the extent that the rule of law is eclipsed by the rule of man, civilization, progress, and real people are the victims. Indeed, America, which arose as a revolt

against official disrespect for the law, is a testament to the importance of the rule of law." (Roger Pilon, "Introduction," in Roger Pilon, ed., *The Rule of Law in the Wake of Clinton*, Washington, D.C.: Cato Institute, 2000, p. 1.)

Professor Lillian R. BeVier says that "what is...dangerous--no, what is likely to be fatal--is to embrace a conception of the common good whose achievement could be won only in disregard of the rule of law." ("Civilization, Progress, and the Rule of Law," in Roger Pilon, ed., *The Rule of Law in the Wake of Clinton*, Washington, D.C.: Cato Institute, 2000, p. 24.)

(q) All nations, or nearly all nations, are, at least in terms of historical origin, nations of immigrants. But only some nations are nations of laws, as we use the term. America has been able remain a nation of immigrants and a nation of laws by means of assimilation. It has required immigrants to accept its basic values. Immigrants have been, and should be, obliged to respect our cultural heritage and obey our laws. The Founding generation set the precedent of restricting naturalization to people who share our nation's republican principles. We should not now proceed, contrarily, to effectively reward people with citizenship for violating republican principles. Governmental ratification of a path of crime to citizenship would not be unprecedented, but it would be contrary to rule of law principles of respecting observance and punishing inobservance, and would replicate a feature of the 1986 immigration law that greatly encouraged unlawful immigration.

"America has been in part an immigrant nation, but much more importantly, it has been a nation that assimilated immigrants and their descendants into its society and culture....The assimilation of different groups into American society has varied and has never been complete. Yet overall, historically assimilation, particularly cultural assimilation, has been a great, possibly the greatest, American success story. It enabled America to expand its population, occupy a continent, and develop its economy with millions of dedicated, energetic, ambitious, and talented people, who became overwhelmingly committed to America's Anglo-Protestant culture and the values of the American Creed, and who helped make America a major force in global affairs. At the heart of this achievement, unmatched by any other society in history, was an implicit contract, which Peter Salins has termed 'assimilation, American style.' According to this implicit understanding, he argues, immigrants would be accepted into American society if they embraced English as the national language, took pride in their American identity, believed in the principles of the American Creed, and lived by 'the Protestant ethic (to be self-reliant, hardworking, and morally upright).'...The critical first phase of assimilation was the acceptance by the immigrants and their descendants of the culture and values of American society....Historically America has thus been a nation of immigration *and* assimilation, and assimilation has meant Americanization. Now, however, immigrants are different; the institutions and processes related to assimilation are different; and, most importantly, America is different. The great American success story may face an uncertain future." (Samuel P. Huntington, *Who Are We?*, New York: Simon & Shuster Paperbacks, 2004, pp. 182-184, footnotes omitted.)

From the time of the Founders, the ideas that new citizens should be persons of good moral character and they should be sympathetic to American institutions have been constant aspects of our immigration policy. James Madison, in debate on August 13, 1787, said he "wished to maintain the character of liberality which had been professed in all the Constitutions & publications of America. He wished to invite foreigners of merit & republican principles among us." (James Madison, Notes of Debates of the Federal Convention of 1787, *teachingamericanhistory.org*, 8/24/07; Debates in the Federal Convention of 1787 as Reported by James Madison, in Charles Callan Tansill, *The Making of the American Republic: The Great Documents, 1774-1789*, New Rochelle, NY: Arlington House, p. 524.)

In the early decades of the Republic, Congress exercised its power over naturalization but largely left immigration to the states. It did, however, in 1778, recommend to the states that they "pass proper laws for preventing the transportation of convicted malefactors from foreign countries into the United States." (E.P. Hutchinson, *Legislative History of American Immigration Policy 1798-1965*, Philadelphia: University of Pennsylvania Press, 1981, pp. 11, 396.)

George Washington questioned the wisdom of settling immigrant groups in bodies, in which they would "retain the Language, habits and principles (good or bad) which they bring with them." He favored "an intermixture with our people" so that they or their descendants would "get assimilated to our customs, measures and laws." (George Washington, to the Vice President, November 15, 1794, John Frederick Schroeder, ed., *Maxims of Washington*, Mount Vernon: The Mount Vernon Ladies' Association, 1963, p. 66.)

"With immigration on the rise after American independence, the Congress passed a series of laws regulating the citizenship naturalization of newcomers. The Naturalization Acts of 1790 and 1795 required new citizens to take an oath of allegiance to support and defend the Constitution and laws of the United States and to renounce all previous political allegiances. In addition, the new citizens were required to be of 'good moral character,' 'attached to the principles of the Constitution' and 'well disposed to the good order of the United States.' All of these requirements remain part of the law today. The Founding Fathers favored what could be called the 'patriotic assimilation' of immigrants into the mainstream of American life." (Dr. John Fonte, The Hudson Institute, Statement to House subcommittee, *commdocs.house.gov*, April 1, 2004, pp. 34-35, 8/31/07.)

"We are defined as Americans by our beliefs--not by our ethnic origins, our race or our religion. Our beliefs in religious freedom, political freedom, and economic freedom--that's what makes an American. Our belief in democracy, the rule of law, and respect for human life--that's how you become an American." (Mayor Rudolph Giuliani, Speech to the U.N. General Assembly, October 1, 2001, quoted in Anne-Marie Slaughter, *The Idea That is America*, New York: Basic Books, 2007, p. 164.)

The Immigration Reform and Control Act of 1986, "in addition to granting legal status to 2.7 million illegal aliens, paved the way for hundreds of thousands of their relatives to join them. Although the law contained increased enforcement and sanctions aimed at ending illegal immigration, the illegal alien population in the U.S. today has been estimated at more than quadruple the 1986 total." ("Ex-agents OK guest-worker plan," *The Washington Times*, November 27, 2006, *www.washtimes.com*.)

"I was Attorney General two decades ago during the debate over what became the Immigration Reform and Control Act of 1986....Since the Immigration and Naturalization Service was then in the Department of Justice, I had the responsibility for directing the implementation of that plan....The lesson from the 1986 experience is that such an amnesty did not solve the problem. There was extensive document fraud, and the number of people applying for amnesty far exceeded projections. And there was a failure of political will to enforce new laws against employers. After a brief slowdown, illegal immigration returned to high levels and continued unabated, forming the nucleus of today's large population of illegal aliens....Today it seems to me that the fair policy, one that will not encourage further illegal immigration, is to give those here illegally the opportunity to correct their status by returning to their country of origin and getting in line with everyone else." (Edwin Meese III, "Reagan Would Not Repeat Amnesty Mistake," *Human Events*, May 25, 2011, *www.humanevents.com*.)

(r) Grants of amnesty and pardon should not counteract the rule of law and enforcement of law. Powers to grant amnesty and pardon, absolute or conditional, when properly used, are fully consistent with government by law, even though at times necessity dictates their use in a manner that allows prior disobedience to escape punishment. The Framers of the Constitution understood the pardoning power to be principally an instrument of law enforcement. It was considered to be exercised most appropriately in making offers of pardon in conflict situations for purposes of restoring the peace. Government cannot perform its basic function of securing our inalienable rights if its policies convey a message that the people need not respect its legitimate authority. Government should not capitulate to lawbreaking, even mass lawbreaking, except when it is not possible to do otherwise.

Amnesty and pardon may be granted absolutely or conditionally. (John E. Nowak, Ronald D. Rotunda, *Constitutional Law*, Fifth Edition, West Publishing Co., 1995, §7.4, p. 245; *United States v. Klein*, 80 U.S. (13 Wall) 128, 20 L.Ed. 519 (1871); *Ex parte William Wells*, 59 U.S. (18 How.) 307, 15 L. Ed. 421 (1855).) "The Constitution authorizes the Executive to grant or withhold the pardon at his own absolute discretion, and this includes the power to grant on terms, as is fully established by judicial and other authorities." (Abraham Lincoln, Third Annual Message, December 8, 1863, James D. Richardson, ed., *A Compilation of the Messages and Papers of the Presidents 1789-1897*, Washington, D.C.: Government Printing Office, 1897, Vol. VI, p. 189.) "Whereas with reference to said rebellion and treason, laws have been enacted by Congress declaring forfeitures and confiscation of property and liberation of slaves, all upon terms and conditions therein stated, and also declaring that the President was thereby authorized at any time thereafter, by proclamation, to extend to persons who may have participated in

the existing rebellion in any State or part thereof pardon and amnesty, with such exceptions and at such times and on such conditions as he may deem expedient for the public welfare..." (Abraham Lincoln, A Proclamation, December 8, 1863, James D. Richardson, ed., *A Compilation of the Messages and Papers of the Presidents 1789-1897*, Washington, D.C.: Government Printing Office, 1897, Vol. VI, p. 213.)

There is nothing in the text of the Constitution that would justify considering the Article II, Section 2 "Power to grant Reprieves and Pardons for Offenses against the United States" to be an exception to the Article II, Section 3 mandate that the president "take Care that the Laws be faithfully executed." The pardoning power complements, rather than qualifies, the take care clause.

There is practically nothing in the early record respecting a connection between the pardon power and justice, mercy, and liberty. It appears, rather, that "the Framers were more inclined to see the pardon as an instrument of law enforcement than as an act of grace." The Framers wrote a pardoning power into the Constitution, placing it in the hands of the executive: "not so that he could partake of the divine virtue of forgiveness, but so that he could enforce the law." (Kathleen Dean Moore, *Pardons: Justice, Mercy and the Public Interest*, New York: Oxford University Press, 1989, pp. 25-27.)

"The most famous pardons of the nineteenth century were those used exactly as Alexander Hamilton foresaw: to 'restore the tranquility of the commonwealth' by a 'well-timed offer of pardon to the...rebels.' The pardon could bring rebels back into the fold, or it could repopulate the army by restoring deserters to service." Although the Supreme Court, for a long period, ignored the Framers' views and introduced the English concept of pardon as mercy, the presidents feared undermining deterrence and justice, and they "used pardon very much the way they used their armies--to end wars." (Kathleen Dean Moore, *Pardons: Justice, Mercy and the Public Interest*, New York: Oxford University Press, 1989, pp. 49-51; John E. Nowak, Ronald D. Rotunda, *Constitutional Law*, Fifth Edition, West Publishing Co., 1995, §7.3, p. 244.)

"The social order cannot exist except upon the basis of a respect for and observance of the law, and it is only when the people of a country are secure in their homes and in the normal activities of their lives from the depredations of the criminal classes that national progress can be maintained." (Franklin D. Roosevelt, September 27, 1934.)

John Locke said "*the end of Law* is not to abolish or restrain, but *to preserve and enlarge Freedom*: For in all the states of created beings capable of Laws, *where there is no Law, there is no Freedom*. For *Liberty* is to be free from restraint and violence from others which cannot be, where there is no Law:" (*Two Treatises of Government*, Peter Laslett, ed., Cambridge, UK: Cambridge University Press, 1988, pp. 305-306 (The Second Treatise of Government, Chapter VI, §57).) If law preserves and enlarges freedom, degradation of law decreases freedom. We become less democratic and less free when the government fails to prevent lawlessness, whether violent or non-violent, and fails to engender respect for the law. We become less democratic and less free when our votes count for less and less--that is, when our votes increasingly fail to translate into laws that

are enforced and obeyed, and thereby protect us and provide opportunity and advance our ideals.

"Constitutional government under the rule of law requires...a culture of respect for law. Examples at the top and at all levels of government who do in fact take care that the laws are faithfully executed are essential to facilitate both the substance and image of integrity." (Chester A. Newland, "Faithful Execution Clause," *How Government Works*, New York: Macmillan Library Reference USA, 1999, p. 552.)

(s) The people of Mission Viejo share with other Americans a patriotic devotion to the principles upon which our nation was founded, and they take pride in their previous efforts to uphold our nation's ideals. The city considers its adoption of one of the nation's first local government E-Verify laws to be an example of legitimate local efforts to enhance compliance with U.S. immigration and employment laws and to uphold the foundational American principle of the rule of law. The city took the risk that its contracting costs would increase; it applied the electronic verification requirement to both its contractors and itself. We consider it to be our duty--indeed, it is our privilege--to pay whatever cost is entailed in doing our part in defending the American system of religious, political, and economic freedom secured by popular government under the rule of law.

City Council members must make their own individual assessments of attitudes in Mission Viejo toward the E-Verify ordinance.

States and local governments do not have free rein in combating employment of unauthorized workers. Federal immigration law preempts "any State or local law imposing civil or criminal sanctions (other than through licensing and similar laws) upon those who employ, or recruit or refer for a fee for employment, unauthorized aliens." (8 USC §1324a(h)(2).)

On May 26, 2011 (months before AB 1236 passed the Senate), the United States Supreme Court, in *Chamber of Commerce of the United States of America v. Whiting*, 563 U.S. __ (2011), upheld Arizona's 2007 licensing sanctions law, including its E-Verify mandate. Even though Congress itself has not made E-Verify mandatory rather than voluntary, the Court found Arizona's E-Verify requirement to be "entirely consistent with the federal law."

The Court said federal immigration law "expressly preempts some state powers dealing with the employment of unauthorized aliens and it expressly preserves others. We hold that Arizona's licensing law falls well within the confines of the authority Congress chose to leave to the States and therefore is not expressly preempted." The Court found likewise that Arizona's law was not impliedly preempted by federal law, as its procedures "simply implement the sanctions that Congress expressly allowed Arizona to pursue through licensing laws."

The Mission Viejo City Council in adopting its ordinance in March 2007 contemplated the possibility of an increase in city contracting expenses as a result of the contractor verification requirement. Council Member Ledesma said, "We have no way of knowing what the economic impact might be because we don't know what the answer is in terms of how many people we're talking about." It is evident from the council's discussions that Council Member Frank Ury was speaking for the others in saying: "We need to make sure that we uphold the laws regardless of economic impact, and if that means paying more for services, that's the way it's going to be." (Mission Viejo City Council Meeting, discussion on proposed Lawful Hiring Compliance Ordinance, March 19, 2007.)

Sacrifice in service of our country is justly viewed not as a burden, but as a privilege. As President Roosevelt said two days after Pearl Harbor (December 9, 1941): "I was about to add that ahead there lies sacrifice for all of us. But it is not correct to use that word. The United States does not consider it a sacrifice to do all one can, to give one's best to our Nation, when the Nation is fighting for its existence and its future life. It is not a sacrifice for any man, old or young, to be in the Army or in the Navy of the United States. Rather it is a privilege. It is not a sacrifice for the industrialist or the wage earner, the farmer or the shopkeeper, the trainman or the doctor, to pay more taxes, to buy more bonds, to forgo extra profits, to work longer or harder at the task for which he is best fitted. Rather it is a privilege."

(t) Mission Viejo was one of the first cities in the nation to adopt an E-Verify requirement for its city contractors. Within four years, there were E-Verify requirements in about 20 California cities and counties, some of which had considered the experience of Mission Viejo in their evaluation of E-Verify. Mission Viejo has often been contacted about E-Verify, and its ordinance has been consulted, by jurisdictions in California and other states.

In discussing Mission Viejo's pending adoption of the Basic Pilot ordinance in 2007, the *Los Angeles Times* reported: "As few as three cities in the U.S. require their contractors to participate in Basic Pilot. Two other cities that recently approved similar ordinances include Inola, Okla., and Hazelton, Pa., where a broader ordinance is being challenged in court on the grounds that local government cannot enforce federal law. Georgia and Oklahoma have passed laws for state contractors. Cherokee County in Georgia and Beaufort County in South Carolina have approved the rule for their contractors." ("O.C. city considers workers screening"/"Mission Viejo may require worker-eligibility checks," *Los Angeles Times*, March 17, 2007, pp. B1, B10.)

Simi Valley's City Attorney said that Simi Valley had a study showing 15 California jurisdictions with E-Verify requirements before that city adopted its ordinance in late 2010.

"Before the bill [AB 1236] was signed, at least 20 municipalities in California required use of E-Verify for either city contractors or all businesses within city limits: Mission Viejo, Palmdale, San Clemente, Murrieta, Lake Elsinore, Lancaster, Temecula, Escondido, Menifee, Hemet, Wildomar, San Juan Capistrano, Hesperia, Norco, San

Bernardino County, Rancho Santa Margarita, Yorba Linda, Placentia, Orange, and Simi Valley. Many more California cities use E-Verify for government employees; such use is not prohibited by the new state bill." (Jon Feere, "California Limits E-Verify, Supports Illegal Hiring Practices," *www.cis.org*, October 2011.)

Mission Viejo City Hall staff members have said that numerous inquiries respecting E-Verify have come in from Orange County and other California jurisdictions and other parts of the country since 2007. Officials from such cities as San Clemente, Villa Park, and Simi Valley have indicated they were influenced in their adoption of E-Verify requirements by Mission Viejo's experience.

A Lewisville, Texas, city council member's proposed contractor E-Verify requirement was "modeled after a program in Mission Viejo, Calif." ("Lewisville may crack down on hiring of illegal immigrants," *The Dallas Morning News*, January 9, 2010.)

Portions of a City of Novato, California E-Verify ballot initiative proposed in 2009 were copied word-for-word from Mission Viejo's ordinance. A summary of the initiative issued by its sponsor said, "We based our initiative on ordinances in Mission Viejo, CA and Lakewood, WA. The Mission Viejo ordinance has been in effect for over two years." (*www.clecnovato.com*.)

Cities such as Temecula, Lakewood, WA, and Camas, WA, have E-Verify ordinances titled "Lawful Hiring Compliance," a title that originated in Mission Viejo. Lakewood's ordinance, from 2009, is identical to Mission Viejo's in many respects. (*municode.cityoflakewood.us*.)

Simi Valley, by 2011, was requiring of its contractors periodic submission of "E-Verify compliance statements," a procedure that originated in Mission Viejo's 2010 amendment to its ordinance.

(u) In 2010, the city amended the ordinance to add contractor E-Verify participation reporting requirements. As of the first reporting period, in 2011, the city achieved 100% compliance by its contractors subject to the E-Verify requirement, numbering approximately 70 companies. We commend our city's contractors for their positive response to the city's efforts in support of the integrity of American law.

In July/August 2010, the council unanimously passed the amended ordinance (No. 10-281), which added provisions designed to improve city monitoring of contractor compliance.

An October 2010 council resolution (No. 10-56) required that the results of the contractors' responses be publicly available and posted on the city's website for public review. The City Clerk's March 2011 report showed 100% compliance by the city's contractors.

(v) In September 2011, the California Legislature passed, and in October 2011, the governor signed, Assembly Bill 1236, the Employment Acceleration Act of 2011 (California Labor Code §§2811-2813), prohibiting the state, cities, counties, and special districts from requiring nongovernmental employers to use electronic employment verification systems, such as E-Verify, as a condition of receiving governmental contracts, as a condition for applying for or maintaining business licenses, or as a penalty for violating licensing laws, except when required by federal law or to receive federal funds.

As relevant to Mission Viejo, AB 1236 provides that "neither the state nor a city, county, city and county, or special district shall require an employer to use an electronic employment verification system, including under the following circumstances: (a) As a condition of receiving a government contract...." (It also prohibits requiring use of an electronic employment verification system as a condition of applying for or maintaining a business license, which nullifies E-Verify ordinances passed in about a half-dozen California cities in 2009 and 2010. Mission Viejo is not a business license city, so it never had occasion to consider an E-Verify requirement for all city businesses.)

(w) In California, the legislative power of the people, excepting rights of initiative and referendum, is vested in the Legislature. State government is sovereign, and local governments are mere subdivisions of the state. The state preempts power in issues of statewide concern. Local ordinances may not authorize acts prohibited by state statute or prohibit acts specifically authorized by state statute. AB 1236 prevents the City of Mission Viejo from entering into contracts with city contractors requiring use of the E-Verify system, on or after January 1, 2012.

In our federal system, the national government and the states share sovereignty, but cities and counties do not. In California, as elsewhere, cities and counties are mere creatures of the state and exist only at the state's sufferance. The state is sovereign and, in a broad sense, all local governments and districts are subdivisions of the state. (*California Redevelopment Association v. Matosantos*, 53 Cal.4th 231 (2011).)

"Passage of local legislation must avoid conflicts with state law, and the state preempts power in issues of statewide concern. Local ordinances may not authorize acts prohibited by state statute, nor prohibit acts specifically authorized by the legislature." ("About Municipal Government," California State Government Guide to Government from the League of Women Voters of California, *www.guidetogov.org*, as of May 20, 2012.)

(x) AB 1236 was premised upon four principal findings; each of them was questionable, outdated, and/or misleading:

For the Legislature's findings, see AB 1236, Section 1, available at *leginfo.ca.gov*.

(1) The Legislature said that a 2007 independent evaluation commissioned by the Department of Homeland Security "found that the electronic employment verification database was still not sufficiently up to date to meet requirements for

accurate verification," and this "has led to employers being unable to hire employees in a timely manner and kept workers from earning wages." E-Verify screening takes place only after a worker is hired, so it cannot be that it has resulted in employers being unable to hire employees in a timely manner and eligible workers being kept from earning wages. The only workers who are terminated are those who initially receive Tentative Nonconfirmations and then fail to contact the Social Security Administration or Department of Homeland Security and resolve discrepancies in identity or eligibility data within the prescribed period of time. In referencing the now-outdated 2007 Westat evaluation (which at the time resulted in DHS saying E-Verify is "an enormous success"), the Legislature ignored the more recent Westat study made public in early 2010, which determined that E-Verify: authorizes over 99% of eligible workers initially, and the majority of the rest in the second step of the E-Verify process; accurately detects the status of unauthorized workers almost half of the time; may deter many unauthorized workers from applying for jobs; is much more effective than the Form I-9 verification process used without E-Verify; reduces discrimination against foreign-born workers; is generally considered by employers to be non-burdensome; and is the best available tool to help employers determine whether their employees are authorized to work in the U.S. The Legislature likewise did not mention the CFI Group/USCIS 2010 Customer Satisfaction Survey wherein "E-Verify received an exceptionally high overall customer satisfaction score." The Legislature ignored administration congressional testimony that E-Verify is "a smart, simple and effective tool" that is "fast, free, and easy-to-use." A law enforcement tool that is inexpensive, quick, and non-burdensome, and cuts the rate of a particular crime nearly in half, must be considered to be an extremely effective one.

Is the Legislature correct in saying, respecting eligible workers, that errors in the verification databases have "led to employers being unable to hire employees in a timely manner and kept workers from earning wages"? E-Verify screening is done only for someone who has been hired. Prescreening is prohibited. So E-Verify does not actually prevent someone from being hired, and earning wages, in the first place. If a Tentative Nonconfirmation (from SSA or DHS) is issued, the employer refers an employee who wishes to contest the result to the SSA or the DHS to resolve the problem, privately explaining to the employee what needs to be done, and providing a notice of the TNC and an instructional referral letter. The employee must follow up with the appropriate government agency within eight work days to update his information. The employer may not terminate the employee until that process is complete. If the discrepancy is not resolved, the finding becomes a final nonconfirmation (FNC), and the employment may then be, and must then be, terminated. (In some circumstances there can be a further contest of the results.)

The 2007 independent evaluation was done for DHS by Westat (*Findings of the Web Basic Pilot Evaluation*, September, 2007), and it did say (p. xxi) that further improvements in the verification database were needed, especially if Basic Pilot (E-Verify) becomes a mandated national program. It also said (p. xxii): "Most employers

using the Web Basic Pilot found it to be an effective and reliable tool for employment verification and indicated that the Web Basic Pilot was not burdensome."

The DHS Assistant Secretary for Policy said following the issuance of the 2007 Westat report: "E-Verify is an enormous success." ("An Immigration Enforcement Tool That Works - For Everyone," Leadership Journal Archive, November 29, 2007, *www.dhs.gov*.)

The Supreme Court said in the *Whiting* case: "According to the Department of Homeland Security, 'the E-Verify system can accommodate the increased use that the Arizona statute and existing similar laws would create.' Brief for United States as *Amicus Curiae* 34. And the United States notes that '[t]he government continues to encourage more employers to participate' in E-Verify. *Id.*, at 31."

In the *Whiting* case, the administration told the Supreme Court that "E-Verify's successful track record...is borne out by findings documenting the system's accuracy and participants' satisfaction." The Court quoted the government's statement (in the E-Verify User Manual for Employees, p. 4, September 2010) that the program is "the best means available to determine the employment eligibility of new hires."

The Legislature's findings reference only the now-outdated 2007 Westat study, and make no mention of the more recent Westat study that was released in early 2010 (*Findings of the E-Verify Program Evaluation*, December 2009, *www.dhs.gov*), which then became the best source of information on the accuracy and effectiveness of E-Verify. The Obama administration's summary of the Westat report ("Westat Evaluation of the E-Verify Program: USCIS Synopsis of Key Findings and Program Implications," January 28, 2010) says that:
--"over 99 percent of authorized workers are initially found to be employment authorized," and the majority of the rest are ultimately found to be authorized.
--E-Verify "accurately detects the status of unauthorized workers almost half of the time."
--it may be that E-Verify "deters many" unauthorized workers from even applying for jobs.
--E-Verify is "much more effective" than the Form I-9 verification process used without E-Verify.
--E-Verify is "the best available tool to help employers determine whether their employees are authorized to work in the United States."
--E-Verify "reduces discrimination against foreign-born workers."
--"Employers are generally satisfied with the program and feel it is non-burdensome."

The Legislature also did not mention the CFI Group/USCIS 2010 Customer Satisfaction Survey - E-Verify: "E-Verify received an exceptionally high overall customer satisfaction score." (USCIS, "E-Verify Gets High Marks from Employers in Customer Satisfaction Survey," January 18, 2011, *www.uscis.gov/everify*.)

Per Obama administration testimony, "E-Verify is a smart, simple and effective tool..." It is "fast, free, and easy-to-use." The administration is not impressed with criticism of E-

Verify based upon the fact that not all eligible workers will receive immediate confirmation: "It is noteworthy that E-Verify is often deemed to have erred when a new hire receives a TNC and is subsequently determined to be work authorized. Yet, the TNC may have been caused by a variety of reasons independent of E-Verify's accuracy. For example, through no fault of E-Verify, various errors - from employer typos to employees incorrectly filling out the Form I-9 - may lead to a TNC. In addition, an employee who neglected to update his or her SAA records upon changing his or her name after marriage could receive a TNC even though he or she is work authorized. More generally, although our goal is to minimize TNCs of work authorized employees, it bears noting that the E-Verify process was designed as a two-step one precisely so that initial TNC data mismatches would not result in inaccurate final verification." (Testimony of USCIS Associate Director Theresa C. Bertucci, House Subcommittee on Immigration Policy and Enforcement, February 10, 2011.)

(2) The Legislature found that mandatory use of electronic verification "would increase the costs of doing business in a difficult economic climate," citing a United States Chamber of Commerce estimate that "the net societal cost of all federal contractors using the E-Verify Program would amount to $10 billion a year, federally." It found that employers report that "the cost, technological demands, and staff time that an electronic employment verification system requires to use and implement come at a time when they are already struggling." Mission Viejo's experience since 2007 has been that E-Verify takes an HR staff member only about five minutes per newly-hired worker found to be work authorized. A few additional steps are needed for hires initially found not work authorized (3.6% of all workers in 2008 per the Westat study; about half that rate in 2011). E-Verify is provided by the federal government free to a business except for the cost of a computer and an Internet connection, and employee training and use time.

E-Verify is provided to a business by the federal government free of charge. The business, of course, must pay for its own computer and Internet connection, and the cost of the time it takes for employee training and use. Very likely the hiring staff at any company that secures a Mission Viejo contract worth $30,000 or more already has a computer and an Internet connection.

As for staff time, use of E-Verify in the hiring process, according to Pav Yee of Mission Viejo HR at City Hall, adds about five minutes for each new employee who is a legal worker. Additional steps and thus additional time--but probably not very much time--are required if E-Verify returns a Tentative Nonconfirmation for a new employee.

(3) The Legislature found that employers using the program "report that staff must receive additional training that disrupts normal business operations," which if E-Verify was mandated nationwide would cost $2.7 billion, most of it borne by small businesses. Mission Viejo's experience since 2007 has been that, far from disrupting normal business operations, E-Verify has required just a few hours of HR staff training over a period of years.

Does E-Verify involve "additional training that disrupts normal business operations"? That has not been the experience of the City of Mission Viejo, which is now in its fifth year using E-Verify. Pav Yee of Mission Viejo HR at City Hall, who since the beginning in 2007 has handled the E-Verify checks for new city employees, says her initial training in 2007 took about two hours. Subsequently, periodically-necessary training on program updates (done through Webinars) has required an estimated one-half hour to one hour for training over any given two-year period. It is difficult to imagine how a few hours of training over a period of years could disrupt normal business operations and result in substantial additional costs.

(4) The Legislature said its intent was "that the state maintain the intent of federal law by ensuring that private employers retain the ability to choose whether to participate in the electronic verification program." It mischaracterized federal law in implying there is an intent that employers retain an ability to choose not to participate in E-Verify despite state or local government mandates. In May 2011, the U.S. Supreme Court, in *Chamber of Commerce v. Whiting*, found Arizona's 2007 E-Verify requirement to be "entirely consistent with the federal law."

In *Chicanos Por La Causa, Inc. (CPLC) v. Napolitano*, 558 F.3d 856 (9th Cir. 2009), the Ninth Circuit determined that Arizona's business licensing sanctions and its E-Verify mandate were not preempted by federal law. The Ninth Circuit referenced the District Court's statement that "while Congress made participation in E-Verify voluntary at the national level, that did not in and of itself indicate that Congress intended to prevent states from making participation mandatory." The Ninth Circuit agreed: "Congress could have, but did not, expressly forbid state laws from requiring E-Verify participation."

On May 26, 2011 (months before AB 1236 passed the State Senate), the United States Supreme Court, in *Chamber of Commerce of the United States of America v. Whiting*, 563 U.S. __ (2011), upheld Arizona's 2007 law, including the E-Verify mandate. Congress itself has not made E-Verify mandatory rather than voluntary, but the Court found Arizona's E-Verify requirement to be "entirely consistent with the federal law."

(y) The city makes no finding as to whether AB 1236, the Employment Acceleration Act of 2011, operates retroactively, such that it prohibits future enforcement of E-Verify provisions contained in city contracts entered into prior to its effective date; however, the city intends to suspend enforcement of E-Verify provisions contained in pre-2012 city contracts, for the sake of continuity respecting nonenforcement begun immediately subsequent to the passage of AB 1236.

It may be that California E-Verify cities are not in agreement as to whether AB 1236, which is silent on retroactivity, prevents enforcement of E-Verify requirements in pre-2012 contracts. The mayor of Rancho Santa Margarita has indicated that his city assumes the law operates retroactively. The City Attorney for the City of Orange noted in November that legislation typically cannot impair existing contracts ("Mission Viejo delays repeal of E-Verify law," *The Orange County Register*, November 23, 2011, Local

6), and an attorney in that office subsequently stated that the city views AB 1236 as nonretroactive and it will continue to enforce its pre-2012 requirements.

Mission Viejo discontinued enforcement of pre-2012 contractual requirements after the passage of AB 1236, and in the interest of continuity should not reverse course. Mission Viejo should avoid making a determination on the retroactivity of AB 1236, as that would be taking sides, unnecessarily, on an issue respecting which the cities seem to differ.

Sec. 2.80.016. - Suspension of certain provisions: Intent and purpose.

(a) It is the intent and purpose of Section 2.80.017 to implement the findings of Section 2.80.015.

(b) It is the intent and purpose of Section 2.80.017 to make inoperative and suspend enforcement of the provisions of this ordinance requiring use of E-Verify by contractors and business entitles that contract with the city, so as to comply in all respects with AB 1236, the Employment Acceleration Act of 2011.

Subsection (b) shows Mission Viejo's intent to comply fully with AB 1236.

(c) It is the intent and purpose of Section 2.80.017 to continue to require participation in E-Verify by the city in the hiring of its employees.

AB 1236 does not prohibit a governmental entity from participating in E-Verify in its hiring of employees if it chooses to do so. (California Labor Code §2813(b).)

(d) It is the intent and purpose of Section 2.80 .017 to continue in force provisions respecting suspension of city contractual obligations with contractors found by the federal government to be in violation of 8 U.S.C. §1324a, which prohibits the hiring for employment of aliens known to be unauthorized.

Section 2.80.040 could result in city contractual obligations being put on hold if a contractor is found to be in violation of federal hiring law as to unauthorized aliens, and then continues in noncompliance. AB 1236 does not bar such a provision.

(e) It is the intent and purpose of Section 2.80.017 to maintain the Lawful Hiring Compliance Ordinance in the city's code for historical and reference purposes.

The complete Mission Viejo E-Verify ordinance will still be accessible on the Internet to those (in other states) who are interested in E-Verify.

(f) It is the intent and purpose of Section 2.80.017 that the provisions of this ordinance that are suspended pursuant thereto shall be automatically revived if AB 1236, the Employment Acceleration Act of 2011, is repealed by the Legislature, or

nullified by an act of Congress or the Executive Branch of the federal government, or declared invalid by a court having jurisdiction over a geographic area that includes Mission Viejo.

The suspended provisions will still exist in writing and could be revived automatically under the specified circumstances.

Sec. 2.80.017. - Suspension of certain provisions: Specification.

This section specifies which provisions are suspended and which provisions are not suspended.

Beginning on January 1, 2012, and continuing thereafter:

The effective date of AB 1236 is January 1, 2012.

(a) Section 2.80.010 respecting the title of the ordinance shall continue in force.

There is no need to change the title of the ordinance.

(b) Section 2.80.020 respecting definitions of terms shall continue in force.

The definitions will still be useful for surviving portions of the ordinance. They do not by themselves impose any requirements on city contractors.

(c) Section 2.80.030 subsection (a) respecting participation in E-Verify by the city in the hiring of its employees shall continue in force.

This subsection (c) preserves subsection (a) of 2.80.030 so as to continue the requirement that the city itself participate in E-Verify in the hiring of its employees. If the E-Verify ordinance was to be repealed in its entirety, the city might no longer be required to use E-Verify. AB 1236 does not prohibit governmental entities from participating in E-Verify if they choose to do so. (California Labor Code §2813(b).)

(d) Section 2.80.030 subsections (b)-(e) respecting participation in E-Verify as a requirement in city contracts with business entities and contractors are inoperative, and enforcement thereof is suspended.

This eliminates E-Verify requirements for the future, in compliance with AB 1236. It also eliminates E-Verify requirements in pre-2012 contracts (whether or not required by AB 1236).

(e) Section 2.80.040 respecting suspension of city contractual obligations with contractors found by the federal government to be in violation of 8 U.S.C. §1324a,

prohibiting the hiring for employment of aliens known to be unauthorized, shall continue in force.

Respecting city contractors, our ordinance was not limited to E-Verify. It also (in Section 2.80.040) puts city contractual obligations on hold if a contractor is in violation of federal hiring law as to unauthorized aliens per a determination by the U.S. Attorney General or the DHS Secretary, and continues in noncompliance. (Given the current degree of immigration law enforcement, this would seem to be an extremely unlikely occurrence.) AB 1236 does not bar such a provision.

Under subsection (a)(ii) of Section 2.80.040, a contractor who is found by the federal government to be in violation of the hiring laws is not subject to suspension of the city's contractual obligations if it had previously verified the alleged unlawful workers using E-Verify. In other words, the contractor escapes the city sanction if it had used E-Verify. This provision works to the benefit of the offending contractor. It would not seem to constitute a requirement that an employer use E-Verify as a condition of receiving a government contract, and would thus not be in violation of AB 1236.

However, if there is concern that subsection (a)(ii), by giving a contractor some benefit for using E-Verify, constitutes a requirement that an employer use E-Verify as a condition of receiving a government contract, the City Council may instead include this subsection among the suspended portions of the ordinance. In that case, Section 2.80.016(d) should be changed to say: "It is the intent and purpose of Section 2.80 .017 to continue in force provisions respecting suspension of city contractual obligations with contractors found by the federal government to be in violation of 8 U.S.C. §1324a, which prohibits the hiring for employment of aliens known to be unauthorized, except subsection (a)(ii) respecting use of E-Verify." And Section 2.80.017(e) should be changed to say: "Section 2.80.040 respecting suspension of city contractual obligations with contractors found by the federal government to be in violation of 8 U.S.C. §1324a, prohibiting the hiring for employment of aliens known to be unauthorized, shall continue in force, except subsection (a)(ii), which is suspended and shall not be enforced."

(f) Section 2.80.050 subsections (a)-(g) respecting E-Verify compliance statements are inoperative, and enforcement thereof is suspended.

Contractor compliance reporting should be eliminated along with the contractor E-Verify requirement.

(g) Section 2.80.050 subsection (h) respecting city retention of E-Verify compliance statements shall continue in force.

The city can keep, for the prescribed period of time, the compliance statements submitted prior to 2012, consistent with AB 1236.

(h) Section 2.80.060 respecting E-Verify compliance statement enforcement is inoperative, and enforcement thereof is suspended, except as subsections (e) and (f) are utilized in Section 2.80.040.

Enforcement of contractor compliance reporting requirements should be eliminated along with the contractor E-Verify requirement. Procedures for relief of contractors in 2.80.060(e) and (f), which are provided for in 2.80.040, may still be useful under the latter section.

(i) Section 2.80.070 respecting appeal of administrative decisions shall continue in force.

Appeal procedures may still be useful in relation to Section 2.80.040.

(j) City Council Resolution 10-56, adopted on October 18, 2010, requiring that the results of reporting requirements by city contractors respecting E-Verify compliance be publicly available and posted to the city's website for public review, is inoperative, and enforcement thereof is suspended, except that previously filed compliance statements shall continue to be publicly available.

Posting of compliance on the city website will be discontinued.

(k) The entirety of this Lawful Hiring Compliance Ordinance shall be maintained in the city's code for historical and reference purposes.

The Mission Viejo E-Verify ordinance--including both suspended and still-operative provisions--will still be available on the Internet to jurisdictions in other states that wish to consider adopting E-Verify ordinances.

(l) The provisions of this ordinance that are inoperative and respecting which enforcement is suspended pursuant to this section shall be automatically revived, and enforcement shall be resumed, to the extent consistent with federal and state law, if AB 1236, the Employment Acceleration Act of 2011, is repealed by the Legislature, or nullified by an act of Congress or the Executive Branch of the federal government, or declared invalid by a court having jurisdiction over a geographic area that includes Mission Viejo.

The ordinance as amended here makes very clear which provisions are suspended as to enforcement; there is no reason to expect any confusion as to whether they are still operative. But the suspended provisions will still exist in writing and could be revived automatically, without action by the City Council, if AB 1236 provisions are repealed or nullified by a court.