Statement of
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Before the Federal and State Affairs Committee
Kansas House of Representatives

Regarding H.B. 2492, 2577, 2576, and 2578

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House Fed & State Affairs
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Attachment 1

Mr. Chairman and Members of the Committee, I come before you today at the request of the Chairman, to provide legal expertise and testimony regarding various bills . During 2001-2003, I served as Counsel to U.S. Attorney General John Ashcroft at the Department of Justice. In that position, I was the Attorney General's chief advisor on immigration law and border security.

I also come before you as legal counsel who helped draft and defend Arizona's 2007 Legal Arizona Worker's Act, which bears similarities to H.R. 2497 and 2577, and Arizona's 2010 SB 1070, which bears similarities to H.R. 2578.

I. E-VERIFY PROVISIONS

A. Kansas has Clear Legal Authority to Require Government Agencies and Recipients of Government Contracts to Use E-Verify

Several decisions by federal courts make clear that a state has constitutional authority to use E-Verify itself, and to require recipients of state contracts to do so. In 2008, the U.S. District Court for the Eastern District of Missouri sustained a city ordinance doing so in the case of *Gray v. Valley Park*, 2008 U.S. Dist. LEXIS 7238 (E.D. Mo. 2008). I represented the City of Valley Park in that case. More importantly, in May 2011, the United States Supreme Court ruled in *Chamber of Commerce v. Whiting*, 131 S.Ct. 1968 (2011), that a state may require all public and private employers in the state to use the E-Verify system.

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

E-Verify an internet-based system that any employer in the United States may utilize to verify whether an individual seeking employment is authorized to work in the United States. Congress mandated its creation in 1996. It was originally known as the Basic Pilot Program. In 2004 Congress reauthorized the Program and expanded it to all fifty states. Although in its earlier years, E-Verify had some data discrepancies because work authorizations were being issued to aliens by district offices before they were added to the central computer data base, that problem has been solved. According to the latest statistics from the Department of Homeland Security, in FY 2010, 98.3% of employees were confirmed as work-authorized either immediately or within a 24-hour period. Of those who are not, 1.4% were ultimately confirmed to be unauthorized aliens; and the remaining 0.3% were subsequently confirmed to be authorized to work after they resolve changes or inaccuracies in their records. Many of those cases were individuals who failed to change their last names with SSA after getting married; and those cases were easily resolved within one day.

C. The Federal Government and Numerous Other States Have Already Implemented the E-Verify Provisions of H.B. 2372.

In 2007, pursuant to an Office of Management and Budget (OMB) directive, all federal agencies were directed to begin using the E-Verify program for their own hiring. Then in September 2009, pursuant to the same OMB directive, federal contractors and subcontractors were required to use E-Verify. Those rules have been implemented successfully and smoothly.

A significant number of states have also implemented laws requiring recipients of government contracts to use E-Verify. Most notably, *all four of the states surrounding Kansas have already adopted such laws*. Colorado did so in 2006, Oklahoma did so in 2007, Missouri did so in 2008, and Nebraska did so in 2009. Other states include Florida, Georgia, Idaho, Indiana, Louisiana, Minnesota, North Carolina, Utah, and Virginia. On top of that, Alabama, Arizona, Mississippi, and South Carolina require all employers in the state (not just

recipients of government contracts) to use E-Verify. So a total of 17 states have already adopted similar E-Verify provisions. None have reported any difficulty carrying out their statutes.

I have also required my agency, the Office of the Secretary of State, to use E-Verify when hiring, and to require recipients of contracts with my agency to use E-Verify. We have had no difficulty whatsoever doing so.

II. PUBLIC BENEFITS PROVISIONS

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

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

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

The effect of H.B. 2576 is to ensure that Kansas complies with its obligations under federal law. It simply requires public officials to verify the legal status of those aliens who seek benefits. This can be accomplished easily and in a matter of seconds via internet using the Systematic Alien Verification for Entitlements (SAVE) program operated by the U.S. Department of Homeland Security.

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

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

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

In 2004, the District Court for the Eastern District of Virginia found that a Virginia policy denying postsecondary education benefits to illegal aliens was permissible under federal law. The Virginia policy adopted federal standards for classifying aliens, just as H.B. 2372 does, and therefore it was also on secure constitutional grounds. *Equal Access Education v. Merten*, 305 F. Supp.2d 585, 603 (2004). Nine years earlier, in the case of *LULAC v. Wilson*, the District Court for the Central District of California articulated the same principle. In reviewing a California law denying benefits to illegal aliens that had been passed prior to PRWORA, the Court found that "benefit denial provisions were not an impermissible regulation of immigration and therefore withstand scrutiny under the first DeCanas test." *LULAC v. Wilson*, 908 F.Supp. 755 (C.D. Cal. 1995).

III. LAW ENFORCEMENT PROVISIONS

H.B. 2578 includes provisions designed to make cooperation between law enforcement and federal immigration authorities more efficient and effective. One would simply require that state and local officers not turn a blind eye when in the normal course of their duties enforcing another law, they develop reasonable suspicion that they are in contact with illegal aliens. The bill operates in a perfectly reasonable fashion. If the police officer, during a detention to investigate another offense, develops reasonable suspicion that the subject is an illegal alien, then the officer must take specific steps to verify or dispel that reasonable suspicion. "Reasonable suspicion" is, of course, a well-defined concept. Over the past four decades, the courts have issued more than eight hundred opinions defining those two words in the context of immigration violations.

The most common situation in which H.B. 2578 will come into play is during a traffic stop. Suppose that a police officer pulls over a minivan for speeding. He discovers that sixteen people are crammed into the van and the seats have been removed. Neither the driver nor any of the passengers has any identification documents. The driver is acting evasively, and the vehicle is travelling on a known human smuggling corridor. Federal courts have held that those four factors can give an officer reasonable suspicion to believe that the occupants are aliens unlawfully present in the United States. At that point, H.B. 2578 kicks in and requires the police officer "when practicable," to verify the immigration status of the person with the federal government. Immigration and Customs Enforcement (ICE) maintains a 24/7 hotline run by the Law Enforcement Support Center (LESC) for exactly that purpose. Indeed, many police departments in Kansas are already regularly contacting the LESC through the use of this hotline. The law simply requires all law enforcement agencies in the state to behave in the same way, no longer turning a blind eye to violations of federal immigration law that their officers come across during their routine duties. Most calls to the LESC take only a short period of time and can be done while the officer is checking the validity of the license plates on the vehicle and checking for wants and warrants on his laptop computer. In the event that other pressing matters call the officer away, he may drop the inquiry because it is no longer practicable. H.B. 2372 does not require police departments to divert resources from other matters.

A similar provision from Arizona's SB 1070 is currently awaiting a decision by the United States Supreme Court in the case of *Arizona v. United States.*

IV. CONCLUSION

Adopting at least one of these bills, if not more, is necessary in light of the fact that our neighboring states have already taken significant steps to reduce illegal immigration. Unless Kansas acts, we will become the number-one destination for illegal aliens in the Midwest. Indeed, we are already well on our way to holding that title. Nebraska passed a bill denying public benefits to illegal aliens in 2006. Oklahoma passed a comprehensive illegal immigration bill in 2007, and Missouri passed an omnibus immigration bill in 2008 that, in terms of strength, is second in the nation only to Arizona's laws. Meanwhile, year after year, Kansas has done absolutely nothing to deter illegal immigration, and continues to reward illegal aliens with in-state tuition.

The people of Kansas want the Kansas Legislature to act. Every public survey on the subject that I have seen reflects this. One organization has collected over 1,000 signatures of Kansans asking this Legislature to act. And another organization, the Kansas Farm Bureau, recently passed a 2012 resolution supporting bills like these. That resolution states: "Kansas Farm Bureau supports legal immigration but recognizes that illegal aliens are taxing the resources of Kansas. We believe enforcement of immigration laws and border security is a responsibility of the federal government, but we support the rights of states to enforce these responsibilities." See http://www.kfb.org/government/2012kfbresolutions.pdf. Action by the Kansas Legislature is long overdue.