ANALYSIS OF THE GOVERNOR'S EXECUTIVE ORDER ON "ILLEGAL IMMIGRATION"
March 31, 2008

Last Thursday, Governor Carcieri issued a wide-ranging executive order purporting to address the issue of illegal immigration in Rhode Island. This divisive order, coming as it does in the context of a major fiscal crisis having virtually nothing at all to do with immigration issues, only diverts attention from the much more pressing concerns facing our state. Unfortunately, the executive order's effects remain far-reaching.

Implementation of the Governor's executive order will encourage and exacerbate racial profiling in the state, burden small organizations and businesses, create bureaucratic difficulties for many citizens and legal immigrants, and cost the state unknown amounts of money. The order contains three major provisions, and each one of them is extremely problematic. They are reviewed below.

1. Use of E-Verify

The executive order requires the Department of Administration to "register and use the federal government's E-Verify program to electronically verify the employment eligibility of new hires in the Executive Branch." Even more disturbingly, the order further requires "that all persons and businesses, including grantees, contractors and their subcontractors and vendors doing business with the State of Rhode Island also register with and utilize the services of the E-Verify program."

E-Verify (formerly known as "Basic Pilot") is an Internet-based system operated by the Department of Homeland Security (DHS) whose purpose is to allow participating employers

to electronically verify the employment eligibility of their newly hired employees through Social Security Administration (SSA) and DHS databases. However, this system is riddled with significant flaws.

* The SSA estimates that its database, upon which E-Verify relies to verify employment authorization, contains 17.8 million errors related to name, date of birth, or citizenship status, with 12.7 million of those errors (approximately 70%) pertaining to U.S. citizens.[1]

* Due to database errors, foreign-born workers (including those who have become U.S. citizens) are 30 times more likely than native-born U.S. citizens to be incorrectly identified as not authorized for employment.[2] Almost 10% of foreign-born citizens are initially told they are not authorized to work when the E-Verify system is used.[3]

* Those wrongly designated by E-Verify as unauthorized to work face unrealistic timeframes to resolve "tentative non-confirmations," which are the notices that employers receive when the program can't automatically verify the status of workers. For a variety of reasons – lack of transportation, lack of childcare, second job, being a full-time student – new hires may not be able to visit a local SSA office within the 8-day allotted timeframe to resolve tentative non-confirmation notices, or may be forced to take time off from their new job in order to fix the database error, something many employers, understandably, are likely to frown upon. Just as troubling is the fact that a 2007 independent study of the program found

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[1] "Congressional Response Report: Accuracy of the Social Security Administration's Numident File" (Office of the Inspector General, Social Security Administration, December 2006), http://www.ssa.gov/oig/ADOBEPDF/A-08-06-26100.pdf

[2] Transcript from Hearing on Employment Eligibility Verification Systems (Subcommittee on Social Security, Committee on Ways and Means, U.S. House of Representatives, June 7, 2007), pp. xii-xiii.

[3] Findings of the Web-Based Basic Pilot Evaluation (Westat, September 2007), http://www.uscis.gov/portal/site/uscis/menuitem.5af9bb95919f35e66f614176543f6d1a/?vgnextoid=89abf90517e15110VgnVCM1000004718190aRCRD&vgnextchannel=a16988e60a405110VgnVCM1000004718190aRCRD.

that almost 10 percent of employers did not notify workers of the tentative non-confirmation notices.[4]

***** Whether intentional or not, many employers who use E-Verify have been found to do so in a discriminatory manner. A September 2007 evaluation of E-Verify found that many employers were engaging in practices prohibited by the program. Forty-seven percent of employers inappropriately pre-screened job applicants; others restricted work assignments (22%), delayed training (16%) or reduced pay (2%) based on tentative non-confirmation notices.[5] The high tentative non-confirmation rate for foreign-born workers – both naturalized citizens and lawful workers – leads to suspicion and racial-based discrimination against applicants who are perceived to look or sound foreign.

It is critical to note the broad scope of the order. By also requiring "grantees, contractors and their subcontractors and vendors doing business with the State" to participate in E-verify, the order will subject hundreds of private employers to the E-Verify requirements. In Arizona, where an E-Verify law recently took effect, businesses both large and small have complained about the burdens that the requirement is imposing on them.[6]

The breadth of the Governor's executive order will particularly affect non-profit organizations that already have limited resources to serve the communities they work with. Any such entity which receives a grant from the state, no matter how small, will be required to participate in the E-Verify program. This is a burden in and of itself, but because some of those organizations work with immigrant communities, their employees are the ones most

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[4] Id. at 76-77.
[5] Id. at xxiii.
[6] See, e.g., http://www.azcentral.com/specials/special46/articles/1128biz-sanctions101six.html; see also http://www.azcentral.com/arizonarepublic/news/articles/0303biz-econ-restaurants0303.html

likely to be victims of SSA and DHS database errors and consequently having to jump the bureaucratic hurdles prompted by those errors.

Of course, it will also force these same organizations to make a choice – to participate in a system that they know is flawed and has the effect of harming and discriminating against the constituencies they help and represent, or to forego state funds in pursuing their mission. This is a cruel choice for the state to impose.

It is particularly cruel for another reason as well. It took Governor Carcieri more than two years to issue an Executive Order on "Equal Opportunity," something his predecessors had done with greater dispatch for decades when taking office. The order he ultimately signed in 2005 was the weakest that any Governor – Republican and Democratic alike – had issued in recent memory. More to the point, Governor Carcieri intentionally omitted a requirement that had been contained in previous equal opportunity executive orders: a ban on discrimination by recipients of state funds.[7] In other words, the Governor issued an executive order in 2005 eliminating an explicit requirement against discrimination by recipients of state funds. Yet he has now issued an executive order that requires those same recipients to participate in a program that will have a demonstrated discriminatory impact on their employees. This indefensible skewing of priorities deserves broad condemnation.

2. Use of 287(g) Agreements.

Another significant aspect of the order is a requirement that the Rhode Island State Police and the Department of Corrections work to secure so-called 287(g) agreements with the federal government. Under these agreements, designated state employees from those two

[7] Executive Order 05-01, "Promotion of Equal Opportunity and the Prevention of Sexual Harassment in State Government." Compare it to, e.g., Executive Order 96-14, "Promotion of Equal Opportunity by State Government," signed by Governor Lincoln Almond.

agencies will receive training allowing them to assist immigration officials in the enforcement of federal immigration laws. There are both fiscal and moral consequences to this.

At the news conference announcing his executive order, Governor Carcieri was explicitly asked whether he had examined the costs of implementing this proposal. Amazingly, he acknowledged that he had not, but he nonetheless insisted that the order would save the state money. There is simply no basis for the claim, while the costs are clear.

One need only examine the federal law at issue. Section 287(g) of the Immigration and Nationality Act provides that the Attorney General may enter into agreements with a "State, or any political subdivision of a State, pursuant to which an officer or employee of the State or subdivision, who is determined by the Attorney General to be qualified to perform a function of an immigration officer in relation to the investigation, apprehension, or detention of aliens in the United States, . . . *may carry out such function at the expense of the State or political subdivision*."[8] (emphasis added) Thus, the federal law itself makes perfectly clear that States will be responsible for costs associated with participation in these agreements.

We have examined a handful of 287(g) agreements in other jurisdictions. They have many of the same attributes, including when it comes to costs, and they confirm that 287(g) means what it says. The training that state employees receive lasts four to five weeks, and while the MOAs make clear that ICE will provide training instructors and materials at ICE expense, as well as the necessary computer hardware and software the state needs to link to ICE, all other costs appear to fall directly on the state agencies themselves.

Below are some typical quotes from the MOAs:

Participating [state agency] personnel will carry out designated functions at [state agency] expense, including salaries and benefits and official issue material.

[8] 8 U.S.C §1357(g).

[State agency] is responsible for the salaries and benefits, including overtime, for all of its personnel being trained or performing duties under this MOA, and for those personnel performing the regular functions of the participating [State agency] personnel while they are receiving training.

[State agency] will provide to ICE, at no cost, an office within each [state correctional] facility for ICE supervisory employees to work.

Except as otherwise noted in this MOA or allowed by federal law, [State agency] will be responsible and bear the costs of participating [State agency] personnel with regard to their property or personnel expenses incurred by reason of death, injury or incidents giving rise to liability.

Of course, there is a cost greater than money when police begin enforcing federal immigration law. This role will inevitably have a severe impact on the civil rights and civil liberties of immigrants and other communities of color. Among other things, such a policy is bound to increase racial profiling and other unjustified stops, not only of undocumented workers, but also of legal residents and United States citizens who "look foreign" simply based on the color of their skin or who "sound foreign" because of their accents.

There are many good reasons why enforcement of immigration law has been left to federal officials. First and foremost, effective policing demands the establishment of trust between police officers and the community they serve, trust that inspires confidence in victims to come forward and report crimes and that allows investigations to proceed efficiently. If local law enforcement officers become, for all intents and purposes, immigration agents in the minds of the immigrant community, any trust that currently exists will be shattered.

Victims of crimes, witnesses, and others in the immigrant community will refuse to cooperate with state and local police for fear that they, or close friends and family members,

could face deportation due to their interaction with police. Enforcing immigration laws will also undermine the painstaking community policing efforts in which many departments have been engaged, squandering years of difficult work in winning the trust of these communities.

Organizations against domestic violence have been particularly vocal in criticizing the impact of these policies because of the way it deters immigrant victims of domestic violence from coming forward.[9]

It is for these reasons that many police departments across the country have opposed participating in the enforcement of immigration law.[10] It is unfortunate that the executive order, rather than promote law enforcement, will actually erode trust in the police that is a necessary aspect of good police work.

3. Encouraging Local Police to Enforce Immigration Law

The third problematic aspect of the Governor's executive order, though not having the force of law, urges "all law enforcement officials" at both the state and local level to "take steps to support the enforcement of federal immigration laws by investigating and determining the immigration status of all non-citizens taken into custody, incarcerated, or under investigation for any crime." This is a recipe for *increased* racial profiling.

We emphasize the word "increased" since too many public officials, including Governor Carcieri, continue to deny that the problem exists at all, despite irrefutable evidence to the contrary.

Ten years ago, when the minority community began to collectively complain that police disproportionately stopped and searched them on the state's roads and highways, law

[9] See, e.g., http://www.nationalimmigrationproject.org/DVPage/GAILncfjcj_article.pdf.
[10] See, e.g., http://www.majorcitieschiefs.org/pdfpublic/mcc_position_statement_revised_cef.pdf.

enforcement officials dismissed those complaints as fanciful and anecdotal. Yet after study after study in Rhode Island documented – with cold, hard facts – that those complaints had merit, the response of most police agencies was – and continues to be – that the *statistics* cannot be believed either. However, simply repeating over and over that racial profiling does not exist does not make it so.

The facts cannot be emphasized enough. Three years of statewide data collection on traffic stops – more data than any other state has collected – show that blacks and Hispanics are much more likely than whites to be stopped, and more likely than whites to be searched even though they are *less likely* to be found with contraband when searched.[11] The Governor's executive order will only encourage stops, questioning, detentions and searches of drivers and passengers based on their complexion or their accent. This is intolerable, especially when one considers how little the administration has done to counter the impact on the community of the racial profiling that presently exists.

Once again, some basic points should be emphasized. Law enforcement practices that have, whether intentional or not, a clearly disproportionate racial impact are unacceptable in a society valuing equal justice. Questionable policies and practices further encourage inappropriate stereotypes that fly in the face of the facts by suggesting, for example, that blacks and Hispanics are stopped and searched more often because they are more likely to be carrying drugs or other contraband.

Just as importantly, they can create a self-fulfilling prophecy that has consequences that ripple throughout the criminal justice system: if racial minorities are disproportionately

[11] For the results of the first study, see "Rhode Island Traffic Stop Statistics Act: Final Report," Northeastern University, June 30, 2003, http://www.riag.state.ri.us/documents/reports/traffic/final.pdf. The Rhode Island ACLU has also issued a series of reports analyzing the more recent data. See, e.g., "The Persistence of Racial Profiling in Rhode Island: A Call for Action" (January 2007), http://www.riaclu.org/documents/RacialProfilingReport0107.pdf

stopped and searched, any arrests that result are likely to be disproportionate as well, leading to misconceptions that racial minorities are more likely to be engaged in criminal behavior when stopped by police. Similarly, every time a police officer's inappropriate questioning of a Latino driver leads to evidence that the driver may be undocumented, there are a dozen other similar occasions where lawful residents are badgered by police because of their appearance or accent.

As has already been noted, efforts by police to act as immigration agents create a climate of fear and mistrust in immigrant communities, making people much less likely to come forward to police as victims of, or witnesses to, criminal conduct. And if, pursuant to 287(g) agreements, police officers are required to attend up to five weeks of training in complex immigration law, why do we want to urge local police to act on their own as bounty hunters for federal immigration agencies? This is not good policing, and only diverts resources away from traditional law enforcement activities and undermines police effectiveness and overall security in local communities.

Earlier this month, in a highly publicized incident, a Providence store owner demanded that two Latino customers, who had been speaking in Spanish to each other, show him their Social Security cards. That incident demonstrated the poisonous atmosphere that exists in our state on this issue, one that directly harms citizens and legal residents of this state and subjects them to humiliating and discriminatory treatment. Ultimately, rather than expressing disapproval for such inexcusable conduct, the Governor's executive order only feeds into this xenophobia. It will now be up to the General Assembly to counteract this unfortunate executive foray that makes some of Rhode Island's most vulnerable residents scapegoats for the serious issues facing our state at this time.