Case No. S196568

IN THE SUPREME COURT OF CALIFORNIA

VICENTE SALAS,
Plaintiff and Appellant,
v.
SIERRA CHEMICAL COMPANY,
Defendant and Respondent.

APPELLANT'S SUPPLEMENTAL BRIEF

Appeal from the Court of Appeal
Third Appellate District, Case No. C064627
Superior Court of California, County of San Joaquin
Superior Court Case No. CV033425

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INTRODUCTION

Pursuant to the Court's Order of February 27, 2013, Plaintiff and Appellant Vicente Salas submits this supplemental brief on the question of whether the remedies available to undocumented workers for violations of California's labor and employment laws are preempted by federal immigration law.

ARGUMENT

For the reasons set forth below, federal immigration law does not prevent undocumented workers from availing themselves of any compensatory remedies afforded by this state's workplace laws, including without limitation awards of backpay, compensatory damages, and punitive damages.

I. The Applicable Law

Under the Supremacy Clause, state law must yield to federal law in three situations. First, state law is preempted where Congress has "enact[ed] a statute containing an express preemption provision." *Arizona v. United States* (2012) 567 U.S. ___, 132 S.Ct. 2492, 2500-01. Second, federal law ousts state law that seeks to regulate conduct "in a field that Congress . . . has determined must be regulated by its exclusive governance." *Id.* at 2501. Finally, state law must give way where it conflicts with federal law, either because "compliance with both federal and state regulations is a physical impossibility," *Florida Lime & Avocado Growers, Inc. v. Paul* (1963) 373 U.S. 132, 142-43, or because the state law "stands as an obstacle to the accomplishment

and execution of the full purposes and objectives of Congress," *Hines v. Davidowitz* (1941) 312 U.S. 52, 67.

As a threshold matter, the U.S. Supreme Court has stated that "[w]e have never assumed lightly that Congress has derogated state regulation, but instead have addressed claims of pre-emption with the starting presumption that Congress does not intend to supplant state law." *New York State Conference of Blue Cross & Blue Shield Plans v. Travelers Ins. Co.* (1995) 514 U.S. 645, 655. "Because the States are independent sovereigns in our federal system, courts have long presumed that Congress does not cavalierly preempt state causes of action." *Medtronic, Inc. v. Lohr* (1996) 518 U.S. 470, 485. "In preemption analysis, courts should assume that 'the historic police powers of the States' are not superseded 'unless that was the *clear and manifest* purpose of Congress.'" *Jones v. Rath Packing Co* (1977) 430 U.S. 519, 525 *quoting Rice v. Santa Fe Elevator Corp.* (1947) 331 U.S. 218, 230 (emphasis added).

II. SB 1818 Is Not Preempted By Federal Immigration Law

None of the conditions required for a finding of federal preemption is present with respect to SB 1818.

A. Federal Immigration Law Contains No Express Preemption Language Applicable to SB 1818

There is nothing in the federal immigration statutes that expressly preempts state worker protection statutes such as SB 1818.

Prior to 1986, the Immigration and Nationality Act ("INA") had at most "a peripheral concern with employment of illegal entrants" to the United States. *De Canas v. Bica* (1976) 424 U.S. 351, 360. Accordingly, *De Canas* found no reason to believe that the INA preempted a California statute that prohibited the knowing employment of undocumented workers. *Id.* at 358.[1] And the Immigration Reform and Control Act ("IRCA"), enacted by Congress in 1986 to make unlawful the knowing employment of undocumented workers,[2] contained only one express preemption provision. That subsection provides:

> **(2) Preemption**
>
> The provisions of this section [8 U.S.C. § 1324a] preempt 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.

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[1] In reasoning that Congress did not intend to occupy the field of law concerning the employment of undocumented workers, *De Canas* pointed to the 1974 amendments to the Farm Labor Contractor Registration Act, which provided (at 7 U.S.C. § 2051) that compliance with that Act "shall not excuse anyone from appropriate State law and regulation." 424 U.S. at 362. The cited language, since recodified in materially identical form at 29 U.S.C. § 1871, remains in effect today.

[2] 8 U.S.C. § 1324a(a)(1)-(2). IRCA also enacted provisions to protect immigrant workers from "document abuse" and discrimination because of their national origin or citizenship status (8 U.S.C. § 1324b). In 1990, Congress amended IRCA to create penalties applicable to any person involved in creating or using fraudulent work authorization documents (8 U.S.C. § 1324c).

8 U.S.C. § 1324a(h)(2).

This subsection applies solely to state or local laws purporting to sanction persons or entities that knowingly hire, recruit, or refer undocumented workers for employment. It does not address and has no bearing upon state employment and labor laws that permit workers to seek remedies for violations of their separate and distinct workplace rights.[3] Accordingly, SB 1818 is clearly not expressly preempted. *See also Cipollone v. Liggett Group, Inc.* (1992) 505 U.S. 504, 517 (noting that "Congress' enactment of a provision defining the pre-emptive reach of a statute implies that matters beyond that reach are not pre-empted.").

B. Nothing in IRCA Supports a Finding of Either "Field Preemption" or "Conflict Preemption"

There is no reason to believe that by enacting IRCA, Congress somehow intended to occupy the field of employment and labor law with respect to immigrant workers to the exclusion of all state regulation. Likewise, there is no basis for any view that SB 1818 is an "obstacle" to IRCA's goals, or that compliance with both IRCA and SB 1818 is "an impossibility."

1. Congress Did Not Intend, Through IRCA, to Supplant the Historic Police Powers of the States to Protect Workers

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[3] *See also Madeira v. Affordable Housing Fdn., Inc.* (2d Cir. 2006) 469 F.3d 219, 239-40 (noting that "[c]ompensatory damages for personal injury do not reasonably equate to sanctions.").

Field preemption is found when federal law establishes a "framework of regulation so pervasive that Congress left no room for the States to supplement it or where there is a federal interest so dominant that the federal system will be assumed to preclude enforcement of state laws on the same subject." *Arizona*, 132 S.Ct. at 2501 (quotation and alteration marks omitted). Neither is the case here.

California possesses broad authority to regulate the employment relationship to protect workers within the State. *See De Canas*, 424 U.S. at 356. This historic police power to enact worker protections remains firmly in the hands of the States, even as narrowly modified by IRCA to make employer sanctions for knowingly hiring undocumented workers (except through licensing laws) an exclusively federal matter. *See, e.g., Chamber of Commerce v. Whiting* (2011) 563 U.S. ___, 131 S.Ct. 1968, 1974 (quoting *De Canas*); *Madeira v. Affordable Housing Fdn., Inc.* (2d Cir. 2006) 469 F.3d 219, 228, 240 (observing that although "immigration is plainly a field in which the federal interest is dominant. . . . State tort and labor laws, however, occupy an entirely different field", and that the States enjoy "'broad authority under their police powers to regulate . . . employment relationship[s] to protect workers within the State.'") (quoting *De Canas*). And, of course, "the mere fact that 'aliens are a subject of a state statute does not render it a regulation of immigration.'" *Arizona*, 132 S.Ct. at 2530 (Alito, J., concurring and dissenting) (quoting *De Canas*).

Indeed, any doubts that Congress intended to leave untouched the States' ability to create rights and remedies for all persons who have been subjected to injustices in the workplace are dispelled by IRCA's legislative history. As noted previously,[4] the House Judiciary Committee made explicit that nothing in IRCA's employer sanctions was to "be used to undermine or diminish in any way labor protections in existing law, or to limit the powers of *federal or state* labor relations boards, labor standards agencies, or labor arbitrators to remedy unfair practices committed against undocumented employees for exercising their rights before such agencies or for engaging in practices protected by existing law."[5] (emphasis added) Likewise, the House Labor and Education Committee emphasized that it "does not intend that any provision of this Act would limit the powers of *State or Federal* labor standards agencies . . . in conformity with existing law, to remedy unfair practices committed against undocumented employees . . . . To do otherwise would be counter-productive of our intent to limit the hiring of undocumented employees and the depressing effect on working conditions caused by their employment."[6] (emphasis added)

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[4] Appellant's Opening Brief at 9 n.9.

[5] H.R. Rep. No. 99-682(I), at 58, *reprinted in* U.S. Code Cong. & Admin. News 5662.

[6] H.R. Rep. No. 99-682(II), at 8-9, *reprinted in* U.S. Code Cong. & Admin. News 5649, 5758.

Clearly, "IRCA does not . . . so thoroughly occupy the field as to require a reasonable inference that Congress left no room for states to act." *Safeharbor Employer Services I, Inc. v. Cinto Velazquez* (2003) 860 So.2d 984, 986 (Fla. App.) (rejecting argument that IRCA preempted Florida workers' compensation law). Indeed, far from any desire to occupy the field with respect to the employment and labor rights of undocumented workers, Congress in enacting IRCA expressly declared that the rights and remedies provided by the States were to continue unabated, in tandem with and, in fact, were a critical part of the effort to achieve IRCA's goals.

2. SB 1818 Does Not Conflict With Federal Immigration Law

Showings of conflict preemption are not easily made. "The existence of a hypothetical or potential conflict is insufficient to warrant the pre-emption of the state statute." *Rice v. Norman Williams Co.* (1982) 458 U.S. 654, 659. Moreover, "preemption analysis does not justify a 'freewheeling judicial inquiry into whether a state statute is in tension with federal objectives'; such an endeavor 'would undercut the principle that it is Congress rather than the courts that preempts state law.'" *Whiting*, 131 S.Ct. at 1985 (quoting *Gade v. Natl. Solid Wastes Mgmt. Assn.* (1992) 505 U.S. 88, 111. A "clear demonstration of conflict . . . must exist before the mere existence of a federal law may be said to pre-empt state law". *Jones*, 430 U.S. at 544 (Rehnquist, J., concurring in part and dissenting in part). Such a showing is not present here.

a. Compliance With Both SB 1818 and IRCA is Not a "Physical Impossibility"

There is no basis whatsoever for a claim that complying with the dictates of both SB1818 and IRCA is impossible. IRCA, as has been explained, created sanctions against employers and others who knowingly hire, recruit, or refer undocumented workers for employment. SB 1818, on the other hand, simply reaffirms the continuing vitality of the substantive rights and remedies that are available to all workers in California irrespective of their immigration status. Thus, as an example, it is entirely possible that an employer can be sanctioned by the Department of Homeland Security for having knowingly hired an undocumented worker while – at the very same time – that worker can file a charge of discrimination against the same employer with the California Department of Fair Employment and Housing. (This very scenario has doubtless occurred with frequency.) There is absolutely no conflict present here, either between these actions or the legal processes they set in motion. *See also Madeira*, 469 F.3d at 242 (rejecting "impossibility" argument and observing that employers' duties to employees under workplace safety laws "are unrelated to, and do not depend on, the worker's compliance with federal immigration laws.") (citations omitted).

Both SB 1818 and IRCA can be fully enforced and complied with at the same time. Their subject matters are different, and neither statute precludes the operation of the other. Indeed, SB 1818 takes pains expressly to exclude from its application the only area of

conceivable tension with the policies motivating IRCA – *i.e.*, "any reinstatement remedy prohibited by federal law". There is no basis for discerning any conflict between the two statutes.

b. SB 1818 Is Not An "Obstacle" to Achieving IRCA's Objectives; Instead, It Helps to Further Those Objectives

IRCA's central purpose, of course, is that of controlling unauthorized immigration to the United States[7] and discouraging the employment of undocumented workers.[8] This purpose is hardly frustrated by providing state law rights and remedies for undocumented employees. Quite the contrary: ensuring – as SB 1818 does – that employers have no financial or legal incentives to prefer and seek out undocumented workers is fully in keeping with and advances IRCA's goals.

As noted previously, the Legislature's purpose in enacting SB 1818 was to reaffirm that all workers in this state were equally

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[7] *See, e.g.*, H.R. Rep. No. 99-682 (I), at 46-49 (stating the purpose of IRCA is that of controlling immigration to the United States, mainly through enactment of employer sanctions), *reprinted in* U.S. Code Cong. & Admin. News 5662; H.R. Rep. No. 99-1000, at 85 (conference report on IRCA) (stating IRCA's purpose is to effectively control unauthorized immigration to the United States), *reprinted in* U.S. Code Cong. & Admin. News 5840, 5840.

[8] "IRCA 'forcefully' made combating the employment of illegal aliens central to '[t]he policy of immigration law.'" *Hoffman Plastic Compounds, Inc. v. NLRB* (2002) 535 U.S. 137, 147, *quoting INS v. National Center for Immigrants' Rights, Inc.* (1991) 502 U.S. 183, 194 and n.8.

protected by California's employment and labor laws regardless of immigration status, so as to ensure that unprincipled employers would have no reason to prefer undocumented persons over those who were work-authorized.[9] Were undocumented workers to be left unprotected, or simply less protected, by the same laws that authorized workers enjoy, unethical employers would have every incentive to employ them knowing that they could be underpaid, subjected to unlawful working conditions, discriminated against, and then fired – all with absolute impunity as far as state law was concerned.[10] Such a structure of unequal rights and remedies would, if anything, encourage employers to seek out unauthorized workers and thereby provide an economic inducement for the behavior that Justice Breyer, in the context of the National Labor Relations Act, pointed to in his dissenting opinion in *Hoffman Plastic Compounds, Inc. v. NLRB* (2002) 535 U.S. 137[11]:

> To *deny* the Board the power to award backpay . . . lowers the cost to the employer of an initial labor law violation . . . [I]t thereby increases the employer's incentive to find and to hire illegal-alien employees. . . . The Court has recognized these considerations in stating that the labor laws

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[9] Appellant's Opening Brief at 13-14.

[10] Even the *Hoffman* majority took pains to assert that its denial of backpay to undocumented workers "does not mean that the employer gets off scot-free." *Id.* at 152 (referencing survival of posting and cease and desist orders as remedies available to undocumented workers).

[11] The majority opinion in *Hoffman* is discussed at length *infra*.

> must apply to illegal aliens in order to ensure that "there will be no advantage under the NLRA in preferring illegal aliens" and therefore there will be "fewer incentives for aliens themselves to enter." [citation] The Court today accomplishes the precise opposite.

Id. at 155-56 (Breyer, J., dissenting) (citing *Sure-Tan v. NLRB* (1984) 467 U.S. 883).[12] The *Hoffman* majority, however, left this observation unaddressed, and thus left unexplained its implicit repudiation of its own opposite reasoning in *Sure-Tan*.[13]

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[12] *Sure-Tan*, 467 U.S. at 893-94 (observing that "[a]pplication of the NLRA helps to assure that the wages and employment conditions of lawful residents are not adversely affected by the competition of illegal alien employees who are not subject to the standard terms of employment. If an employer realizes that there will be no advantage under the NLRA in preferring illegal aliens to legal resident workers, any incentive to hire such illegal aliens is correspondingly lessened. In turn, if the demand for undocumented aliens declines, there may then be fewer incentives for aliens themselves to enter in violation of the federal immigration laws.").

[13] Federal courts of appeals have similarly observed that providing equal remedies to unauthorized employees is necessary to avoid creating economic incentives for employers to hire them. *See, e.g., Patel v. Quality Inn South* (11th Cir. 1988) 846 F.2d 700, 704-05 ("[w]e recognize the seeming anomaly of discouraging illegal immigration by allowing undocumented aliens to recover in an action under the FLSA. By reducing the incentive to hire such workers the FLSA's coverage of undocumented aliens helps discourage illegal immigration and is thus fully consistent with the objectives of the IRCA."); *Lamonica v. Safe Hurricane Shutters, Inc.* (11th Cir. 2013) 711 F.3d 1299, 1308-09 (following *Patel* in reaffirming FLSA coverage for unauthorized employees, holding that "even after *Hoffman*, we maintain that "[b]y reducing the incentive to hire such workers the FLSA's coverage of undocumented aliens helps

For these and other reasons, including the clear indications of contrary intent in IRCA's legislative history, Justice Breyer and three other Justices concluded that Congress could not have intended that IRCA would deprive undocumented workers of remedies under either federal or state labor laws. 535 U.S. at 156-57 (Breyer, J., dissenting). *See also Madeira*, 469 F.3d at 246 (observing that the *Hoffman* majority did not explicitly dispute that denying equal benefits would encourage hiring of unauthorized workers). Numerous courts of other States, in rejecting *Hoffman*-based preemption challenges, have likewise determined that the denial of equal state law rights and remedies to unauthorized workers would frustrate IRCA's purposes because of the perverse incentives that would be created as a result.[14]

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discourage illegal immigration and is thus fully consistent with the objectives of the IRCA." (citation omitted), and rejecting *in pari delicto* defense based on plaintiff's use of a false Social Security number); *Madeira,* 469 F.3d at 245 (discerning "a financial incentive for unscrupulous employers to hire undocumented workers" if latter were excluded from workers' compensation coverage).

[14] *See, e.g., Grocers Supply, Inc. v. Cabello* (2012) 309 S.W.3d 707, 718-19 (Tex. App.) ("it could be argued that employers might have a higher incentive for hiring illegal aliens if Congress superseded liability for those individuals' injuries."); *Asylum Co. v. D.C. Dept. of Employment Svcs.* (2010) 10 A.3d 619, 633 (D.C.) ("denying compensation to undocumented aliens 'creates powerful incentives for employers to hire such individuals.'") (citation omitted); *Balbuena v. IDR Realty LLC* (2006) 845 N.E.2d 1246, 1257 (N.Y.) ("limiting a lost wages claim by an injured undocumented alien would lessen an employer's incentive to comply with the Labor Law and supply all of its workers the safe workplace that the Legislature demands.") (citations omitted); *Design Kitchen and Baths v. Lagos* (2005) 882

It is thus difficult to discern any conflict between IRCA, on the one hand, and the rights and remedies reaffirmed by SB 1818. To the contrary, the maintenance of equal protections for undocumented workers – and the resulting avoidance of incentives for employers to prefer such workers – is essential to achieving IRCA's purposes.

For these reasons, SB 1818 is not "conflict preempted" by IRCA. Accordingly, there are no grounds for any claim that SB 1818

A.2d 817, 826 (Md.) (noting that without workers' compensation protections, "unscrupulous employers could, and perhaps would, take advantage of [undocumented workers] and engage in unsafe practices with no fear of retribution"); *Correa v. Waymouth Farms, Inc.* (2003) 664 N.W.2d 324, 331 n.4 (Minn.) ("to the extent that denying unauthorized aliens benefits predicated on a diligent job search gives employers incentive to hire unauthorized aliens in expectation of lowering their workers' compensation costs, the purposes underlying the IRCA are not served."). The California Court of Appeal has likewise rejected a *Hoffman*-based preemption challenge to California's Workers' Compensation Act. *Farmer Brothers Coffee v. WCAB* (2005) 133 Cal.App.4th 533.

Other State courts had reached the same conclusion prior to *Hoffman*. *See, e.g., Reinforced Earth Co. v. Workers' Comp. Appeal Bd.* (2000) 749 A.2d 1036, 1039 (Pa. Commw. Ct.) (stating that denial of workers' compensation benefits would encourage employers by "actively seek[ing] out illegal aliens rather than citizens or legal residents because they will not be forced to insure against or absorb the costs of work-related injuries"); *Dowling v. Slotnik* (1998) 712 A.2d 396, 404 (Conn.) ("denying undocumented workers equal coverage under employment and labor laws would "contravene the purpose of the Immigration Reform Act by creating a financial incentive for unscrupulous employers to hire undocumented workers.").

is preempted by IRCA on any basis.[15] This Court should join the overwhelming majority of sister State courts that have likewise found

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[15] This conclusion is fully consistent with the two recent decisions of the U.S. Supreme Court that have discussed the asserted preemptive effect of IRCA upon state enactments concerning undocumented immigrants.

In *Chamber of Commerce v. Whiting* (2011) 563 U.S. ___, 131 S.Ct. 1968, the Court found that IRCA did not preempt an Arizona law that provided for the suspension of the licenses of businesses that knowingly employed unauthorized persons, because that law fell squarely within the exception for licensing-based requirements contained in IRCA's express preemption language. *Id.* at 1980. *Whiting* also found not preempted the law's requirement that employers use the federal "E-Verify" online employment authorization verification system, in that such laws were not expressly preempted, and also because the federal government (1) had in fact *encouraged* the States to use E-Verify, and (2) disclaimed that the Arizona law would obstruct the operation of E-Verify. *Id.* at 1985-86.

In *Arizona v. United States* (2012) 567 U.S. ___, 132 S.Ct. 2492, the Court upheld a preemption challenge to another Arizona law concerning undocumented immigrants insofar as (1) its penalties for non-compliance with alien registration requirements were preempted because Congress had occupied the field of alien registration; (2) it criminalized actions that IRCA purposely refrained from penalizing as inconsistent with federal policy; and (3) its authorization for state and local officers to make warrantless stops of persons suspected of being deportable encroached on the exclusive authority of federal authorities to make determinations as to removability. In each of these areas, the Arizona law purported to legislate in areas where "the federal power to determine immigration policy is well settled." *Id.* at 2498. In the present case, by comparison, SB 1818 hardly purports to legislate as to "which aliens may be removed from the United States and the procedures for doing so." *Id.* at 2499. The Court held a fourth section of the law was not preempted because it was consistent with federal

no reason to believe that IRCA displaces their longstanding protections against discrimination and other abuses in the workplace.[16]

C. *Hoffman*'s Reasoning Does Not Bear Upon the Issues in This Case

The U.S. Supreme Court's opinion in *Hoffman*, which held that the National Labor Relations Board improperly awarded backpay to an undocumented worker as a remedy for unlawful labor practices,

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statutes envisioning state cooperation with immigration authorities, and because it was premature to determine whether its implementation would conflict with federal immigration enforcement. *Id.* at 2507-10.

[16] *See* decisions cited at n.14, *supra*; *see also, e.g., Gonzalez v. Performance Painting, Inc.* (2011) 258 P.3d 1098 (holding New Mexico workers' compensation benefits not preempted); *Abel Verdon Construction v. Rivera* (2011) 348 S.W.3d 749 (holding Kentucky workers' compensation benefits not preempted); *Economy Packing Co. v. Illinois Workers' Comp. Comm'n* (2008) 901 N.E.2d 915 (holding Illinois workers' compensation benefits not preempted); *Coma Corp. v. Kansas Dept. of Labor* (2007) 154 P.3d 1080 (holding Kansas Wage Payment Act not preempted); *Rosa v. Partners in Progress, Inc.* (2005) 868 A.2d 994 (holding New Hampshire common law negligence claim not preempted); *Continental PET Technologies, Inc. v. Palacias* (2004) 604 S.E.2d 627 (holding Georgia workers' compensation benefits not preempted); *Ruiz v. Belk Masonry Co., Inc.* (2002) 559 S.E.2d 249 (holding, prior to *Hoffman*, North Carolina workers' compensation benefits not preempted). *But cf. Tarango v. State Indus. Ins. System* (2001) 25 P.3d 175 (Nev.) (holding Nevada workers' compensation benefits preempted by IRCA); *Crespo v. Evergo Corp.* (2004) (N.J. Super. A.D.) 841 A.2d 471 (holding undocumented employee's damages for discriminatory termination under New Jersey law precluded by *Hoffman*, although not on preemption grounds, but reaffirming coverage for undocumented workers by state workers' compensation laws).

does not usefully inform the question of what state law rights and remedies are available to undocumented workers in light of IRCA. Indeed, *Hoffman* was not even a preemption case. Nor does anything in that decision lend support to finding that SB 1818 is preempted by IRCA.

1. The *Hoffman* Opinion

At issue in *Hoffman* was a remedial order issued by the National Labor Relations Board in a case where the employer had unlawfully laid off four employees because of their participation in union organizing. That order required the employer to cease and desist from further NLRA violations, to post a notice concerning the remedial order, and awarded the employees backpay and reinstatement. At a subsequent hearing held to determine the amount of backpay to be awarded, one of the employees, José Castro, testified that he had obtained his employment by using a birth certificate that did not belong to him.

On appeal from the Board's decision that Castro was nonetheless entitled to backpay, *Hoffman* held that the Board had exceeded its discretion inasmuch as awarding backpay conflicted with what the Court perceived to be Congress' intent in enacting IRCA. The Court analyzed IRCA as follows:

> Under the IRCA regime, it is impossible for an undocumented alien to obtain employment in the United States without some party directly contravening explicit congressional policies. Either the undocumented alien tenders fraudulent identification, which subverts the cornerstone of IRCA's enforcement mechanism, or the

> employer knowingly hires the undocumented alien in direct contradiction of its IRCA obligations. The Board asks that we overlook this fact and allow it to award backpay to an illegal alien for years of work not performed, for wages that could not lawfully have been earned, and for a job obtained in the first instance by a criminal fraud. We find, however, that awarding backpay to illegal aliens runs counter to policies underlying IRCA, policies the Board has no authority to enforce or administer. Therefore, as we have consistently held in like circumstances, the award lies beyond the bounds of the Board's remedial discretion.

535 U.S. at 148-49. The *Hoffman* majority dismissed the plain evidence of contrary Congressional intent contained in IRCA's legislative history as "a rather slender reed"[17] and noted that, in any case, IRCA did not overrule *Sure-Tan v. NLRB* (1984) 467 U.S. 883,

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[17] The majority took Justice Breyer to task for "pointing to a single Committee Report" (that of the House Judiciary Committee). *Id.* at 149 n.4. But this understates the significantly greater extent to which Congress's intent to maintain rights and remedies for unauthorized workers was reflected elsewhere throughout IRCA's legislative history. *See, e.g.,* H.R. Rep. No. 99-682(II) (House Labor and Education Committee), at 8-9, *reprinted in* U.S. Code Cong. & Admin. News 5649, 5758 (emphasizing need to maintain existing powers of federal and state labor standards agencies to protect legal rights of unauthorized employees); *Patel v. Quality Inn South* (11th Cir. 1988) 846 F.2d 700, 704 (noting that in IRCA, "Congress specifically authorized the appropriation of additional funds for increased FLSA enforcement on behalf of undocumented aliens."); Wishnie, *Prohibiting the Employment of Unauthorized Immigrants: The Experiment Fails* (2007) U. Chi. Legal F. 193, 203-04 (examining IRCA's legislative history and concluding that IRCA's "[m]aintenance of all existing labor protections for undocumented immigrants furthered the goal of discouraging their employment.").

which "limited the remedial powers of the NLRB."[18] 535 U.S. at 149 n.4.

2. *Hoffman*'s Backpay Holding Was Narrow

In discussing the extent to which *Hoffman* might provide any guidance in the case at bar, it is important to understand what that decision held and what it did not hold. First, *Hoffman* expressly reaffirmed that undocumented workers, even those who used false documentation to obtain employment, were covered by the NLRA.[19] Accordingly, any argument that Mr. Salas's alleged and unproven proffer to Sierra of an invalid Social Security number deprives him of his ability to maintain his suit under the Fair Employment and Housing Act thus finds utterly no support in *Hoffman*. If anything, *Hoffman* counsels a contrary conclusion – that even though Castro had tendered false documentation to obtain employment, he still had rights under the NLRA and remedies for their violation.

Second, *Hoffman* is properly limited to the legal framework from which it arose. Importantly, *Hoffman*'s outcome turned upon its

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[18] *Sure-Tan* "limited the remedial powers of the NLRB" in the sense that it overturned a Seventh Circuit order directing the Board to impose a minimum backpay award without regard to the employees' actual economic losses or legal availability for work. *Sure-Tan*, however, cast no doubt on the general availability of backpay to undocumented workers. *Id.*, 467 U.S. at 902.

[19] *Id.* at 149 n.4 ("Our first holding in *Sure-Tan* ['that undocumented aliens are employees within the meaning of the NLRA'] is not at issue here").

disapproval of what it characterized as the *Board*'s attempt to provide remedies it believed were consistent with IRCA – an action, the Court held, the Board could not take inasmuch as its authority was limited to the interpretation of its own statute, the NLRA. More than anything else, it was the Court's conclusion that the Board had exceeded the bounds of its administrative discretion in attempting to interpret IRCA that underlay its reversal of the Board's backpay award.[20] *Hoffman* therefore did not reach the question whether the *courts* – whose role certainly encompasses weighing and resolving conflicts between arguably competing statutes – would have had the authority to make a backpay award. This distinguishing factor plainly diminishes *Hoffman*'s relevance to the present case.[21]

Finally, the question of the Board's limited discretion to interpret other statutes aside, *Hoffman*'s analysis would necessarily have been different had it been undertaken not in the NLRA context

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[20] *See, e.g.,* 535 U.S. at 149 (stating that backpay award "runs counter to policies underlying IRCA, *policies the Board has no authority to enforce or administer*. Therefore, as we have consistently held in like circumstances, the award lies *beyond the bounds of the Board's remedial discretion.*") (emphasis added), 151-52 (stating that "[h]owever broad the Board's discretion to fashion remedies with dealing only with the NLRA, *it is not so unbounded as to authorize this sort of an award.*") (emphasis added).

[21] *See, e.g., Rivera v. Nibco, Inc.* (9th Cir. 2004) 364 F.3d 1057, 1068-69 (noting that "to the extent that *Hoffman* stands for a limitation on the NLRB's remedial discretion to interpret statutes other than the NLRA, [*Hoffman*] appears not to be relevant to a Title VII action.").

but, instead, in the context of an employment discrimination statute. At least to the extent that the FEHA is motivated by the same public policies as Title VII of the Civil Rights Act of 1964,[22] the role of backpay is critical. As *Hoffman* pointed out, backpay awards under the NLRA are a matter of discretion.[23] By comparison, however, in the employment discrimination context, courts are presumptively required to award backpay when the preconditions for it are otherwise present.[24] This heightened significance of backpay in the civil rights context makes eminent sense in that, unlike under the NLRA, which is only enforced administratively and provides no private rights of action, statutes such as the FEHA depend importantly on the role of plaintiffs as private attorneys general for their vigorous enforcement.[25]

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[22] *See Richards v. CH2M Hill* (2001) 26 Cal.4th 798,812 (noting similarity between wording and purposes of FEHA and Title VII).

[23] *Id.*, 535 U.S. at 142. *See also Albemarle Paper Co. v. Moody* (1975) 422 U.S. 405, 419-21 (noting discretionary nature of backpay under the NLRA and contrasting it with the strong presumption in favor of backpay under Title VII).

[24] *See City of Los Angeles Dep't of Water & Power v. Manhart* (1978) 435 U.S. 702, 729 (noting that presumption in favor of backpay awards under Title VII can "seldom be overcome"); *see also Albemarle Paper Co. v. Moody* (1975) 422 U.S. 405, 417 ("'[T]he statutory purposes [leave] little room for the exercise of discretion not to order reimbursement.'") (citation omitted).

[25] The need for vigorous private enforcement of the FEHA is highlighted by a 2010 assessment of the FEHA's effectiveness conducted by the Center for Law & Public Policy at the UCLA School of Law. Among other things, the study found that the FEHA's enforcement by the Department of Fair Employment and Housing was

See, e.g., Rivera v. Nibco, Inc. (9th Cir. 2004) 364 F.3d 1057, 1067 (discussing importance of private actions in the enforcement of Title VII). The availability of backpay remedies is undoubtedly a decisive factor for many potential plaintiffs in deciding whether to proceed with their legal claims. *See also Albemarle Paper Co. v. Moody* (1975) 422 U.S. 405, 417-18 (noting that it is "the reasonably certain prospect of a backpay award that provide[s] the spur or catalyst which causes employers and unions to self-examine and to self-evaluate their employment practices"). *Hoffman*, therefore, can scarcely be used to support the notion that IRCA precludes backpay remedies in the employment discrimination context; the Court simply had no occasion to reach that issue. Indeed, given the greatly differing statutory imperatives involved, there is every reason to believe it would have arrived at a different result.

3. Even Assuming *Arguendo* That SB 1818's Affirmation of Remedies Under the FEHA Was Somehow "Counter To" IRCA, Preemption Does Not Thereby Follow

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impeded by inadequately trained staff, poor quality assurance, an inefficient caseload system, and a lack of sufficient resources. Blasi and Doherty, "*California Employment Discrimination Law and its Enforcement: The Fair Employment and Housing Act at 50*", at 62-63 (available at http://www.dfeh.ca.gov/res/docs/Renaissance/FEHA%20at%2050%20-%20UCLA%20-%20RAND%20Report_FINAL.pdf.).

Finally, even assuming *arguendo* that the rights and remedies reaffirmed by SB 1818 might nonetheless still be "counter to"[26] the policies underlying IRCA, despite all indications to the contrary, a conclusion that SB 1818 is therefore preempted would be unjustified. As discussed above, for a "conflict" to be sufficiently significant to warrant a drastic finding of preemption, either of two conditions must be present: (1) compliance with both federal and state law must be a "physical impossibility"; or (2) the state law at issue must "stand[] as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress". *Florida Lime & Avocado Growers, Inc. v. Paul* (1963) 373 U.S. 132, 142-43; *Hines v. Davidowitz* (1941) 312 U.S. 52, 67. Moreover, even the possibility that some "tension" between federal and state law could conceivably exist does not support a finding of conflict preemption. *Silkwood v. Kerr-McGee Corp.* (1984) 464 U.S. 238, 256.

As explained above, there is no conflict between IRCA and SB 1818. II.B.2, *supra*. And in any event, *Hoffman*'s conclusion that NLRA backpay awards were "counter to" IRCA's purposes is open to serious dispute. The *Hoffman* majority did not address the plentiful and unambiguous legislative history evincing that Congress intended that federal and state workplace protections continue in force, alongside and complementary to IRCA. Nor did the majority respond in any manner to the dissent's argument that the denial of equal remedies to undocumented workers would have the effect of

[26] *Hoffman*, 535 U.S. at 149.

encouraging unlawful immigration. Likewise, the majority did not address Justice Breyer's concern that it would be purely speculative to posit that foreign workers would be motivated to enter the United States unlawfully in hopes that they would be subjected to workplace abuses and, as a consequence, be able to receive remedies for those violations.[27]

For these reasons, this Court need not adopt *Hoffman*'s summary conclusion that awarding backpay in the NLRA context would be "counter to" IRCA, let alone extend it to the very different legal context presented here, where the vitality of this State's sovereign police powers to protect workers is at issue.

D. None of the Other Remedies Sought in this Action are Preempted by Federal Immigration Law

As seen, backpay remains fully available to undocumented workers in this State for violations of the FEHA, notwithstanding IRCA. Similarly, there is even less reason to conclude that any other FEHA remedies are unavailable to undocumented workers by virtue of IRCA, save – as SB 1818 specifies – "any reinstatement remedy prohibited by federal law".

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[27] *Id.* at 155. *See also Patel*, 846 F.2d at 704 ("We doubt, however, that many illegal aliens come to this country to gain the protection of our labor laws."); *Dowling v. Slotnik* (1998) 712 A.2d 396, 404 (Conn.) ("Potential eligibility for workers' compensation benefits in the event of a work-related injury realistically cannot be described as an incentive for undocumented aliens to enter this country illegally.").

The FEHA aims "to provide effective remedies that will . . . redress the adverse effects of [discriminatory] practices on aggrieved persons", and "to provide effective remedies that will . . . prevent and deter unlawful employment practices." *Harris v. City of Santa Monica* (2013) 56 Cal.4th 203, 225 (citations omitted). The importance in this State of compensatory and punitive damage awards as means of redressing workplace wrongs is well established.[28] There is no reason why the availability to undocumented workers of such damages should be cast into doubt by IRCA – even if IRCA were thought, through a *Hoffman* lens, to somehow conflict with FEHA *backpay* awards. Such damages are not expressly preempted by IRCA. Nor – for the reasons discussed with respect to backpay awards – does the availability of those remedies do anything other than *advance* IRCA's purposes of discouraging unauthorized immigration, in that they likewise serve to deprive employers of any economic incentives to prefer and seek out persons who are not work-authorized.

The vitality of FEHA's compensatory and punitive damage remedies notwithstanding IRCA finds additional support in that – like backpay – such awards do not presume continuing IRCA violations by

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[28] *See, e.g.,* cases cited in Amicus Curiae Brief of the American Civil Liberties Union, et al., filed Sept. 25, 2012, at 21-22, and Appellant's Answer to Brief of Amicus Curiae Brief Employers Group, filed Dec. 21, 2012, at 6 n.4.

either an employer or an employee.[29] As with "make-whole" remedies, such damages simply operate to remedy harms already incurred. This aspect of such damages remedies distinguishes them from prospective, "forward-looking" remedies such as reinstatement, which in the case of an undocumented plaintiff would require the court to order an action that plainly violated IRCA (unless the plaintiff had obtained legal status in the interim). SB 1818, of course, specifically carves out an exception for prohibited reinstatement.[30]

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[29] *See Madeira*, 469 F.3d at 242-49 (discussing, as factor to be considered in determining which workplace remedies might conflict with IRCA, whether such remedies presume continued IRCA violations).

[30] Appellant does not seek reinstatement in this matter.

The remedy of front pay, or future lost wages, may present special considerations. Front pay in lieu of reinstatement might be presumed to be unavailable to undocumented workers for the same reason as reinstatement – *i.e.*, that those workers could not properly claim loss of future wages that could not be legally earned, inasmuch as they would not be authorized to continue working in the United States. Some courts, however, have considered the possibility that a front pay award based not on United States wage levels, but on wage levels in the employee's country of origin, might satisfy IRCA-related concerns. *See, e.g., Rosa v. Partners in Progress* (2005) 868 A.2d 994, 998-1002 (N.H.) (finding unauthorized employees "[g]enerally" ineligible to recover future lost United States earnings for workplace injury, but discussing circumstances in which future lost wage awards would not conflict with IRCA) and cases cited therein. The Court

CONCLUSION

For the foregoing reasons, federal immigration law only precludes the reinstatement of an employee in an FEHA action who is not work-authorized at the time reinstatement would be ordered. The availability to undocumented workers of the remainder of the FEHA's remedies in such cases, including and certainly not limited to backpay, is neither preempted nor otherwise precluded by IRCA. And lastly, for the same reasons, there is no basis for concluding that like remedies afforded unauthorized workers by any other of this State's labor and employment laws are affected by IRCA, either. As already explained, such remedies are fully consistent with and, indeed, are essential to achieving IRCA's purposes.

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need not decide the issue of front pay, however, as that remedy is not requested in this action.

Dated: May 28, 2013

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CERTIFICATE OF WORD COUNT

Pursuant to Rule 8.520(c)(1) of the California Rules of Court, I certify that this Appellant's Supplemental Brief contains 6,624 words, exclusive of the caption page, tables of contents and authorities, signature blocks, and this Certificate and that appearing on the page following.

Dated: May 28, 2012

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CERTIFICATE OF SERVICE

I, PAMELA MITCHELL, declare:

I am a citizen of the United States, over 18 years of age, employed in the County of San Francisco, and not a party to or interested in the within entitled action. I am an employee of THE LEGAL AID SOCIETY - EMPLOYMENT LAW CENTER, and my business address is 180 Montgomery Street, Suite 600, San Francisco, CA 94104.

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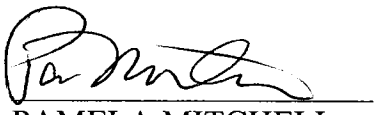
I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct. Executed on May 28, 2013.



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