Case No. S196568

IN THE SUPREME COURT OF CALIFORNIA

VICENTE SALAS,
Petitioner and Appellant

vs.

SIERRA CHEMICAL COMPANY,
Defendant and Respondent

RESPONDENT'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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TABLE OF CONTENTS

TABLE OF AUTHORITIES

California Cases

Federal Cases

Statutes

Miscellaneous

I. INTRODUCTION.

The Court has directed the parties to submit supplemental briefs on the question whether federal immigration law preempts state law and thereby precludes an undocumented worker from obtaining an award of compensatory remedies for a violation of state labor and employment laws, citing *Hoffman Plastic Compounds, Inc. v. NLRB* (2002) 535 U.S. 137.

There are four species of federal preemption: express, conflict, obstacle, and field. Conflict preemption arises when simultaneous compliance with both state and federal law is impossible. Obstacle preemption arises when state law is an obstacle to the accomplishment and execution of the full purposes and objective of federal law. (*Bronco Wine Co. v. Jolly* (2004) 33 Cal.4th 943, 955.)

As discussed below, this Court has examined the conflict and obstacle preemption of California law in a variety of contexts. In some instances the Court has found that the state law in question was preempted by federal law (*e.g. Olszewski v. Scripps Health* (2003) 30 Cal.4th 798) and in some cases that the state law was not

preempted by federal law (*e.g. Viva! International Voice for Animals v. Adidas Promotional Retail Operations, Inc.* (2007) 41 Cal.4th 929.)

The relationship of state law to federal immigration policy was throughly examined in *Arizona v. United States* (2012) ___ U.S. ___, 132 S.Ct. 2492, which held that provisions of an Arizona statute that criminalized the failure to comply with federal alien-registration requirements and the seeking or engaging in work by an undocumented alien, and that authorized officers to arrest any person whom the officer has probable cause to believe has committed an offense that makes the person subject to deportation, were preempted by federal immigration law.

Courts are reluctant to infer preemption, and typically it is the burden of the party claiming that Congress intended to preempt state law to prove it. (*Olszewski, supra,* 30 Cal.4th at p. 815.) The presumption against preemption, however, does not apply where the laws in question "touch on matters implicating foreign affairs." (*Viva!, supra,* 41 Cal.4th at p. 938.) Although there is no doubt that federal immigration policy is tied to the goverment's management of

foreign affairs (*Arizona, supra,* 132 S.Ct. at p. 2498), it appears that the foreign affairs exception recognized in *Viva!* does not apply here. (*Arizona, supra,* 132 S.Ct. at p. 2501.)

The federal government has "broad, undoubted power over the subject of immigration and the status of aliens." (*Arizona, supra,* 132 S.Ct. at p. 2498.) The Immigration Reform and Control Act ("IRCA") provides a comprehensive scheme that regulates the employment of foreign nationals in the United States. In *Hoffman*, the Court held that an award of backpay would conflict with "explicit statutory prohibitions critical to federal immigration policy, as expressed in IRCA" and "would encourage the successful evasion of apprehension by immigration authorities, condone prior violations of the immigration laws, and encourage future violations." (535 U.S. at p. 151.) In light of *Hoffman's* holding, it is difficult to conceive of how a law providing for an award of compensatory damages to an undocumented worker would not be preempted as conflicting with and an obstacle to federal immigration policy.

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II. DISCUSSION.

A. Federal Law Preempts State Law That Conflicts With Or Is An Obstacle To The Full Accomplishment Of Its Purposes.

The supremacy clause of the United States Constitution establishes a constitutional choice-of-law rule, makes federal law paramount, and vests Congress with the power to preempt state law. (U.S. Const., art. VI, cl. 2; *Cipollone v. Liggett Group, Inc.* (1992) 505 U.S. 504, 516 ; (*Viva!, supra,* 41 Cal.4th at pp. 935-936); *Jevne v. Superior Court* (2005) 35 Cal.4th 935, 949.)

There are four species of federal preemption: express, conflict, obstacle, and field. (*Bronco Wine Co., supra,* 33 Cal.4th at p. 955.) Express preemption arises when Congress explicitly identifies the extent to which its enactments preempt state law. (*Jevne, supra,* 35 Cal. 4th at p. 949.) Field preemption exists where Congress intended to preempt all state law in a particular area. (*Viva, supra*, 41 Cal. 4th at p. 936.) Conflict preemption arises when simultaneous compliance with both state and federal law is impossible. (*Hillsborough County v. Automated Medical Labs.* (1985) 471 U.S. 707, 713; *Olszewski, supra,* 30 Cal.4th at p. 815.)

Obstacle preemption arises when state law is an obstacle to the accomplishment and execution of the full purposes and objective of federal law. (*Bronco Wine Co.*, *supra*, 33 Cal.4th at p. 955.)

The issue for which the Court requested further briefing clearly involves both conflict and obstacle preemption. It is questionable whether the issue also involves field preemption. Congress has enacted a comprehensive scheme governing the employment of foreign nationals in the United States through the IRCA, and it is clear, for example that states cannot regulate the registration of non-citizens. (See *Arizona, supra,* 132 S.Ct. at p. 2502, which held that provisions of an Arizona statute that criminalized the failure to comply with federal alien-registration requirements was preempted, and *Hines* v. *Davidowitz* (1941) 312 U.S. 52, 66-67, which held that Congress' enactment of a system for alien registration precluded Pennsylvania from enforcing its own alien registration system.) Sierra Chemical suggests that the law in question should be examined through the prism of conflict and obstacle preemption and not field preemption.

/ / /

B. The Presumption Against Preemption Probably Applies To A State Law That Impacts Federal Immigration Policy.

Preemption analysis is an inquiry into whether state and federal law conflict. (*Viva, supra*, 41 Cal. 4th at p. 936.) The focus of the inquiry is congressional intent. (*Jevne, supra*, 35 Cal.4th at p. 949.) That intent is juxtaposed to the state law that is under scrutiny to determine if the law has been preempted because: (1) the law's subject is one exclusively within the power of the federal government; or (2) there's a conflict between the state and federal laws such that simultaneous compliance with both is impossible; or (3) the state law impedes in some way achieving the goals of the federal law and the policy underlying it.

This Court has observed that courts are reluctant to infer preemption, and that it is the burden of the party claiming that Congress intended to preempt state law to prove it. (*Olszewski, supra*, 30 Cal.4th at p. 815; *Bronco Wine Co., supra*, 33 Cal.4th at pp. 956-957.) The Court has also held that the presumption does not apply where the laws in question "touch on matters implicating foreign affairs." (*Viva!, supra.*, 41 Cal.4th at p. 938, citing *Crosby*

v. National Foreign Trade Council, (2000) 530 U.S. 363 and *American Ins. Assn. v. Garamendi* (2003) 539 U.S. 396.)

In the presumption/no presumption continuum, immigration policy is a lot closer to foreign policy than it is to federal Medicaid reimbursement policies. *Viva!* connected the federal law, the Endangered Species Act of 1973, to "matters implicating foreign affairs" through the location of the entire wild kangaroo population in two foreign countries and to the Act's role in the fulfillment of United States international conservation treaty obligations. Federal immigration policy is inevitably tied to foreign affairs, as foreign states have an interest in the extent to which their citizens are allowed to work and reside in the United States:

> The Government of the United States has broad, undoubted power over the subject of immigration and the status of aliens. . . . This authority rests, in part, on the National Government's constitutional power to "establish an uniform Rule of Naturalization," U. S. Const., Art. I, § 8, cl. 4, and its inherent power as sovereign to control and conduct relations with foreign nations. . . .
>
> The federal power to determine immigration policy is well settled.

> Immigration policy can affect trade, investment, tourism, and diplomatic relations for the entire Nation, as well as the perceptions and expectations of aliens in this country who seek the full protection of its laws. . . .Perceived mistreatment of aliens in the United States may lead to harmful reciprocal treatment of American citizens abroad . . . .

(*Arizona, supra,* 132 S.Ct. at p. 2498.)

Arizona does observe that "[i]n 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." (*Id.* at p. 2501.) The analysis that follows, however, does not appear to recognize a presumption against preemption.[1] Sierra Chemical suggests that the foreign affairs exception recognized in *Viva!* does not apply here.

C. A State Law That Allows An Activity That Is Prohibited By Federal Law Is Preempted.

In *Olszewski, supra,* the Court held that held that Welf. & Inst. Code, sections 14124.791, and 14124.794, were preempted by

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[1] Justice Alito, concurring in part and dissenting in part, observed that "[t]he Court gives short shrift to our presumption *against* pre-emption." (*Id.* at p. 2530,)

federal Medicaid statutes and regulations, which show a clear intent to bar a health care provider from recovering form a Medi-Cal beneficiary any amount exceeding the allowed charges, even when a third party tortfeasor is later found liable for the injuries suffered by that beneficiary.

Olszewski arose from a class action brought by a Medi-Cal beneficiary against her medical provider, asserting claims based on a lien which the provider had asserted against plaintiff's potential recovery from a third party tortfeasor, as provided by Welf. & Inst. Code, sections 14124.791, and 14124.794. The principal issue which this Court addressed was whether the state statute was preempted by federal law. The Court first found that the statutes at issue addressed a subject traditionally regulated by the states, public health and the cost of health care, so that a presumption against preemption applied.[2] (*Olszewski, supra,* 30 Cal.4th at pp. 815-816.) The Court then reviewed the relevant federal statutes and

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[2] The Court observed that Medicaid was "not a 'field' traditionally legislated by Congress. Rather, by enacting the Medicaid statutes, Congress legislated in the field of public health--a field traditionally regulated by the states." (*Id.* at p. 816.)

regulations to determine Congress' intent, concluding that:

> Read together, these statutes and regulations are unambiguous and limit provider collections from a Medicaid beneficiary to, at most, the cost-sharing charges allowed under the state plan, even when a third party tortfeasor is later found liable for the injuries suffered by that beneficiary.

(*Id.* at p. 820.)

The Court's analysis of the state statutes led to the conclusion that:

> By contrast, under sections 14124.791 and 14124.74, a provider, after refunding the Medi-Cal payment, may recover the *full customary charge* for its services through a lien on the beneficiary's property--i.e., his or her recovery for lost wages or pain and suffering. Because this customary charge is usually, if not always, greater than the amount payable under Medicaid . . . , these sections allow the provider to recover from the beneficiary an amount *greater* than the nominal cost-sharing charges allowed under the state plan. Because sections 14124.791 and 14124.74 allow the provider to recover more than these cost-sharing charges from the beneficiary, they cannot coexist with federal law and stand as an obstacle to the accomplishment of Congress's intent. . . .

(*Id.* at p. 820 [citations omitted] [emphasis in original].)

Viva!, on the other hand, found that a California Penal Statute that prohibited the importation into or sale within California of products made from Kangaroo did not conflict with federal policy:

> This case is analogous to *Bronco Wine Co. v. Jolly*, *supra*, 33 Cal.4th 943. There, as here, the party arguing preemption contended that state law prohibited what federal law authorized and was therefore preempted. (*Id.* at p. 992.) As we explained in rejecting this argument, " '[t]here is a difference between (1) not making an activity unlawful, and (2) making that activity lawful.' In our view it is more accurate to characterize the state statute as prohibiting ... what the federal [regulation] *does not prohibit.*" (*Ibid.*, quoting *Cel-Tech Communications, Inc. v. Los Angeles Cellular Telephone Co.* (1999) 20 Cal.4th 163, 183 [83 Cal. Rptr. 2d 548, 973 P.2d 527].) So too here: federal law does not prohibit importation of kangaroo products, while state law does. That arrangement poses no obstacle to current federal policy.

(*Id.* at p. 952 [emphasis in original].)

Olszewski and *Viva!* illustrate the principle that where a state law allows an activity that is prohibited by federal law, the state law is preempted. The conflict examined in *Hoffman* between federal immigration policy and the authority of the National Labor Relations

Board to order a backpay award for violation of the National Labor Relations Act demonstrates why a state law that provides for an award of compensatory damages to an undocumented employee would be allowing what federal law prohibits.

D. A State Law That Is An Obstacle To The Accomplishment And Execution Of The Full Purposes And Objectives Of Congress Is Preempted.

Arizona, supra, examined a provision of the challenged Arizona statute that made it a state misdemeanor for "an unauthorized alien to knowingly apply for work, solicit work in a public place or perform work as an employee or independent contractor." In holding that this provision constituted an obstacle to the objectives of federal immigration policy, the Court stated:

> IRCA's framework reflects a considered judgment that making criminals out of aliens engaged in unauthorized work--aliens who already face the possibility of employer exploitation because of their removable status--would be inconsistent with federal policy and objectives. . . .
>
> Arizona law would interfere with the careful balance struck by is an obstacle to the regulatory system Congress chose. Although § 5(C) [of the challenged statute] attempts to achieve one of the same goals

> as federal law--the deterrence of unlawful employment--it involves a conflict in the method of enforcement. The Court has recognized that a "[c]onflict in technique can be fully as disruptive to the system Congress enacted as conflict in overt policy." *Motor Coach Employees* v. *Lockridge*, 403 U.S. 274, 287, 91 S. Ct. 1909, 29 L. Ed. 2d 473 (1971). The correct instruction to draw from the text, structure, and history of IRCA is that Congress decided it would be inappropriate to impose criminal penalties on aliens who seek or engage in unauthorized employment. It follows that a state law to the contrary is an obstacle to the regulatory system Congress chose.

(132 S. Ct. at pp. 2504-2505.)

In *Olszewski, supra,* the Court found that the challenged state statute allowed a health care provider to recover more than the provider was entitled to recover under federal law and accordingly was an obstacle to the accomplishment of Congress's intent. (30 Cal.4th at p. 820.)

Hoffman's holding that an allowing an award of backpay to an undocumented worker "would encourage the successful evasion of apprehension by immigration authorities, condone prior violations of the immigration laws, and encourage future violations" (535 U.S. at

p. 151) demonstrates why a state law that provided for an award of compensatory damages would be an obstacle to the full accomplishment of federal immigration policy.

E. Allowing an Award of Compensatory Damages for a Violation of State Labor and Employment Laws would Conflict with and Be an Obstacle to the Central Purpose of Federal Immigration Policy.

Hoffman's analysis of the relationship between the IRCA and an award of backpay to an undocumented employee provides a clear explanation of why an award of compensatory damages to an undocumented worker for a violation of state labor and employment laws would conflict with and be an obstacle to the accomplishment of federal immigration policy.

Hoffman's journey to the Supreme Court began with an Administrative Law Judge's ruling that an award of backpay or reinstatement to an undocumented employee for violation of the NLRA would be contrary to *Sure-Tan, Inc. v. NLRB* (1984) 467 U.S. 883 and in conflict with the IRCA, which makes it unlawful for employers knowingly to hire undocumented workers or for employees to use fraudulent documents to establish employment

eligibility. The NLRB reversed the ALJ's ruling with regard to backpay, finding that the most effective way to further federal immigration policy was to provide the NLRA's remedies to undocumented workers in the same manner as to other employees. The Court of Appeal denied the employer's petition for review of the NLRB's order. (*Hoffman Plastic Compounds v. NLRB* (2001) 237 F.3d 639.) The Supreme Court granted certiorari and reversed the judgment of the Court of Appeals.

Hoffman's reversal was based on a conflict which the Court held to exist between an award of backpay to an undocumented employee and federal immigration policy, which has at its core the denial of employment to illegal aliens:

> As we have previously noted, IRCA "forcefully" made combating the employment of illegal aliens central to "the policy of immigration law." *INS v. National Center for Immigrants' Rights, Inc., 502 U.S. 183, 194, 116 L. Ed. 2d 546, 112 S. Ct. 551, and n. 8 (1991).* It did so by establishing an extensive "employment verification system," *§ 1324a(a)(1)*, designed to deny employment to aliens who (a) are not lawfully present in the United States, or (b) are not lawfully authorized to work in the

> United States, *§ 1324a(h)(3).* This verification system is critical to the IRCA regime. To enforce it, IRCA mandates that employers verify the identity and eligibility of all new hires by examining specified documents before they begin work. *§ 1324a(b).* If an alien applicant is unable to present the required documentation, the unauthorized alien cannot be hired. *§ 1324a(a)(1).*

(*Hoffman, supra,* 535 U.S. at pp. 147-148 [footnote omitted].)

The Court held that an award conflicted with the policy of denying employment to undocumented workers:

> 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.

(*Id.* at pp. 148-149.)

The Court also found that awarding backpay to an undocumented worker would be an obstacle to accomplishing IRCA's policy of denying employment to undocumented employees:

> Indeed, awarding backpay in a case like this not only trivializes the immigration laws, it also condones and encourages future violations. The Board admits that had the INS detained Castro [the undocumented employee], or had Castro obeyed the law and departed to Mexico, Castro would have lost his right to backpay. . . . Castro thus qualifies for the Board's award only by remaining inside the United States illegally. . . .

(*Id.* at p. 150.)

The same considerations apply to an award of compensatory damages to an undocumented worker for a violation of state labor or employment laws. Only by illegally remaining in the United States could an undocumented worker qualify for an award of compensatory damages. A state law that provided for an award

would condone and encourage future violations. This represents both a conflict with and an obstacle to the central tenet of the IRCA.

III. CONCLUSION.

The analysis in *Hoffman* of the relationship between IRCA and the award of backpay to an undocumented employee is dispositive of the issue whether an award of compensatory damages to an undocumented worker for a violation of state labor and employment laws would conflict with or be an obstacle to the accomplishment of federal immigration policy. That policy prohibits the NLRB from awarding backpay to an undocumented worker for a NLRA violation and preempts a state law that provides for an award of compensatory damages to an undocumented worker for a violation of state labor and employment laws.

Dated: May 28, 2013

Respectfully submitted,

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CERTIFICATE OF WORD COUNT
(Calif. Rule of Court 8.204(s)(1))

The test of this brief consists of 4303 words as counted by the word processing program (Word Perfect) that was used to generate this brief.

Dated: May 28, 2013

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PROOF OF SERVICE

I hereby certify that I am a citizen of the United States, over the age of eighteen years, and not a party to this action. My business address is 1818 Grand Canal Boulevard, Suite 4, Stockton, California 95207. I served the foregoing document entitled:

RESPONDENT'S SUPPLEMENTAL BRIEF

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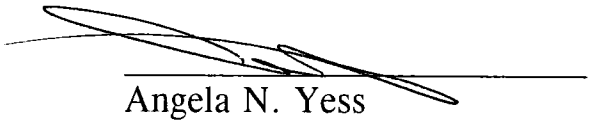
The acts described above were undertaken and completed in San Joaquin County on May 28, 2013.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct, and that this declaration was executed on May 28, 2013, at Stockton, California.



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