Case No. S196568

IN THE SUPREME COURT OF CALIFORNIA

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

APPELLANT'S RESPONSE TO 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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INTRODUCTION

In its supplemental brief, Defendant and Respondent Sierra Chemical Company contends that this Court should find that SB 1818 conflicts with and is thus preempted by IRCA. The difficulty with this proposition, however, is that there exists nothing in law or fact to support it.

ARGUMENT

Sierra makes no argument that IRCA expressly preempts SB 1818, and further concedes that there is no basis for a finding of field preemption.[1] Accordingly, it "suggests that the law in question should be examined through the prism of conflict and obstacle preemption".[2]

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[1] Respondent's Supplemental Brief ("RSB") at 4-5.

[2] *Id.* at 5. Sierra treats "conflict preemption" and "obstacle preemption" as different preemption analyses. (*See, e.g.*, RSB at 3, 5, 18.) Because some authorities treat the latter as a subset of the former (*see, e.g., Jevne v. Superior Court* (2005) 35 Cal.4th 935, 949-50; *Arizona v. United States* (2012) 567 U.S. at ___, 132 S.Ct. 2494, 2501), and for simplicity's sake, this brief will refer to "conflict" in responding to Sierra's arguments that SB 1818 conflicts with IRCA and/or is an obstacle to it. *But cf. Viva! International Voice for Animals v. Adidas Promotional Retail Ops., Inc.* (2007) 41 Cal.4th 929, 935 n.3 ("'The categories of preemption are not 'rigidly distinct.'' . . . As conflict and obstacle preemption are analytically distinct . . . we treat them as separate categories here.") (citations omitted).

I. Sierra's Near-Total Reliance on *Hoffman* is Unavailing

In asserting that SB 1818 – and, by extension, the substantive state law workplace protections that it reaffirmed for undocumented workers – is preempted by IRCA, Sierra relies virtually exclusively on *Hoffman Plastic Compounds, Inc. v. NLRB* (2002) 535 U.S. 137, which found that the National Labor Relations Board ("NLRB") exceeded its discretion in awarding backpay to an undocumented worker as a remedy for his employer's unlawful labor practices under the National Labor Relations Act ("NLRA"). Sierra notes that *Hoffman* found such backpay awards to be "counter to" IRCA's purposes in that those awards "condone[d]" unlawful conduct. The essence of Sierra's argument is contained in the following paragraph:

> 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.

(RSB at 15-18.[3])

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[3] In its brief, Sierra discusses whether awards of "compensatory *damages*" are preempted by IRCA (emphasis added). (*See, e.g.*, RSB at 3, 12, 14, 17, 18.) For purposes of this responsive brief, Appellant will assume that Sierra is in fact referring thereby to "compensatory *remedies*" as specified in the Court's February 27, 2013 Order

This conclusory statement – unsupported by anything other than a series of block quotations lifted from *Hoffman*, unaccompanied by any analysis – does not make any effort to explain why the FEHA antidiscrimination remedies reaffirmed by SB 1818 conflict with IRCA. Sierra, for one, does not explain how providing state law remedies for the disability discrimination alleged here in fact "condone[s] and encourage[s] future violations." Nor does it explain *why* "the same considerations" that preclude NLRA administrative backpay awards to undocumented workers would also bar the civil remedies for employment practices that this State, in the exercise of its police powers, has declared unlawful – particularly given the important presumption against preemption, which Sierra concedes.[4] Likewise, Sierra wholly fails to acknowledge that the underlying statute at issue here – the FEHA – is a court-enforced State civil rights law that, unlike the NLRA, depends critically upon private enforcement and an array of civil remedies to achieve its purposes.[5] In short, it fails to explain how *Hoffman*, a case that turned on the *NLRB's* lack of discretion to decide whether an award of backpay was "counter to" IRCA, provides useful guidance in the present case.[6]

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directing this supplemental briefing, which remedies would *inter alia* include backpay, compensatory damages, and punitive damages.

[4] *See, e.g.*, RSB at 2, 6.

[5] *See, e.g.*, Appellant's Supplemental Brief ("ASB") at 20-21.

[6] *Id.* at 142-43 (announcing, at the outset of its analysis, "This case exemplifies the principle that the Board's discretion to select and

Similarly, Sierra neglects to explain how *Hoffman* supports the idea, for purposes of *preemption* analysis, that there is an actual conflict between IRCA and SB1818 such that the remedies that SB1818 reaffirms cannot possibly stand. As set forth in Appellant's Supplemental Brief, IRCA and SB 1818 do not conflict with each other.[7] And certainly Congress saw no conflict with State workplace laws when it enacted IRCA; to the contrary, it was crystal clear that existing State employment protections and remedies were to remain undisturbed and in full force as a *necessary complement* to IRCA: "To do otherwise would be counterproductive of our intent to limit the hiring of undocumented workers and the depressing effect on working conditions caused by their employment."[8]

Sierra likewise makes no attempt to explain away the perverse economic incentives *to* hire unauthorized workers that would result from leaving them unprotected from employer discrimination.[9] As Congress explicitly observed, eliminating such incentives would *obviate* conflict with IRCA, not create it. Nor does Sierra address the fallacy of assuming that unauthorized workers are drawn to the United

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fashion remedies for violations of the NLRA, though generally broad, is not unlimited.") (citations omitted).

[7] ASB at 7-15.

[8] H.R. Rep. No. 99-682(II) at 8-9, *reprinted in* U.S. Code Cong. & Admin. News 5649, 5758; *see also* ASB at 6 and authorities cited there.

[9] *See, e.g.*, ASB at 10-13.

States in hopes of being discriminated against and, as a result, winning the opportunity to attempt to obtain remedies for their harms through the legal system.[10]

Finally, Sierra parrots *Hoffman*'s language in asserting that "[o]nly by illegally remaining in the United States could an undocumented worker qualify for an award of compensatory damages." (RSB at 17.) But in so doing, Sierra fails to recognize that neither backpay, nor compensatory or punitive damages, nor any other compensatory, "make whole" remedies require (as does reinstatement) a prevailing plaintiff's future unauthorized presence in the United States.[11] *See, e.g., NLRB v. A.P.R.A. Fuel Oil Buyers Group* (2d Cir. 1997) 134 F.3d 50, 58 ("the backpay order does not require the reestablishment of an employment relationship in contravention of IRCA. Instead, it simply compensates Benavides and Guzman for the economic injury they suffered as a result of the Company's unlawful discrimination against them.") (*abrogated on other grounds, Hoffman Plastic Compounds, Inc. v. NLRB* (2002) 535 U.S. 137; *discussed at Madeira v. Affordable Housing Fdn., Inc.* (2d Cir. 2006) 469 F.3d 219, 233).

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[10] *See* ASB at 23 and authorities cited at n.27.

[11] Sierra quotes *Hoffman*'s statement that "[i]ndeed, awarding backpay . . . condones and encourages future violations." (RSB at 17.) But the *Hoffman* majority was referring to situations in which a worker might have been detained by immigration authorities or voluntarily left the United States. (535 U.S. at 150.)

For these reasons, *Hoffman* does not support a conclusion that SB 1818 is conflict preempted by IRCA.[12]

II. SB 1818 Does Not "Allow" An Activity That Is Prohibited by Federal Law

Sierra devotes a section of its brief to arguing the generally unremarkable proposition that "a state law that allows an activity that is prohibited by federal law is preempted." (RSB at 8-12.) But to the extent that Sierra contends that SB 1818 somehow "allows" activity prohibited by IRCA, this argument is astoundingly misdirected.

SB 1818, of course, in no way purports to make legal or otherwise permit the knowing employment of unauthorized workers. It simply reaffirms the existence of rights and remedies that those

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[12] The cases discussed by Sierra in which state law was found preempted are not useful here. For example, in *Olszewski v. Scripps Health* (2003) 30 Cal.4th 798, Medicaid's legislative history made clear that it prohibited burdening "needy" beneficiaries with health care costs. *Id.* at 819. Thus, this Court had no trouble finding that Medicaid preempted a California law that would allow health providers to collect liens on Medicaid beneficiaries. *Id.* Here, in contrast, IRCA's legislative history addresses Federal and State workers' rights only in order to reaffirm their continuing vitality. ASB at 6.

Likewise, *Arizona v. United States* (2012) 567 U.S. ___, 132 S.Ct. 2492 found provisions of Arizona state law preempted insofar as they encroached on the federal government's exclusive power to regulate alien registration, and conflicted with federal law by deputizing state officials to act as immigration officials and creating criminal penalties for working without authorization where Congress had manifested an opposite intent. By comparison, SB 1818 neither encroaches upon federal immigration authority nor conflicts with Congressional intent.

workers have against an employer who has violated this State's employment and labor laws. Nothing about SB 1818 or the remedies it preserves "allows" the unlawful employment of undocumented workers any more than the existence of penalties for any sort of unlawful behavior somehow "allows" or otherwise condones any aspect of that behavior. Certainly, it is difficult to see how reaffirming penalties for law-breaking employers who would exploit undocumented persons somehow connotes a license by the Legislature for those employers to hire them. And as already described, the denial of equal remedies to those workers would encourage their hiring and, if anything, serve to *perpetuate* IRCA violations. No conflict is present here.

III. SB 1818 Does Not Conflict With the Conduct of Foreign Affairs

Sierra appears to concede that the presumption against preemption applies here. (*See* RSB at 8 [acknowledging that *Arizona*, an immigration case, recognizes a presumption against preemption, and stating that "Sierra Chemical suggests that the foreign affairs exception [to that presumption] ... does not apply here"]). But even were Sierra to contend that no presumption should apply here because immigration policy is related to foreign affairs, that argument would be unavailing.[13]

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[13] The sole decision it cites to in this regard, *Viva! International Voice for Animals v. Adidas Promotional Retail Ops., Inc.* (2007) 41 Cal.4th 929, observes only that "where a traditional state exercise of the police power implicates foreign affairs concerns, *no particular*

It is undisputed that federal immigration law is related to and may implicate many aspects of the foreign affairs of the Nation. *See, e.g., Toll v. Moreno* (1982) 458 U.S. 1, 10. But Sierra does not explain how *SB 1818* constitutes a regulation of foreign affairs, let alone one that would conflict with the federal government's primacy in that area. As discussed *supra*, however, SB 1818 is not an immigration law; it does not purport to "allow" the employment of unauthorized workers, or to affect in any manner the terms upon which immigrant workers are admitted to the United States or deported therefrom. If anything, Congress in 1986 made plain that the preservation of State workplace rights and remedies for undocumented workers – which SB 1818 effects – was consistent with and, indeed, was a critical element in *advancing* IRCA's goals of stemming unlawful immigration to the United States. As such, there is no cognizable argument that SB 1818 is preempted as conflicting with the federal government's conduct of foreign affairs.

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presumption applies." (*Id.* at 939; emphasis added.) Indeed, after applying ordinary preemption principles, *Viva!* ultimately concluded that Cal. Penal Code § 653o, which bars the importation into California of products made *inter alia* from kangaroo, was not preempted by the federal Endangered Species Act because it neither conflicted with nor posed an obstacle to the federal policy reflected therein. *Viva!* thus lends scant support to any notion that SB 1818 is preempted on "foreign affairs" grounds.

CONCLUSION

Sierra has provided no reason to discern any conflict between SB 1818 and IRCA, let alone any conflict that would counsel a drastic finding of preemption. Its invitation to find that IRCA preempts SB 1818 on that basis should, therefore, be declined.

Dated: June 11, 2013

Respectfully submitted,

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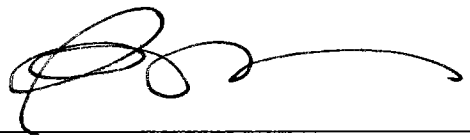
By: 

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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 Response to Respondent's Supplemental Brief contains 1,989 words, exclusive of the caption page, tables of contents and authorities, signature blocks, and this Certificate and that appearing on the page following.

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