No. 12-2170

IN THE UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

ELMER LUCAS, ET AL.,

Plaintiffs-Appellees,

v.

JERUSALEM CAFE, LLC, ET AL.,

Defendants-Appellants.

On Appeal from the United States District Court
for the Western District of Missouri

BRIEF FOR THE SECRETARY OF LABOR AS *AMICUS CURIAE* IN SUPPORT OF PLAINTIFFS-APPELLEES

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Pursuant to Federal Rule of Appellate Procedure 29(a), the Secretary of Labor ("Secretary") submits this brief as *amicus curiae* on behalf of the Plaintiffs-Appellees.

INTEREST OF THE SECRETARY OF LABOR

The Secretary has a statutory mandate to administer and enforce the Fair Labor Standards Act ("FLSA" or "Act") for all covered employees. *See* 29 U.S.C. 204, 211(a), 216(c), 217. The Department of Labor's ("Department's") longstanding position is that all workers are entitled to the minimum wage and overtime protections of the FLSA, regardless of their immigration status. The Department also has consistently interpreted *Hoffman Plastic*

Compounds, Inc. v. NLRB, 535 U.S. 137 (2002), to allow workers to recover FLSA minimum wages and overtime compensation for hours worked. Thus, the Secretary has a significant interest in countering the contrary position advanced by Defendants-Appellants in this case, and ensuring that immigration status is not a barrier to seeking redress for FLSA violations.

STATEMENT OF THE ISSUES

(1) Whether the Supreme Court's decision in *Hoffman* precludes undocumented workers from recovering unpaid minimum and overtime wages for work performed under the FLSA.

(2) Whether undocumented workers have standing to bring FLSA claims for unpaid minimum and overtime wages for work performed.

(3) Whether evidence of plaintiffs' immigration status was properly excluded because it is irrelevant both to workers' ability to recover unpaid wages under the FLSA, and to the employers' defense that they did not "employ" the plaintiffs within the meaning of the Act.

Pursuant to Eighth Circuit Local Rule 28A(i)(2), the most apposite cases to the issues in this case are *Hoffman Plastic Compounds, Inc. v. NLRB*, 535 U.S. 137 (2002), *Patel v. Quality Inn South*, 846 F.2d 700 (11th Cir. 1988), and *Galdames v. N & D Inv. Corp.*, 432 Fed. Appx. 801, 804 (11th Cir. 2011) (per curiam), *cert. denied,* 132 S. Ct. 1558 (2012). The most

apposite statutory provisions are the Fair Labor Standards Act at 29 U.S.C. 203(e), 203(g), 206, and 207, and the Immigration Reform and Control Act, 8 U.S.C. 1324a.

SUMMARY OF THE ARGUMENT

The Department's longstanding position, articulated both before and after *Hoffman*, is that undocumented workers are entitled to minimum wages and overtime pay for hours worked under the FLSA. This position is grounded in the definitions of "employee" and "employ" under the Act, which contain no limitation based on immigration status, and in the fact that enforcing the FLSA on behalf of all workers regardless of immigration status is essential to achieving the purposes of the Act to protect workers from substandard working conditions, to reduce unfair competition for law-abiding employers, and to spread work and reduce unemployment by requiring employers to pay overtime compensation. *See* 29 U.S.C. 202(a), 203(e), 203(g). The Supreme Court's decision in *Hoffman*, barring an award of backpay to an undocumented worker for work that was not performed because of an illegal discharge under the National Labor Relations Act ("NLRA"), 535 U.S. at 151, is distinguishable from FLSA claims for unpaid wages for work already performed.[1] Therefore, undocumented workers continue to

[1] The term "backpay" is often used to describe both unpaid wages for hours worked (under minimum wage and overtime laws), and the

have standing to bring suit for unpaid wages for hours worked under the FLSA. Further, evidence of plaintiffs' immigration status was properly excluded because it is irrelevant to their ability to bring suit under the FLSA and to whether they were employed within the meaning of the Act.

STATEMENT OF THE CASE

1. Plaintiffs, six former kitchen staff workers of the Jerusalem Cafe restaurant in Kansas City, Missouri, brought suit under FLSA section 16(b) against the Jerusalem Cafe, Farid Azzeh, and Adel Alazzeh, individually and as successor in interest to Jerusalem Cafe (hereinafter collectively referred to as "defendants"). *See* First Am. Compl., Case No. 4:10-CV-00582-DGK at 2 (July 10, 2010). Plaintiffs alleged that defendants willfully failed to pay them the applicable minimum wage and/or overtime wages they were due under the FLSA. *See Lucas v. Jerusalem Cafe, LLC*, No. 4:10-CV-00582-DGK, 2012 WL 1758153, at *1 (W.D. Mo. May 10, 2012); 29 U.S.C. 206, 207.

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pay owed to workers who have been wrongfully terminated and are owed wages they would have earned but for the unlawful termination. This brief refers to wages owed for hours worked as "unpaid wages" and wages owed for hours that would have been worked but for unlawful acts as "backpay." *See Sure-Tan, Inc. v. NLRB*, 467 U.S. 883, 900 (1984) (backpay is "a means to restore the situation 'as nearly as possible, to that which would have obtained but for the illegal discrimination'") (quoting *Phelps Dodge Corp. v. NLRB*, 313 U.S. 177, 194 (1941)).

2. Prior to trial, the district court granted plaintiffs' motion *in limine* seeking to preclude any mention of plaintiffs' immigration status. *See* Order Granting Mots. *in Limine*, Case No. 4:10-CV-00582-DGK at 1 (Sept. 27, 2011). The court noted that plaintiffs were Guatemalan nationals living in the United States whose "claims turn on such facts as how many hours they worked, if any; whether Defendants[] had knowledge of any overtime Plaintiffs worked; and how much Defendants paid Plaintiffs." *Id.* As such, the court determined that "even if they were working in the United States illegally, their immigration status is irrelevant" because "illegal aliens have a right to recover unpaid wages under the FLSA." *Id.*

3. A four-day jury trial was held in November 2011. *See* Appellants' Br. at 38. During the trial, one of the plaintiffs indicated during testimony that plaintiffs were "illegals." *See id.* The court issued a curative instruction, directing the jury to disregard this statement. *See id.* Subsequently, when plaintiffs' counsel was cross-examining Mr. Azzeh about why a plaintiff's hours were not on Jerusalem Cafe's payroll records, the court called a recess to discuss with the parties Azzeh's anticipated response (according to defendants' counsel, that Azzeh could not "I-9" the worker because he "didn't have paper"), as it would require dissolving the order *in limine* or precluding this line of inquiry. *See id.* The parties then

agreed to disregard the order *in limine* in order to allow for such questioning. *See id.* at 39. However, defendants argued that they should have been allowed to introduce evidence of the workers' immigration status earlier, because it was their chief defense as to why they did not place these workers on their payroll. *See id.* The jury found that plaintiffs were employed by defendants and that the failure to pay applicable wages under the FLSA was willful. *See id.* at 40. The court awarded $141,864.04 in actual damages for unpaid minimum wages and overtime, an equal amount in liquidated damages, and attorney's fees. *See id.* at 40-41.

4. Defendants moved for judgment as a matter of law or, alternatively, a new trial, arguing that undocumented workers are "prohibited by federal law from being paid any wages, [and] lacked standing to sue as 'employees.'" *See* Appellants' Br. at 41. They also argued that the order *in limine* was erroneously granted because evidence of immigration status was relevant to standing and because the order precluded defendants' "ability to make their best defense." *See id*. The district court denied defendants' motion. *See Lucas,* 2012 WL 1758153, at *4.

a. The court ruled as a threshold matter that defendants' standing argument was a belated attempt to raise an affirmative defense that the Immigration Reform and Control Act of 1986 ("IRCA") prohibits undocumented workers from being "employed" or

recovering unpaid wages under the FLSA. *See Lucas*, 2012 WL 1758153, at *2 & n.1. Because defendants failed to assert this argument earlier, it was deemed waived. *See id.* at *2. However, the court went on to hold that plaintiffs had standing to sue because they were injured by not being paid the proper wages for work they performed, which was the result of defendants' failure to pay the lawful wage; the court's judgment would redress their injury. *See id.*

The court further noted that defendants raised a specific prudential standing argument about plaintiffs not being within the "zone of interests" that the FLSA aims to protect for the first time in their reply brief, thereby precluding consideration of this argument. *See Lucas*, 2012 WL 1758153, at *2 n.3. Even if the argument were properly raised, however, the court concluded that it was meritless because the FLSA protects both documented and undocumented workers. *See id.* (citing *Patel v. Quality Inn South*, 846 F.2d 700, 704 (11th Cir. 1988), for the proposition that IRCA did not limit the rights of undocumented workers under the FLSA).

b. The district court also ruled that it properly granted plaintiffs' motion *in limine* because immigration status is irrelevant to undocumented workers' ability to recover unpaid wages under the FLSA. *See Lucas*, 2012 WL 1758153, at *2. Further, with respect to whether defendants' were harmed by the

exclusion of this evidence, the court concluded that any error was harmless because one of the plaintiffs inadvertently testified that plaintiffs were undocumented, and defendants were subsequently allowed to freely mention this during their case-in-chief. *See id.* Further, the court rejected defendants' argument that referencing plaintiffs' immigration status would have supported their defense that they did not employ plaintiffs because they were undocumented. *See id.* at *3. The court noted that defendants' testimony that they never employed plaintiffs, and that plaintiffs simply "volunteered" to work at the restaurant without pay, was "contradicted by a mountain of more credible evidence," including a video of plaintiffs working in the restaurant's kitchen and the testimony of two police officers who had discussed with defendants how plaintiffs would be paid for their last days of work. *See id.*

5. Defendants raise two arguments on appeal, both based on the applicability of *Hoffman* to unpaid wage cases under the FLSA. First, they contend that, under *Hoffman*, undocumented workers lack standing to claim unpaid wages under the FLSA. *See* Appellants' Br. at 42. Specifically, they argue that undocumented workers do not fall within the "zone of interests" protected by the FLSA because the Supreme Court in *Hoffman* directed that "federal employment statutes may not be applied to trench upon explicit statutory prohibitions in federal

immigration policy" such as IRCA's prohibition on the employment of undocumented workers. *See id.* at 43. Therefore, they contend that undocumented workers cannot be considered "employees" under the FLSA and there can be no employer-employee relationship if the worker is undocumented. *See id.* at 48-55. Second, defendants argue that the district court erroneously issued the order *in limine* and denied their motion for a new trial because evidence of plaintiffs' immigration status is relevant to their "ability to recover under the Fair Labor Standards Act" and to defendants' defense that "they had not employed the plaintiffs because the plaintiffs were undocumented aliens." *Id.* at 42.

ARGUMENT

I. *HOFFMAN* DOES NOT PRECLUDE UNDOCUMENTED WORKERS FROM RECOVERING UNPAID MINIMUM AND OVERTIME WAGES FOR WORK PERFORMED UNDER THE FLSA

Defendants' interpretation of *Hoffman* and its purported implications for unpaid wages under the FLSA is incorrect, and has not been accepted by the courts. The Supreme Court's holding in *Hoffman* regarding backpay for work that would have been performed but for an unlawful discharge is distinguishable from FLSA suits for unpaid wages. *Hoffman* cannot be read, as defendants suggest, to alter the FLSA's bedrock minimum wage and overtime requirements, nor did IRCA impliedly repeal the definitions of "employee" or "employ" under the FLSA.

1. In *Hoffman*, the National Labor Relations Board ("NLRB") determined that the company violated the NLRA by discharging employees because of their union activities. 535 U.S. at 140. The NLRB ordered that Hoffman cease and desist from violating the NLRA, post a notice regarding the remedial order, and offer reinstatement and backpay to the affected employees. *Id.* at 140-41. At an administrative hearing to determine the amount of the backpay award, one of the affected employees, Jose Castro, testified that he was from Mexico, had never been legally admitted into the United States, and had obtained his job at Hoffman by presenting false documentation. *Id.* at 141. The administrative law judge denied all relief for Castro based on his undocumented status. *Id.* The NLRB denied reinstatement, but awarded Castro backpay up to the date that Hoffman purportedly first learned that he was unauthorized to work. *Id.* at 141-42. A panel of the D.C. Circuit and then the appeals court sitting *en banc* enforced the Board's order. *Id.* at 142.

The Supreme Court reversed. It did not question its earlier holding in *Sure-Tan* that undocumented workers are "employees" under the NLRA. *See Hoffman*, 535 U.S. at 150 n.4. Instead, the Court held, in light of the changed "legal landscape" created by the passage of IRCA, that the NLRB lacked discretion to fashion a backpay remedy for such a worker. *Id.* at 147-52. The Supreme Court reasoned that the NLRB's

discretion, although broad, might have to yield when it conflicts with another federal statute. *Id.* at 147. Awarding backpay to Castro, according to the Court, would conflict with congressional policies under IRCA. *Id.* at 149. Specifically, IRCA prohibits the employment of workers who are not authorized to work in the United States, and imposes criminal and civil penalties on employees who submit false documentation as part of the required employment verification process and on employers who knowingly hire employees who lack proper documentation. *Id.* at 147-48. In the Court's view, awarding backpay to an undocumented worker "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" runs counter to those policies. *Id.* at 149.

The Supreme Court also reasoned that an award of backpay in those circumstances would encourage future violations of IRCA, because an employee like Castro qualifies for backpay only by remaining illegally in the United States. *See Hoffman,* 535 U.S. at 150. The Court further noted that the backpay award was in tension with the rule that illegally-discharged employees must attempt to mitigate their damages by seeking work, because an undocumented immigrant is not authorized to work. *Id.* at 150-51. For all these reasons, the Court concluded that an award of backpay would "unduly trench upon explicit statutory

prohibitions critical to federal immigration policy, as expressed in IRCA." *Id.* at 151. The Supreme Court emphasized that the Board could impose other, nonmonetary sanctions against an employer, such as a cease-and-desist or posting order. *Id.* at 152.

Contrary to defendants' contentions, *Hoffman* does not hold that undocumented workers are no longer considered to be "employees" under the NLRA. As noted above, the Court explicitly left undisturbed the holding of *Sure-Tan* that undocumented workers *are* employees under the NLRA. S*ee Hoffman*, 535 U.S. at 150 n.4.[2] Therefore, it is clear that *Hoffman* does not stand for the proposition that undocumented workers are no longer "employees" under the NLRA; similarly, *Hoffman* does not stand for the proposition that IRCA implicitly overruled the FLSA's definition of "employee." *See Galdames v. N & D Inv. Corp.*, 432 Fed. Appx. 801, 804 (11th Cir. 2011) (per curiam)

[2] Since *Hoffman*, the Eleventh Circuit has upheld the NLRB's conclusion that undocumented workers remain statutory employees under the NLRA after IRCA. *See NLRB v. Concrete Form Walls, Inc.*, 225 Fed. Appx. 837 (11th Cir. 2007) (per curiam) (enforcing *Concrete Form Walls, Inc.*, 346 N.L.R.B. 831, 833-34 (2006)). In addition, the D.C. Circuit has rejected arguments that IRCA impliedly repealed the definition of "employee" in the NLRA or that *Hoffman* implicitly overruled *Sure-Tan*'s holding that undocumented workers were covered as "employees" under the NLRA. *See Agri Processor Co. v. NLRB*, 514 F.3d 1, 4-5 (D.C. Cir. 2008); *see also NLRB v. Kolkka*, 170 F.3d 937, 941 (9th Cir. 1999) (IRCA did not implicitly overrule the NLRA's definition of "employee").

(*Hoffman* did not overrule post-IRCA circuit precedent holding that undocumented workers are entitled to minimum wage and overtime for work performed under the FLSA; thus, undocumented workers continue to be covered as employees under the FLSA), *cert. denied,* 132 S. Ct. 1558 (2012).

Moreover, recovering unpaid wages due under the FLSA for work already performed does not present the same potential conflict with IRCA policies as do backpay awards for wage losses resulting from unlawful job deprivation under the NLRA. A suit for wages for *hours worked* under the FLSA seeks payment for work actually performed, rather than for work employees claim they *would* have performed but for their illegal layoff or termination. Accordingly, a suit for FLSA back wages does not implicate the Supreme Court's concern in *Hoffman* that Congress did not intend to permit recovery for work not performed. It also does not implicate the Supreme Court's concern that an NLRA backpay award, which is contingent on an undocumented worker's continued presence in the United States, would encourage such workers to remain in the United States in order to obtain a recovery. Moreover, there is no duty to mitigate damages in an FLSA suit for hours worked; thus, there is no tension with the rule that employees who seek backpay for an illegal discharge must mitigate their damages.

In addition, *Hoffman* addresses the NLRB's authority to remedy unfair labor practices, which does not require an award of backpay in all cases. *See* 535 U.S. at 152; 29 U.S.C. 160(c). The Supreme Court essentially concluded that even by requiring the Board to forgo backpay remedies, the purposes of the statute could still be achieved with other remedies, such as NLRB orders to cease and desist violations and to post a notice to employees detailing NLRA rights and the employer's prior NLRA violations. *See Hoffman*, 535 U.S. at 152. By contrast, the FLSA's enforcement provisions necessarily provide for the recovery of unpaid minimum wages and overtime compensation. *See* 29 U.S.C. 216(b), (c). Removing these remedies under the FLSA would be contrary to the central purpose of the statute -- to improve working conditions by imposing minimum wage and overtime requirements. *See* 29 U.S.C. 202(a) (setting out congressional finding of "labor conditions detrimental to the maintenance of the minimum standard of living necessary for health, efficiency, and general well-being of workers"); *Overnight Motor Transp. Co. v. Missel*, 316 U.S. 572, 575-78 (1942).

In sum, *Hoffman*'s holding is limited to backpay for unperformed work under the NLRA's remedial scheme, which is distinguishable from undocumented workers' recovery of minimum wages and overtime compensation under the FLSA for work already performed. Thus, defendants' argument as to the applicability

of *Hoffman* to the FLSA's minimum and overtime wage requirements should be rejected.

2. The Department has had a longstanding and consistent interpretation, articulated both before and after *Hoffman,* that the FLSA includes all workers regardless of immigration status. *See* U.S. Dep't of Labor, Wage and Hour Division, "Fact Sheet #48: Application of U.S. Labor Laws to Immigrant Workers: Effect of Hoffman Plastics decision on laws enforced by the Wage and Hour Division" ("WHD Factsheet #48") (rev. July 2008), *available at* https://www.dol.gov/whd/regs/compliance/whdfs48.htm; Sec'y of Labor's Br., *Josendis v. Wall to Wall Residence Repairs, Inc.*, No. 09-12266 (11th Cir. filed Aug. 26, 2010), *available at* http://dolcontentdev.opadev.dol.gov/sol/media/briefs/josendis(A)-8-26-2010.htm (letter brief setting forth government's view that the Eleventh Circuit's decision in *Patel*, which held that undocumented workers are entitled to minimum wages and overtime pay for hours worked under the FLSA, remains good law after the Supreme Court's decision in *Hoffman*).[3] As an initial matter, the

[3] The Eleventh Circuit did not reach this issue in its decision in *Josendis* because it concluded that the district court properly granted summary judgment for the employer on other grounds. *See Josendis v. Wall to Wall Residence Repairs, Inc.*, 662 F.3d 1292, 1301 n.14 (11th Cir. 2011). However, as discussed *supra,* a separate panel of the Eleventh Circuit, in an unpublished decision, held that *Hoffman* did not overrule the Eleventh Circuit's precedent in *Patel*; thus, undocumented workers continue to be covered under the FLSA. *See Galdames*, 432 Fed. Appx. at 804.

Department interprets the broad definitions of "employee" in section 3(e)(1) as "any individual employed by any employer," and "employ" in section 3(g) as "to suffer or permit to work," to expressly include all individuals employed by covered employers without any limitation based on immigration status. 29 U.S.C. 203(e)(1), (g).

The Department consistently has enforced the FLSA and gained relief on behalf of undocumented workers. *See, e.g., In re Chao*, No. 08-mc-56-JSS, 2008 WL 4471802 (N.D. Iowa Oct. 2, 2008); U.S. Dep't of Labor, News Release Number: 05-461-DAL, "U.S. Labor Department Sues Juan's Tractor Services in Keller, Texas, to Recover $142,347 in Back Wages" (Mar. 22, 2005), *available at* https://www.dol.gov/whd/media/press/whdpressVB2.asp?pressdoc=Southwest/SWarchive2/20050461.xml ("If employees work overtime hours, they must be paid overtime compensation irrespective of their immigration status."); *Donovan v. Burgett Greenhouses, Inc.*, 759 F.2d 1483 (10th Cir. 1985); *Donovan v. MFC, Inc.*, No. CA-3-81-0925-D, 1983 WL 2141 (N.D. Tex. Dec. 27, 1983); *Brennan v. El San Trading Corp*., No. EP 73 CA-53, 1973 WL 991 (W.D. Tex. Dec. 26, 1973). In addition, the Department has successfully maintained the legal position that employer questioning regarding employees' immigration status is improper because immigration status is not relevant to liability for unpaid wages under the FLSA. *See,*

e.g., Solis v. Cindy's Total Care, Inc., No. 10 Civ. 7242, 2011 WL 6013844 (S.D.N.Y. Dec. 2, 2011) (granting motion *in limine* excluding evidence of employees' immigration status); *Solis v. Raceway Petroleum, Inc.*, No. 06-CV-3363 (D.N.J. Feb. 16, 2010) (Doc. 128 (mot. *in limine*), Doc. 156 (order granting)); *Solis v. Best Miracle Corp.*, No. 08-CV-00998 (C.D. Cal. Feb. 8, 2010) (Doc. 123 (mot. *in limine*), Doc. 167 (order granting)); *Chao v. Danmar Finishing Corp.*, No. 02-CV-2586 (E.D.N.Y. Apr. 23, 2003) (Doc. 28 (letter br. for protective order), Doc. 40 (order granting)). The passage of IRCA did not require the Department to alter its enforcement strategies. To the contrary, in section 111(d) of IRCA, Congress appropriated funds for "such sums as may be necessary to the Department of Labor for enforcement activities of the Wage and Hour Division . . . in order to deter the employment of unauthorized aliens and remove the economic incentive for employers to exploit and use such aliens." Pub. L. No. 99-603, § 111(d), 100 Stat. 3359, 3381 (1986).

This enforcement policy concerning undocumented workers is essential to achieving the purposes of the FLSA to protect workers from substandard working conditions, to reduce unfair competition for law-abiding employers, and to spread work and thereby reduce unemployment by requiring employers to pay overtime compensation. *See* 29 U.S.C. 202(a); *Citicorp Indus.*

Credit v. Brock, 483 U.S. 27, 36-37 (1987); *Overnight Motor Transp.*, 316 U.S. at 578. The Department has long understood that undocumented workers tend to accept substandard employment conditions and are less likely to report wage violations for fear of being deported, which can depress wages and working conditions for all workers. Applying wage and hour laws to undocumented workers also furthers the FLSA's purpose of removing substandard wages as "an unfair method of competition." 29 U.S.C. 202(a)(3). Employers that pay less than the FLSA requires them to pay have lower labor costs and may thereby gain an unfair advantage over competitors who comply with the law. *See Tony & Susan Alamo Found. v. Sec'y of Labor*, 471 U.S. 290, 299 (1985). Finally, enforcing the FLSA's wage and hour provisions for undocumented workers helps to spread employment by avoiding the creation of a subset of workers who are outside the law, and can be required to work numerous hours with no overtime pay. Requiring employers to pay an overtime premium for all workers encourages employers to hire more workers rather than exclusively employ those who are willing to work abnormally long hours "maybe out of desperation." *Mechmet v. Four Seasons Hotels, Ltd.*, 825 F.2d 1173, 1176 (7th Cir. 1987). The Department's interpretation of the FLSA to apply to all workers, regardless of immigration status, is also consistent with the

policy goals of IRCA because paying required wages reduces the incentive for employers to hire undocumented workers.

3. The courts have uniformly agreed that undocumented workers are entitled to minimum wage and overtime protections under the FLSA, and that *Hoffman* is inapplicable to such claims. In *Galdames*, just as in this case, the employer argued that the court erroneously failed to grant the employer's post-trial motion for judgment as a matter of law on the ground that the plaintiffs were not "employees" under the FLSA because they were undocumented. 432 Fed. Appx. at 803. The Eleventh Circuit noted that it had previously concluded in *Patel*, which analyzed the effect of IRCA on undocumented workers' claims for unpaid minimum and overtime wages under the FLSA, that "illegal aliens were covered 'employees' under the FLSA and could sue for unpaid wages." *Id.* (citation omitted). The Eleventh Circuit determined that *Hoffman* was not directly on point because it pertained to the NLRA, not the FLSA, and because in *Patel* the undocumented worker sought unpaid minimum wages and overtime for work already performed as opposed to backpay for being unlawfully discharged. *See id.* at 804. The court concluded that *Hoffman* did not "clearly overrule" circuit precedent; it

thus reaffirmed that "illegal aliens are 'employees' covered by the FLSA." *Id.*[4]

There are numerous district court decisions ruling that *Hoffman* is inapplicable to FLSA suits for unpaid wages. For example, in *Cindy's Total Care*, 2011 WL 6013844, at *2-3, the district court granted the Secretary's motion *in limine* because the plain text of the Act extends protections and remedies to "any individual" without qualification, the immigration status of employees is irrelevant when the backpay award sought is exclusively for work that was already performed, and because

[4] Other post-*Hoffman* appellate court decisions support such a result. For example, the Second Circuit observed that ordering an employer to pay minimum wages prescribed by the FLSA for labor already performed is at the far end of the "spectrum of remedies potentially available to undocumented workers" in terms of a conflict with federal immigration policy because "the immigration law violation has already occurred. The order does not itself condone that violation or continue it. It merely ensures that the employer does not take advantage of the violation by availing himself of the benefit of undocumented workers' past labor without paying for it . . . ." *Madeira v. Affordable Hous. Found., Inc.*, 469 F.3d 219, 242-43 (2d Cir. 2006). In *Bollinger Shipyards, Inc. v. Director, OWCP*, 604 F.3d 864, 879 (5th Cir. 2010), the Fifth Circuit held that undocumented workers are covered under the Longshore and Harbor Workers' Compensation Act, and that neither *Hoffman* nor IRCA preclude undocumented workers' receipt of workers' compensation. And in *Rivera v. NIBCO, Inc.*, 364 F.3d 1057, 1069 (9th Cir. 2004), the Ninth Circuit expressed "serious[] doubt" about whether *Hoffman*'s holding applied to backpay awards for undocumented workers under Title VII of the Civil Rights Act of 1964, given that "the overriding national policy against discrimination would seem likely to outweigh any bar against the payment of back wages to undocumented immigrants in Title VII cases."

such an award vindicates both the FLSA and federal immigration policy. In *Jin-Ming Lin v. Chinatown Restaurant Corp.*, 771 F. Supp. 2d 185, 190 (D. Mass. 2011), the district court concluded that undocumented workers could recover unpaid wages under the FLSA because, unlike the backpay award at issue in *Hoffman* which was discretionary under the NLRA, "awards for unpaid wages under the FLSA are not discretionary, but rather a matter of statutory entitlement when the necessary factual predicate has been established." In *Villareal v. El Chile, Inc.*, 266 F.R.D. 207, 212 (N.D. Ill. 2010), the district court granted a protective order barring inquiry into plaintiffs' immigration status "because courts that have considered the issue have held -- uniformly as far as the cases cited by the parties or this court's research discloses -- that immigration status is not relevant to a claim under the FLSA for unpaid wages for work previously performed." *See Zavala v. Wal-Mart Stores, Inc.*, 393 F. Supp. 2d 295, 321-24 (D.N.J. 2005) (joining "the growing chorus acknowledging the right of undocumented workers to seek relief for work already performed under the FLSA"); *Flores v. Amigon*, 233 F. Supp. 2d 462, 463-64 (E.D.N.Y. 2002) (noting the longstanding distinction between "undocumented workers seeking backpay for wages actually earned and those seeking backpay for work not performed," and stating that the "policy issues addressed and implicated by the decision in *Hoffman* do not apply

with the same force . . . in a case" for unpaid overtime compensation); *Flores v. Albertsons, Inc.*, No. CV0100515AHM, 2002 WL 1163623, at *5 (C.D. Cal. Apr. 9, 2002) (denying discovery regarding immigration status, noting that "*Hoffman* does not establish that an award of unpaid wages to undocumented workers for work actually performed runs counter to IRCA"); *see also David v. Signal Int'l, LLC*, 257 F.R.D. 114, 124 (E.D. La. 2009); *Montoya v. S.C.C.P. Painting Contractors, Inc.*, 589 F. Supp. 2d 569, 577 n.3 (D. Md. 2008); *Chellen v. John Pickle Co.*, 446 F. Supp. 2d 1247, 1277-78 (N.D. Okla. 2006); *Galaviz-Zamora v. Brady Farms, Inc.*, 230 F.R.D. 499, 501-02 (W.D. Mich. 2005).

4. Finally, the Department is entitled to a degree of deference for its longstanding and consistent interpretation of the FLSA as applicable to all workers, regardless of immigration status, as well as its position regarding the remedies available under the FLSA post-*Hoffman*. *See Skidmore v. Swift & Co.*, 323 U.S. 134, 140 (1944). These views have been set forth in WHD Factsheet #48 and are evidenced by the Department's enforcement priorities and litigation positions over several decades, including the position taken and deferred to by the Eleventh Circuit when the Department participated as *amicus curiae* in *Patel*, the litigation undertaken in the ten years since *Hoffman*, and in the letter brief filed by the Secretary in the Eleventh Circuit in *Josendis*. *See Fed. Express Corp. v. Holowecki*, 552

U.S. 389, 398-402 (2008) (deferring to EEOC's position taken in policy statements, internal directives, and brief).

II. UNDOCUMENTED WORKERS HAVE STANDING TO BRING SUIT UNDER THE FLSA SEEKING UNPAID WAGES FOR WORK PERFORMED

1. Defendants' standing argument does not appear to be based on constitutional requirements, but rather on the prudential requirement that plaintiffs' injuries be within the "zone of interests" sought to be protected by the statute. *See* Appellants' Br. at 46.[5] As a threshold matter, the district court properly viewed defendants' prudential standing argument as a statutory defense that IRCA prohibits undocumented workers from being "employed" or recovering unpaid wages under the FLSA, and correctly determined that this argument was waived because it was raised for the first time in a reply brief. *See Lucas*, 2012 WL 1758153, at *2 & n.3; *see, e.g., United States v. Van Nguyen*, 602 F.3d 886, 893 (8th Cir. 2010). The question whether a plaintiff bringing an FLSA suit is an "employee" under the Act

[5] To the extent this Court chooses to address constitutional standing (rather than deeming it to be a waived statutory defense), it should affirm the district court's holding that plaintiffs, as undocumented workers, have standing to sue their employer for unpaid wages for work performed because they were injured by the failure to pay applicable wages, the injury was caused by their employers, and the court could order relief for these injuries. *See Red River Freethinkers v. City of Fargo*, 679 F.3d 1015, 1022-23 (8th Cir. 2012) ("To have standing, '[a] plaintiff must allege personal injury fairly traceable to the defendant's allegedly unlawful conduct and likely to be redressed by the requested relief.'") (quoting *Allen v. Wright*, 468 U.S. 737, 751 (1984)).

(or whether IRCA implicitly amended the FLSA) is an element of the plaintiff's claim for relief rather than a potential jurisdictional bar to the court's consideration of that claim. *Cf. Arbaugh v. Y & H Corp.*, 546 U.S. 500, 516 (2006) ("[W]hen Congress does not rank a statutory limitation on coverage as jurisdictional, courts should treat the restriction as nonjurisdictional in character.").

2. Defendants do not cite a single case holding that undocumented workers lack standing to seek unpaid wages under the FLSA's minimum wage and overtime provisions. As discussed above, courts have uniformly held that undocumented workers are entitled to seek compensation for unpaid wages under the FLSA. Some courts have specifically addressed this as a standing issue, concluding that *Hoffman* does not prohibit plaintiffs from having standing to bring claims for unpaid wages for work already performed. *See, e.g., Galaviz-Zamora*, 230 F.R.D. at 502 (concluding that *Hoffman* does not apply to circumstances where individuals seek compensation for work already performed; therefore, plaintiffs' immigration status is not relevant for purposes of standing or damages); *Reyes v. Van Elk, Ltd.*, 148 Cal. App. 4th 604, 615 (Cal. App. 2d Dist. 2007) (*Hoffman* does not prohibit plaintiffs from having standing to bring prevailing wage claims for work already performed). Other courts, like the Eleventh Circuit, have simply affirmed post-*Hoffman* that

undocumented workers may bring claims under the FLSA. *See Galdames*, 432 Fed. Appx. at 804; *see also Polycarpe v. E & S Landscaping Serv., Inc.*, No. 07-23223-CV-JLK, 2011 WL 5321006, at *2 (S.D. Fla. Nov. 3, 2011) (rejecting employer's argument that plaintiffs, as undocumented workers, could not bring suit under the FLSA).

Defendants contend essentially that IRCA implicitly amended the FLSA, and that undocumented workers lack prudential standing because they can no longer be considered "employees" under the Act. Defendants would thus have this Court rule that IRCA's prohibition on hiring unauthorized workers means that employers who nevertheless employ undocumented workers and reap the benefits of their labor are completely immune from any requirement to pay wages as mandated under the FLSA. However, the plain language of the term "employee" under the FLSA does not contain any limitation based on immigration status, and every court that has considered this issue post-*Hoffman* has concluded that undocumented workers are "employees" within the meaning of the Act. The FLSA was enacted in large part to protect workers from substandard working conditions and to reduce unfair competition for law-abiding employers. *See* 29 U.S.C. 202(a). Indeed, if IRCA were interpreted as defendants suggest, it would directly conflict with the purposes of the FLSA, which "was clearly designed to prevent such unfair

competition and the unjust enrichment of employers who hire illegal workers so as to pay substandard wages." *Cindy's Total Care*, 2011 WL 6013844, at *3. Allowing all workers to seek redress for employers' failure to pay minimum wage and overtime under the FLSA, regardless of immigration status, thus serves the purposes of the Act. Finally, "amendments by implication are disfavored." *Patel*, 846 F.2d at 704 (ruling that "nothing in the IRCA or its legislative history suggests that Congress intended to limit the rights of undocumented aliens under the FLSA. To the contrary, the FLSA's coverage of undocumented aliens is fully consistent with the IRCA and the policies behind it").[6] As such, undocumented workers are within the zone of interests the FLSA sought to protect.

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[6] Defendants' statement that *Hoffman* "command[ed] that federal employment statutes cannot be read to trench upon express prohibitions critical to the IRCA" to support its argument against the recovery of unpaid FLSA wages for undocumented workers, *see* Appellants' Br. at 56, not only ignores the specific holding of *Hoffman*, discussed above, but also IRCA's legislative history. In *Patel*, the Eleventh Circuit examined IRCA and its potential implications for the FLSA in detail. Specifically, the court cited a House Education and Labor Committee Report on IRCA, which stated in relevant part that IRCA was not intended to limit the powers of agencies such as the Department's Wage and Hour Division, because otherwise it would be "'counterproductive of our intent to limit the hiring of undocumented employees and the depressing effect on working conditions caused by their employment.'" 846 F.2d at 704 (quoting H.R. Rep. No. 99-682 (II), at 8-9 (1986), *reprinted in* 1986 U.S.C.C.A.N. 5657, 5658). In addition, IRCA provided increased funding to the Department's Wage and Hour Division "'in order to deter the employment of unauthorized aliens and remove the economic incentive for employers to exploit and use

III. EXCLUDING EVIDENCE OF PLAINTIFFS' IMMIGRATION STATUS WAS PROPER BECAUSE SUCH EVIDENCE IS NOT RELEVANT TO THEIR ABILITY TO RECOVER UNPAID WAGES UNDER THE FLSA OR TO DEFENDANTS' DEFENSE THAT THEY DID NOT "EMPLOY" PLAINTIFFS WITHIN THE MEANING OF THE ACT

1. For the reasons discussed above, the district court properly granted the order *in limine* excluding evidence of plaintiffs' immigration status on the ground that it is not relevant to their ability to recover unpaid wages under the FLSA. Further, allowing inquiry into plaintiffs' immigration status would have a chilling effect on workers' willingness to come forward and seek redress. *See, e.g., In re Reyes*, 814 F.2d 168, 170 (5th Cir. 1987) (refusing to allow discovery regarding immigration status in FLSA case because it was irrelevant and "could inhibit petitioners in pursuing their rights in the case"); *see also Rivera*, 364 F.3d at 1064 (holding that a protective order barring discovery of immigration status during

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such aliens.'" *Id.* (quoting Pub. L. No. 99-603, § 111(d), 100 Stat. 3381). Although the majority in *Hoffman* questioned the probative value of a committee report from one House of a politically divided Congress, it primarily rejected the report because it said nothing about the NLRB's authority to award backpay to undocumented workers. 535 U.S. at 149-50 n.4 (discussing H.R. Rep. No. 99-682 (I), at 58 (1986), *reprinted in* 1986 U.S.C.C.A.N. 5649, 5662, a House Judiciary Committee report on IRCA which states that the committee did not intend to "undermine or diminish in any way labor protections in existing law"). The congressional reports and the additional funding provided in IRCA for the Wage and Hour Division to enforce the FLSA and reduce incentives for employers to exploit unauthorized workers are important indicators that Congress did not intend to "trench upon" enforcement of the FLSA for all workers when it enacted IRCA.

discovery in a Title VII case was justified due to the "chilling effect that the disclosure of plaintiffs' immigration status could have upon their ability to effectuate their rights").

2. Defendants contend that the order *in limine* prevented them from making out a defense that plaintiffs were not on the payroll because they were undocumented, and therefore could not be hired as employees. That defense has no merit. Undocumented workers can be employees under the FLSA. *See, e.g., Galdames,* 432 Fed. Appx. at 804 (reaffirming that "illegal aliens are 'employees' covered by the FLSA").[7] Indeed, the jury found that plaintiffs were employed by defendants under the FLSA. *See* Appellants' Br. at 40.

Moreover, defendants' apparent belief that they did not have an employment relationship with individuals known to be unauthorized to work is not dispositive. Rather, the relevant question under the FLSA is whether, as a matter of economic reality, the individuals were in fact employees whom defendants "suffered or permitted to work," which would thereby make defendants liable for unpaid wages under the Act. *See, e.g., Blair v. Wills*, 420 F.3d 823, 829 (8th Cir. 2005) ("The Supreme Court has defined 'work' to include 'physical or mental exertion

[7] As noted above, the Supreme Court in *Hoffman* did not conclude that undocumented workers were not employees under the NLRA. *See* 535 U.S. at 150 n.4.

. . . controlled or required by the employer and pursued necessarily and primarily for the benefit of the employer and his business.'") (quoting *Tenn. Coal, Iron & R.R. v. Muscoda, Local No. 123*, 321 U.S. 590, 598 (1944)); *Rudolph v. Metro. Airports Comm'n*, 103 F.3d 677, 680 (8th Cir. 1996) ("Ordinarily, all time that an employer 'suffers or permits' its employees to work must be compensated . . . ."); *see also* 29 U.S.C. 203(g) (defining "employ" to include "to suffer or permit to work"). Employers cannot simply label a worker as a "non-employee" to escape their minimum and overtime wage obligations under the FLSA, even if that worker is undocumented. *See, e.g., Hodgson v. Taylor*, 439 F.2d 288, 290 (8th Cir. 1971) (stating that "the dispositive questions [regarding employee status] under the Act are those of economic reality"; labeling a worker as an independent contractor, for example, "does not affect this job status"); *see also Barnett v. YMCA, Inc.*, No. 98-3625, 1999 WL 110547, at *1 (8th Cir. Mar. 4, 1999) ("The Supreme Court . . . has stated that courts should determine whether an individual is an 'employee' in light of the 'economic reality' of the situation under the totality of the circumstances, rather than rely on technical labels.") (citing *Goldberg v. Whitaker House Co-op, Inc.*, 366 U.S. 28, 33 (1961)).

Defendants contend that their best defense as to whether plaintiffs were employees is that defendants "didn't want to put

illegals on [their] payroll [and] [e]verybody that's on [their] payroll was legal," Appellant's Br. at 64, and that defendants could not "I-9" the workers because they "didn't have paper," *id.* at 38. Employee status and liability for unpaid wages under the FLSA, however, cannot be determined by whether the employer followed the procedures required under IRCA when new employees are hired (using the "I-9" employment eligibility verification form), or by whether the employer kept records of hours worked as required under the FLSA. For all of these reasons, the district court's exclusion of evidence of immigration status was proper.[8]

[8] Moreover, as the district court explained, defendants were eventually able to present evidence to the jury that they did not employ plaintiffs because they were undocumented, thereby rendering any error in initially excluding such evidence harmless.

CONCLUSION

For the foregoing reasons, this Court should affirm the judgment of the district court.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I hereby certify that:

1. This brief complies with the type-volume requirements of Fed. R. App. P. 32(a)(7)(B) because this brief contains 6,929 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

2. This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because this brief has been prepared in a monospaced typeface using Microsoft Office Word 2003, Courier New 12-point font containing no more than 10.5 characters per inch.

3. The electronic version of this brief filed via the Court's CM/ECF system is a searchable PDF created from the original word processing file. It was scanned for viruses, using McAfee VirusScan Enterprise and AntiSpyware Enterprise 8.8, and is virus-free.

Date: September 24, 2012

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REVISED CERTIFICATE OF SERVICE FOR PAPER BRIEFS

I certify that a PDF version of the Brief for the Secretary of Labor as *Amicus Curiae* in Support of Plaintiffs-Appellees was filed electronically with the Clerk of this Court on September 24, 2012. I certify that Counsel for Appellants and Counsel for Appellees are registered CM/ECF users and that service was accomplished by the appellate CM/ECF system.

I further certify that I have served ten paper copies of the Brief for the Secretary of Labor as *Amicus Curiae* in Support of Plaintiffs-Appellees to the Clerk of this Court and one paper copy to the counsel listed below by express mail on September 27, 2012, and that the text of the PDF version of this Brief that was filed electronically is identical to the paper copies that were served to the Court and the following counsel:

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