SUPREME COURT OF NEW JERSEY

DOCKET NO. 089632

SERGIO LOPEZ, *Plaintiff-Petitioner,*

v.

MARMIC L.L.C., and MIKE RUANE, individually,
Defendants-Respondents.

BRIEF OF AMICI CURIAE MAKE THE ROAD NEW JERSEY, LEGAL AID AT WORK, NATIONAL EMPLOYMENT LAW PROJECT, AMERICAN CIVIL LIBERTIES UNION OF NEW JERSEY, CATA, LABORERS EASTERN REGION ORGANIZING FUND, LAUNDRY WORKERS CENTER, LEGAL SERVICES OF NEW JERSEY, NEW JERSEY ALLIANCE FOR IMMIGRANT JUSTICE, NEW LABOR, SERVICE EMPLOYEES INTERNATIONAL UNION LOCAL 32BJ, AND VOLUNTEER LAWYERS FOR JUSTICE, IN SUPPORT OF PETITION FOR CERTIFICATION

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INTRODUCTION AND PRELIMINARY STATEMENT

For the reasons set forth below, amici curiae respectfully request that this Court grant plaintiff Sergio Lopez's petition for certification, and reverse.[1]

ARGUMENT

I. IRCA DOES NOT BAR CLAIMS FOR WAGES FOR WORK ALREADY PERFORMED; INSTEAD, UNIFORM ENFORCEMENT OF NEW JERSEY'S WAGE AND HOUR LAWS IS A NECESSARY COMPLEMENT TO IRCA AND ADVANCES ITS PURPOSES.

In affirming the Superior Court, the Appellate Division rejected Mr. Lopez's claim for wages for work he had already performed for the defendants, based primarily on its conclusion that the Immigration Reform and Control Act of 1986 ("IRCA") entirely ousted his rights under New Jersey wage and hour laws. Among other things, it reasoned that since IRCA made it unlawful for an employer knowingly to hire undocumented immigrants, Mr. Lopez was therefore "barred from relief and was precluded from recovering damages."[2] It stated that "plaintiff is an undocumented alien expressly included within the statutory definition of the IRCA. Thus, there could be no employee-employer

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[1] Certification is warranted inasmuch as this appeal presents a question of general public importance which has not been but should be settled by this Court, and because the decision under review is in conflict with other decisions of the Appellate Division. N.J. Ct. R. 2:12-4.

[2] Lopez v. Marmic LLC and Ruane, No. A-2391-22, 2024 WL 3060524 (N.J. Super. Ct. App. Div. June 20, 2024) ("Lopez"), at *7.

relationship between the parties." Id.

This fundamentally flawed understanding of IRCA, and its relationship to laws that protect workers against employer exploitation, misapprehends the animating purpose of IRCA—to control unauthorized immigration to the United States[3] and discourage the employment of undocumented workers.[4] Universally applying wage and hour protections to all workers serves these purposes. The Appellate Division's determination to the contrary runs against the conclusion of virtually every court that has ever considered the issue.[5]

In enacting IRCA, Congress established a system meant to ensure that only persons authorized to work in the United States could obtain employment.

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[3] See, e.g., H.R. Rep. No. 99-682 (I) (report of House Judiciary Committee), at 46-49 (stating the purpose of IRCA is that of controlling immigration to the United States), reprinted in U.S. Code Cong. & Admin. News 5662; H.R. Rep. No. 99-1000, at 85 (conference report on IRCA) (same), reprinted in U.S. Code Cong. & Admin. News 5840, 5840.

[4] "IRCA 'forcefully' made combating the employment of illegal aliens central to '[t]he policy of immigration law.'" Hoffman Plastic Compounds, Inc. v. NLRB, 535 U.S. 137, 147 (2002).

[5] See, e.g., Lucas v. Jerusalem Cafe, LLC, 721 F.3d 927, 937 (8th Cir. 2013); Lamonica v. Safe Hurricane Shutters, Inc., 711 F.3d 1299, 1308 (11th Cir. 2013); Chellen v. John Pickle Co., Inc., 434 F. Supp. 2d 1069, 1099 (N.D. Okla. May 24, 2006) (collecting cases); Zavala v. Wal-Mart Stores, Inc., 393 F. Supp. 2d 295, 323 (D.N.J. 2005) ("this Court only joins the growing chorus acknowledging the right of undocumented workers to seek relief for work already performed under the FLSA.", and collecting cases); Coma Corp. v. Kansas Dep't of Lab., 283 Kan. 625, 635 (2007).

In so doing, it relied primarily upon a regime of sanctions against employers who knowingly hired undocumented workers. Consistent with this, Congress stipulated that IRCA was not 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 standards agencies . . . to remedy unfair practices committed against undocumented employees for exercising their rights before such agencies or for engaging in practices protected by existing law."[6]

Congress plainly understood that if undocumented workers were unprotected against unlawful labor practices, employers could be incentivized to seek them out and prefer them over authorized workers, as they could exploit them with total impunity. This would encourage undocumented immigration to the United States, not deter it—frustrating IRCA's primary objective. Numerous federal and state courts have recognized that affording legal coverage to all workers regardless of their immigration status is essential

[6] H.R. Rep. No. 99-682(I), at 58, reprinted in U.S. Code Cong. & Admin. News 5662 (report of the House Judiciary Committee). IRCA's legislative history elsewhere made clear that Congress "does not intend that any provision of this Act would limit the powers of State or Federal labor standards agencies . . . 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." H.R. Rep. No. 99-682(II), at 8-9, reprinted in U.S. Code Cong. & Admin. News 5649, 5758 (report of the House Education and Labor Committee).

to furthering IRCA's purpose.[7] Thus, the Appellate Division's view of IRCA as an essentially punitive statute meant to deprive undocumented workers of their workplace rights,[8] while allowing their employers entirely to avoid liability for hiring and exploiting them, is fundamentally misguided.

The Appellate Division's suggestion that such a result is required by

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[7] See, e.g., Sure-Tan, Inc. v. National Labor Relations Board, 467 U.S. 883, 893-94 (1984) (observing, in pre-IRCA case, that "[a]pplication of the [National Labor Relations Act] helps to assure that the wages and employment conditions of lawful residents are not adversely affected by the competition of [undocumented] 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 [undocumented workers] to legal resident workers, any incentive to hire such [undocumented workers] is correspondingly lessened."); Lamonica, 711 F.3d at 1308-09 (reaffirming applicability of Fair Labor Standards Act ("FLSA") to undocumented employees, holding that "even after [Hoffman Plastic Compounds Inc. v. NLRB, 535 U.S. 137 (2002)], we maintain that '[b]y reducing the incentive to hire such workers the FLSA's coverage of undocumented [workers] helps discourage illegal immigration and is thus fully consistent with the objectives of the IRCA.'") (citation omitted); Salas v. Sierra Chem. Co., 59 Cal.4th 407, 426 (2014), cert. denied, 574 U.S. 1047 (2014) (concluding IRCA does not preempt state law making immigration status irrelevant to liability in employment cases, save for post-discovery period back pay and reinstatement remedies, and observing, "[i]t would frustrate rather than advance the policies underlying federal immigration law to leave [undocumented workers] so bereft of state law protections that employers have a strong incentive to 'look the other way' and exploit a black market for illegal labor.").

[8] Importantly, nothing in IRCA makes it per se unlawful for undocumented persons to work without authorization, let alone imposes any penalties upon them for doing so. The sole liability IRCA creates for undocumented employees applies if they have proffered invalid documents to obtain work. 8 U.S.C. § 1324c(a). See infra at 15 n.26.

federal preemption doctrine[9] is unfounded, as none of the conditions for preemption is present here.[10] First, IRCA contains only a single, narrowly-drawn preemption provision that bars states or localities from imposing their own sanctions on entities employing, recruiting or referring undocumented workers.[11] It does not address or preempt state employment and labor laws that, like the New Jersey wage and hour laws at issue here, permit employees to seek remedies for violations of their workplace rights.

Second, Congress has never sought to occupy the field of employment

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[9] See Lopez at *7 ("[P]laintiff was not eligible to work for defendants under the IRCA and was barred from relief and was precluded from recovering damages."), *6 ("[T]he [Hoffman] Supreme Court reversed because the unfair labor practice claims under the NLRA were precluded by the IRCA").

[10] Under the Supremacy Clause, state law must yield to federal law (1) where Congress has "enact[ed] a statute containing an express preemption provision," Arizona v. United States, 567 U.S. 387, 399 (2012); (2) where state law seeks to regulate conduct "in a field that Congress . . . has determined must be regulated by its exclusive governance," id.; and (3) 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, 373 U.S. 132, 142-43 (1963), 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, 312 U.S. 52, 67 (1941). "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, 518 U.S. 470, 485 (1996).

[11] 8 U.S.C. § 1324a(h)(2) ("The provisions of this section 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.").

and labor law to the exclusion of state regulation, let alone with respect to undocumented workers.[12] The cases are clear that the historic police power to enact workplace protections remains firmly in states' hands, even as narrowly modified by IRCA to make employer sanctions for knowingly hiring undocumented workers (except through licensing laws) an exclusively federal matter.[13] Any remaining doubts that Congress intended to leave untouched states' ability to protect all persons who have been subjected to injustices in their workplaces are dispelled by IRCA's legislative history, discussed supra.

Third, and finally in the preemption analysis, laws such as New Jersey's wage and hour statutes do not conflict with IRCA. Compliance with both sets of laws is hardly "a physical impossibility." Florida Lime, 373 U.S. at 143. New Jersey's wage and hour laws do not require employers to knowingly hire

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[12] "Field preemption" obtains 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, 567 U.S. at 399 (quotation and alteration marks omitted).

[13] See, e.g., Madeira v. Affordable Hous. Found., Inc. 469 F.3d 219, 228, 240 (2d Cir. 2006) (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 v. Bica, 424 U.S. 351, 356 (1976)). And, of course, "the mere fact that '[undocumented workers] are a subject of a state statute does not render it a regulation of immigration.'" Arizona, 567 U.S. at 451 (Alito, J., concurring and dissenting).

undocumented workers or to continue to employ workers if they subsequently learn they lack work authorization. Instead, they simply require employers to properly pay workers while they are employed. Employers can readily comply with both statutory regimes, for example, by verifying an employee's work authorization upon hire, 8 U.S.C. § 1324a(b), paying them all wages owed under New Jersey law and, if applicable, later terminating the employee if the employer learns they are undocumented, 8 U.S.C. § 1324a(a)(2).[14] No conflict exists, and neither statute precludes the operation of the other, because two separate and distinct sets of interests and legal violations are involved.

Nor do New Jersey's wage and hour laws pose any "obstacle," Florida Lime, 373 U.S. at 141, to IRCA's objectives. If anything, their uniform application to all employees irrespective of immigration status is a powerful, necessary complement to IRCA's intent to deter employers from seeking out undocumented workers due to their greater vulnerability to exploitation.[15]

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[14] See Sanchez v. Dahlke Trailer Sales, 897 N.W. 267, 276 (Minn. 2017).

[15] See, e.g., Sure-Tan, 467 U.S. at 893-84 ("If an employer realizes that there will be no advantage under the NLRA in preferring [undocumented workers] to legal resident workers, any incentive to hire such [undocumented workers] is correspondingly lessened."). Cf. Serrano v. Underground Utils. Corp., 407 N.J. Super. 253, 271 (App. Div. 2009) ("allowing undocumented workers to sue non-compliant employers under the FLSA may advance [IRCA]'s policy objectives.") (citation omitted).

Finally, the Appellate Division's breathtaking determination that "there could be no employee-employer relationship between the parties" because Mr. Lopez was undocumented, Lopez at *6, is baffling. IRCA nowhere reconceives traditional notions of employment, or defines away the fact that employment relationships—even if unlawful—do exist between undocumented workers and those who hire them.[16] Nothing in IRCA changes the fact that Mr. Lopez was an employee of defendants and, as a consequence, was protected by New Jersey's wage and hour statutes. *See* N.J.S.A. 34:11-4.1(b), -56a1(h).[17]

II. THE COURT BELOW FUNDAMENTALLY MISCONSTRUED HOFFMAN V. NATIONAL LABOR RELATIONS BOARD

The Appellate Division looked to Hoffman Plastic Compounds, Inc. v. National Labor Relations Board, 535 U.S. 137 (2002) ("Hoffman"), to support its conclusion that Mr. Lopez was properly barred from seeking wages for work he had already performed. Its reliance on Hoffman was misplaced.

At issue in Hoffman was a National Labor Relations Board ("NLRB") remedial order in an administrative proceeding where an undocumented

[16] See 8 U.S.C. § 1324a(2) (making it unlawful to "continue to employ" a person after learning the person is not work-authorized); 8 C.F.R. § 274a.1(f) (defining "employee" without reference to work-authorized status).

[17] Cf. Serrano at 270 ("The definition of a 'workman' or 'worker' . . . under the [New Jersey Prevailing Wage Act] is not qualified, at least in the text of the statute, by a precondition of lawful citizenship.").

employee had been unlawfully terminated in retaliation for protected union organizing activities—an undisputed violation of the National Labor Relations Act ("NLRA"). Hoffman, 535 U.S. at 148. The sole question before the Court was whether the NLRB had exceeded the limits of its authority, as an Executive Branch agency, by including in its remedial order an award of *back pay*—that is, the wages the worker would have earned but for his illegal termination. The Court found the NLRB had surpassed its authority because its back pay award implicated the federal policy against undocumented immigration, as expressed in IRCA, in a way that "the Board has no authority to enforce or administer." Id. at 149. Notably, in pointing out that its vacation of the back pay award "does not mean that the employer gets off scot-free" and that other remedies authorized under the NLRA were left undisturbed, id. at 152, Hoffman underscored the continuing vitality of the NLRA to sanction a malfeasant employer, even where it acted against undocumented workers.

Against this background, it must be noted what Hoffman did *not* do. First, Hoffman's conclusion concerning back pay in no way addressed awards, such as that sought here, of *wages for work already performed*—a species of relief entirely distinct from "back pay." Here, Mr. Lopez does not seek any post-termination wages, but only the wages for the labor he had already performed for the defendants. The Appellate Division's reliance on Hoffman

conflated these two very different types of relief.[18]

What is more, Hoffman nowhere held that "the unfair labor practice claims under the NLRA were precluded by the IRCA," as the Appellate Division wrote. Lopez at *6. Just the opposite: as already noted, Hoffman presumed that the NLRA applied to the undocumented worker in that case, and that the defendants' liability for its actions against him was unquestioned. Hoffman, 535 U.S. at 152. As an opinion that considered the propriety of a *remedial* order, Hoffman can in no way be read as articulating any concerns about the post-IRCA vitality of the NLRA, or of any other labor or employment laws, so far as their *coverage* of undocumented workers is

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[18] This conflation is all the more curious in that the opinion below cited approvingly to Zeng Liu v. Donna Karan Int'l, Inc., 207 F. Supp. 2d 191 (S.D.N.Y. 2002), for the very proposition that Hoffman did not foreclose wage awards to undocumented employees for work already performed. Lopez at *6. Elsewhere, and similarly, the Appellate Division appeared to recognize that legal violations occurring *during* the employment relationship—such as the wage theft that occurred here—merit different treatment. Id. at *7 ("Plaintiff did not assert a claim for workplace harassment or other misconduct while he worked for defendants.").

The difference between these two types of wage remedies has elsewhere been acknowledged by the Appellate Division. See Crespo v. Evergo Corp., 366 N.J. Super. 391, 398 (App. Div. 2004) ("To be sure, Hoffman has not been expanded beyond its specific focus.", citing Zeng Liu, supra, for its observation that Hoffman did not preclude an undocumented worker's claims for work already performed); Serrano at 269-70 (citing Crespo and Zeng Liu).

concerned. Similarly, there is no reasonable argument that Hoffman supports the notion that IRCA, under federal preemption principles, sub silentio voids all laws governing the employment conditions of unauthorized workers.[19]

III. COMPLIANCE WITH WAGE AND HOUR LAWS MAY NOT BE CIRCUMVENTED BY CONJURING THE EXISTENCE OF A SO-CALLED "BARTER ARRANGEMENT."

A. Parties cannot contract out of the fundamental rights and obligations of wage and hour laws.

Wage and hour laws remediate "labor conditions detrimental to the maintenance of the minimum standard of living necessary for health, efficiency, and general well-being of workers," and combat the use of substandard labor conditions as an "unfair method of competition." 29 U.S.C. § 202(a). The importance of these bedrock protections for workers and the economy cannot be overstated: every year, workers lose $15 billion to wage

[19] See Section I supra; see also Incalza v. Fendi North America, Inc., 479 F.3d 1005, 1009-13 (9th Cir. 2007) (distinguishing Hoffman and holding state employment antidiscrimination statute not preempted by IRCA); Salas, 59 Cal.4th at 418-27, 430-31 (distinguishing Hoffman and holding IRCA did not preempt a state statute making irrelevant an employee's immigration status under all state labor and employment laws, save for awards of back pay for periods postdating the discovery of an employee's undocumented status, and reinstatement when prohibited by federal law). Cf. Lucas, 721 F.3d at 935-37 (distinguishing Hoffman and rejecting argument that Hoffman "implicitly amended the FLSA to exclude" undocumented workers).

theft nationwide.[20] And because they ensure employees are paid the wages owed them, these laws are indispensable to keeping local economies running, ensuring governments are funded through essential tax revenues, and keeping noncompliant employers from gaining an anti-competitive advantage.[21]

Understanding the gravity of these protections, courts have long held that employers cannot leverage their unequal bargaining power to contract out of their responsibilities under wage and hour laws. See Brooklyn Sav. Bank v. O'Neil, 324 U.S. 697, 706–07 (1945) (explaining that "due to the unequal bargaining power as between employer and employee, certain segments of the population required [FLSA] to prevent private contracts . . . which endangered national health and efficiency and as a result the free movement of goods in interstate commerce.").[22] Consistent with this, both the New Jersey Wage and Hour Law ("NJWHL") and the New Jersey Wage Payment Law ("NJWPL") explicitly bar private agreements purporting to exempt employers from their

[20] NAT'L EMP'T LAW PROJECT, WORKERS LOSE BILLIONS IN UNPAID WAGES EVERY YEAR 2 (2023), https://tinyurl.com/bdhb4cmc.

[21] *See* NAT'L EMP'T LAW PROJECT, JUST PAY: IMPROVING WAGE AND HOUR ENFORCEMENT AT THE UNITED STATES DEPARTMENT OF LABOR 7 (2010), https://bit.ly/3YYHxcr.

[22] This Court has noted that statutes addressing "similar concerns," such as the FLSA, NJWHL and NJWPL, should generally "resolve similar issues . . . by the same standard." Hargrove v. Sleepy's, LLC, 220 N.J. 289, 313 (2015).

obligations under either law. N.J.S.A. 34:11-4.7,[23] -56a3.[24]

Defendants cannot shirk their obligations under the NJWHL and the NJWPL by adopting an employment agreement by another name. An agreement that purports to set a term or condition of a worker's employment, however styled, cannot serve as a subterfuge to justify the theft of their wages.

B. IRCA does not provide a loophole for employers to ignore its requirements through the construct of a "barter arrangement."

Moreover, IRCA does not permit, let alone require, the so-called "barter arrangement" at issue here. The Appellate Division's apparent finding to the contrary, Lopez at *6, 10, badly misapprehends IRCA and the Form W-4.

First, as noted previously, that Mr. Lopez lacked work authorization does not mean that under IRCA "there could be no employee-employer relationship between the parties.", Lopez at *6. The fact that an individual fits IRCA's statutory definition of an "unauthorized alien," 8 U.S.C. § 1324a(h), hardly means they cannot be treated as an "employee." Exactly the opposite is true:

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[23] "It shall be unlawful for any employer to enter into or make any agreement with any employee for the payment of wages of any such employee otherwise than as provided in this act . . . . Every agreement made in violation of this section shall be deemed to be null and void . . . ."

[24] "The employment of an employee in any occupation in this State at an oppressive and unreasonable wage is hereby declared to be contrary to public policy and any contract, agreement or understanding for or in relation to such employment shall be void."

IRCA's regulations expressly define "employee" as "an *individual* who provides services or labor for an employer for wages *or other remuneration*". 8 C.F.R. § 274a.1(f) (emphasis added). This definition plainly encompasses Mr. Lopez in relation to the defendants.

Moreover, even assuming arguendo the posited "barter arrangement" was lawful under New Jersey law *and* did not constitute an employment relationship under IRCA, it would still violate IRCA's express prohibition on obtaining labor through contract where the contracting entity knows the individual providing services is undocumented.[25] This is precisely what the Appellate Division approved of here, on the mistaken premise that IRCA required this. See Lopez at *10 (noting the "trial judge duly found that a barter arrangement was created after defendants discovered plaintiff provided a fictitious Social Security number").[26]

In upholding the "barter arrangement," the Appellate Division also

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[25] 8 U.S.C. § 1324a(a)(4) ("[A] person or other entity who uses a contract, subcontract, or exchange . . . to obtain the labor of an alien in the United States knowing that the alien is an unauthorized alien . . . with respect to performing such labor, shall be considered to have" violated IRCA's prohibition on hiring undocumented workers).

[26] Defendants possessed the requisite "knowledge" here, given their apparent failure to comply with IRCA's Form I-9 process when first hiring Mr. Lopez. 8 C.F.R. § 274a.1(l)(1)(i) (defining "knowing" as including constructive knowledge based on a failure to complete the Form I-9.).

erroneously suggested that an employer cannot pay an individual if their W-4 includes an invalid Social Security number. Lopez at *10 ("Plaintiff attempts to argue that an employer-employee relationship continued to exist after Marmic discovered plaintiff provided a fictitious Social Security Number *and thus could not be paid wages*.") (emphasis added). But federal tax law "does not require the discharge of an employee" or prohibit the payment of wages to an employee who submits an invalid or no Form W-4. Kansas v. Garcia, 589 U.S. 191, 197 (2020). Instead, this simply impacts the amount of wages the employer is to withhold for tax purposes. Id.; 26 C.F.R. § 31.3402(f)(2)-1(a)(4), (f)(3). IRCA does not foreclose payment of wages based on an invalid Form W-4 either and, in fact, it is entirely inapplicable to this question. Kansas, 589 U.S. at 207–09 (noting that "[t]he submission of taxwithholding [sic] forms is *fundamentally unrelated* to the federal employment verification system . . . [a]nd using another person's Social Security number on tax forms threatens harm that has no connection with immigration law").[27]

The theorized "barter arrangement" at issue, therefore, did not bring

[27] In other words, a Form W-4 plays no role in the employment verification process prescribed by IRCA. 8 U.S.C. § 1324a(b). As such, plaintiff's submission of an invalid Form W-4 does not violate IRCA's prohibition on employees using invalid documents *to obtain employment*. See 8 U.S.C. § 1324c; 18 U.S.C. § 1546(b). The Appellate Division erroneously suggested otherwise. Lopez at *6 (quoting Hoffman, 535 U.S. at 148).

defendants into compliance with IRCA. Instead, it meant they were likely violating IRCA[28] *and*, as discussed supra at 11-13, New Jersey's wage and hour protections—all while being rewarded for doing so by escaping any sort of liability under either. Allowing employers to engage in such practices based on workers' undocumented status—especially where, as here, the "arrangement" involves workers living in employer-controlled housing—encourages the exploitation that workplace laws are meant to prevent, including the most egregious forms such as labor trafficking.[29]

IV. THE COURT BELOW ERRONEOUSLY IGNORED DEFENDANTS' RECORDKEEPING VIOLATIONS AND ERRED IN PERMITTING THE CONSIDERATION OF MR. LOPEZ'S IMMIGRATION STATUS TO ASSESS HIS CREDIBILITY.

A. Where an employer has failed to keep records, justice requires that wage claimants bear a lesser burden of proof.

As under the FLSA, under New Jersey law employers are charged with maintaining wage and hour records for every employee. N.J.S.A. 34:11-4.6(e), -56a20. Where the employer has failed to do so, the worker must simply

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[28] Here, at a minimum, defendants' IRCA violations likely included knowingly hiring, knowingly continuing to employ, and failing to comply with IRCA's Form I-9 verification system. See 8 U.S.C. § 1324a(a)-(b).

[29] See, e.g. COLLEEN OWENS ET AL., UNDERSTANDING THE ORGANIZATION, OPERATION, AND VICTIMIZATION PROCESS OF LABOR TRAFFICKING IN THE UNITED STATES (2014), https://tinyurl.com/2ve44p23 (finding that providing housing and threatening workers based on their immigration status were among the key forms of employer control over trafficking survivors).

produce "sufficient evidence to show the amount and extent of that work as a matter of just and reasonable inference."[30] The employer must then proffer evidence "of the precise amount of work performed" or "to negative the reasonableness of the inference to be drawn from the employee's evidence." Id. (known as "the Mt. Clemens burden-shifting").

Where an employer has failed to comply with its recordkeeping requirements, utilizing the Mt. Clemens burden-shifting framework is imperative. Otherwise, workers would be impaired in pursuing their wage and hour claims, inconsistent with the remedial nature of wage and hour laws. N.J. Dep't of Labor, 2002 WL 187400 at *85 (citing Mt. Clemens, 328 U.S. at 687). Failing to apply the Mt. Clemens framework would, indeed, incentivize employers to forego recordkeeping requirements, frustrating workers' ability to enforce their rights under the NJWHL and NJWPL. This is of paramount importance for historically marginalized workers—such as undocumented immigrants—in industries where workers tend to be paid "off the books."[31]

Here, the Appellate Division erroneously declined to apply the Mt.

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[30] N.J. Dep't of Lab. v. Pepsi-Cola Co., No. A-918-00T5, 2002 WL 187400, at *85 (N.J. Super. Ct. App. Div. 2002) (quoting Anderson v. Mt. Clemens Pottery Co., 328 U.S. 680, 687 (1946) ("Mt. Clemens")).

[31] See, e.g., Castillo v. Givens, 704 F.2d 181, 184 (5th Cir. 1983) (observing farmworkers were paid cash and the employer did not keep records of the individual workers' names, wages, or hours worked).

Clemens framework, finding that Mr. Lopez failed to prove a cognizable damages claim because he "failed to proffer any time sheets or other documents supporting the hours he worked." Lopez at *7. But under Mt. Clemens, damages are certain where a worker has proved that they performed work and were not paid in accordance with the applicable wage and hour law. Id. at 688. Here, Mr. Lopez met his initial burden by showing he had performed work for which he had not been properly compensated.[32] Further, the uncertainty of damages does not foreclose a NJWHL claim.[33]

Requiring workers to provide time sheets or similar documents where the employer has not met its duty to keep records would unlawfully shift its legal duty to the worker. This would unfairly hamstring workers' efforts to recoup illegally withheld wages for work they have performed.

B. An individual's immigration status should not impact the credibility of their testimony.

The Appellate Division erroneously affirmed the Superior Court's

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[32] It is undisputed that from June 2015 to December 2018, Mr. Lopez performed work for defendants pursuant to the supposed "barter agreement." Lopez at *2-3 (explaining that his duties "essentially remained the same" as when he was originally hired). Further, defendants only compensated Mr. Lopez with an apartment and utilities amounting to $1,150 per month and did not pay him "an actual hourly rate." Id. at *3.

[33] Iliadis v. Wal-Mart Stores, Inc., 191 N.J. 88, 109 (2007) ("[D]amages need not be proved with precision where that is impractical or impossible.").

finding that Mr. Lopez was not a credible witness because of his immigration status. Lopez at *4.[34] However, courts nationwide have refused to admit an individual's immigration status as evidence of the credibility of their testimony, and we urge this Court to do the same.[35]

Were this Court to let stand the Appellate Division's opinion, New Jersey's wage and hour protections would be rendered ineffective in protecting one of New Jersey's worker communities most in need of these laws' protection. Allowing a worker's immigration status to impact their credibility in seeking to enforce their wage and hour rights would have a chilling and prejudicial effect in all future wage and hour cases.

[34] Throughout its decision, the Appellate Division treated the Form W-4 issue—in relation to Mr. Lopez's testimony, his status as an "employee" and his entitlement to wages owed—as a proxy for Mr. Lopez's immigration status.

[35] See, e.g., Mischalski v. Ford Motor Co., 935 F. Supp. 203, 207-08 (E.D.N.Y. 1996) ("[N]o authority . . . support[s] the conclusion that the status of being [undocumented] impugns one's credibility. Thus, by itself, such evidence is not admissible for impeachment purposes."); Hernandez v. Paicius, 109 Cal. App. 4th 452, 460 (2003) (concluding that the plaintiff's immigration status was inadmissible as evidence to attack their credibility).

V. THE DECISION BELOW RENDERS UNDOCUMENTED WORKERS IN NEW JERSEY EVEN MORE VULNERABLE TO ABUSE, TO THE DETRIMENT OF ALL WORKERS.

Undocumented workers are an integral part of New Jersey's economy. This state is home to roughly 475,000 undocumented immigrants, who constitute about 7% of its workforce[36] and who are particularly susceptible to wage theft.[37] The decision below provides unscrupulous employers with an explicit roadmap for evading their state law obligations and paying their workers an illegal wage—or even not at all—with total impunity. If uncorrected, it will legitimize a new means of exploiting an already vulnerable workforce, and depress the working conditions of all who labor in this state.

CONCLUSION

The Court should grant plaintiff's petition for certification, and reverse.

Dated: September 3, 2024

Christopher Ho
Laura Alvarenga Scalia
LEGAL AID AT WORK

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[36] AM. IMMIGR. COUNCIL, IMMIGRANTS IN NEW JERSEY (2020), https://bit.ly/3SYfkyj; Jeffrey S. Passel & Jens Manuel Krogstad, *What We Know About Unauthorized Immigrants Living in the U.S.*, PEW RSCH. CTR. (July 22, 2024), https://tinyurl.com/pnrsja8s.

[37] See, e.g., ANNETTE BERNHARDT ET AL., BROKEN LAWS, UNPROTECTED WORKERS: VIOLATIONS OF EMPLOYMENT AND LABOR LAWS IN AMERICA'S CITIES (2009), https://bit.ly/4cIjCRJ (finding immigrant workers experienced minimum wage violations at nearly twice the rate as their U.S.-born peers).

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