Case No. 18-5850

IN THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

RICARDO TORRES,

Plaintiff-Appellant,

v.

PRECISION INDUSTRIES, INC.,

Defendant-Appellee.

On Appeal from the United States District Court
For the Western District of Tennessee
Honorable S. Thomas Anderson, U.S. District Judge
Docket No.: 1:16-cv-01319-STA-egb

BRIEF OF TENNESSEE IMMIGRANT AND REFUGEE RIGHTS COALITION, LATINO MEMPHIS, ET AL. AS AMICI CURIAE IN SUPPORT OF PLAINTIFF-APPELLANT RICARDO TORRES

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IDENTITY AND INTERESTS OF AMICI

The interests of the individual *Amici* and their corporate disclosure information are contained in the Motion for Leave to File Amicus Brief filed herewith. Pursuant to Federal Rule of Appellate Procedure 29(a)(4)(E), *Amici* state that no party's counsel authored this brief in whole or in part and that no party's counsel or any other person contributed money that was intended to fund the preparation or submission of this brief.

INTRODUCTION AND SUMMARY OF ARGUMENT

Amici urge this Court to reverse the order of the district court appealed from herein and, instead, to hold that neither the Immigration Reform and Control Act of 1986 ("IRCA"), 8 U.S.C. § 1324a, nor *Hoffman Plastic Compounds, Inc. v. NLRB*, 535 U.S. 137 (2002), bars awards of backpay, or compensatory and punitive damages, to Plaintiff-Appellant Ricardo Torres based on his Tennessee common law claim of retaliatory discharge against Defendant-Respondent Precision Industries, Inc. ("Precision").

The decision below is predicated upon the flawed premise that a generally applicable workplace protection is somehow transformed into a regulation of immigration where that protection is equally available to undocumented workers. It is not. Instead, the claim at issue here, and the remedies sought thereunder, must be upheld as a protected exercise by the State of Tennessee of its historic police powers

to regulate employment and health and safety. In failing to recognize this, the district court ignored the strong presumption, reiterated time and again by the U.S. Supreme Court, against any asserted preemption of the police powers possessed by the States. *Amici* join in Plaintiff-Appellant Torres's general discussion of preemption doctrine and write here, among other things, to expand on and contextualize the State police powers at issue in this case.

If not reversed, the result reached by the district court will render a significant and already vulnerable portion of the labor force even more subject to exploitation, while undermining the rights of all workers, frustrating Congressional intent, and stymieing Tennessee's established prerogatives in the process.

ARGUMENT

I. The District Court Erred in Denying Mr. Torres the Remedies Made Available to Him by Tennessee's Protections Against Retaliation.

A. Federal Immigration Law Does Not Eviscerate States' Historic Police Power to Regulate Employment, Health and Safety.

In concluding that IRCA and *Hoffman* precluded Mr. Torres from seeking backpay and damages under Tennessee common law, the district court concluded that "[s]tate concerns of labor protections quite simply must yield to federal immigration policy." *Torres v. Precision Indus., Inc.*, No. 1:16-cv-01319-STA-ebg,

2018 WL 3474088, at *6 (W.D. Tenn. July 19, 2018).[1] But the Supreme Court and numerous other federal courts have made clear that whether a particular state law is preempted by federal immigration policy is no "simple" matter. Instead, "because the States are independent sovereigns in our federal system, we have long presumed that Congress does not cavalierly pre-empt state-law causes of action." *Medtronic, Inc. v. Lohr*, 518 U.S. 470, 485 (1996). When the "historic police powers of the States" are at issue, the courts must presume that these powers are "*not* to be superseded . . . unless that was the *clear and manifest* purpose of Congress." *Jones v. Rath Packing Co.*, 430 U.S. 519, 525 (1977) (emphasis added) (internal quotation marks and citation omitted); *DeCanas v. Bica*, 424 U.S. 351, 357 (1976) ("Only a demonstration that complete ouster of state power including state power to promulgate laws not in conflict with federal laws was "'the clear and manifest purpose of Congress'" would justify that conclusion.") (citations omitted).

As the Supreme Court has repeatedly recognized, "States possess broad authority under their police powers to regulate the employment relationship to protect workers within the State." *DeCanas*, 424 U.S. at 356. This allows the States

[1] In addition to joining Plaintiff-Appellant's preemption arguments presented in his Opening Brief, *Amici* also join in his argument that *Hoffman Plastic Compounds, Inc. v. N.L.R.B.*, 535 U.S. 137 (2002), does not support the district court's result because it did not concern a federal statute's preemption of a State's historic police powers and it is factually distinguishable in important ways. Plaintiff-Appellant's Opening Br. 19-54 (Doc. No. 19).

to fashion local measures, such as "minimum and other wage laws, laws affecting occupational health and safety, and workmen's compensation laws" to effectively address "essentially local problems", *id.* at 356-57. Tied to workplace protections is the established authority of the States to promote the health and safety of their residents more broadly. Because those issues are "primarily, and historically, ... matter[s] of local concern . . . the States traditionally have had great latitude under their police powers to legislate as to the protection of the lives, limbs, health, comfort, and quiet of all persons[.]" *Medtronic, Inc.*, 518 U.S. at 475; *see also Metro. Life Ins. Co. v. Massachusetts*, 471 U.S. 724, 756 (1985).

In light of this, and that "the mere fact that 'aliens are the subject of a state statute does not render it a regulation of immigration'", *Arizona v. United States*, 567 U.S. 387, 451 (2012) (Alito, J., concurring and dissenting) (quoting *DeCanas*), numerous federal courts have held that the state regulation of employment and health and safety is not compelled to "yield to federal immigration policy", as the district court concluded. For example, in *Madeira v. Affordable Housing Foundation, Inc.*, 469 F.3d 219, 223 (2d Cir. 2006), the Second Circuit held that IRCA did not preempt a New York State law that allowed undocumented workers to recover lost past and future United States earnings stemming from safety violations at construction sites. New York had enacted this law given the "particular dangers of construction work[.]" *Id.* at 229. The court grounded its analysis, correctly, upon the presumption

that since the regulation of "occupational health and safety" is a traditional state police power, *id.* at 228-29, IRCA did not preempt the state law at issue, *id.* at 238. Notably, *Madeira* observed that the field of tort and labor law is an "entirely different field" from immigration law. *Id.* at 240.[2] *See also Incalza v. Fendi N. Am., Inc.*, 479 F.3d 1005, 1013 (9th Cir. 2007) (holding IRCA did not preempt California common law employment claim).[3]

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[2] In reaching its conclusion, the *Madeira* court also reviewed IRCA's legislative history and noted that although *Hoffman* afforded this history little weight, it did so in the context of analyzing two federal statutes—not a federal statute's potential preemption of state law. 469 F.3d at 240-41. Unlike in the *Hoffman* context, in a preemption analysis the burden lies with the party seeking preemption to demonstrate this was in fact Congress's intent. Therefore, *Madeira* found, "Even if, in the preemption context, we heed *Hoffman Plastic's* admonition to afford the House Report little weight in identifying Congress's affirmative endorsement of other statutory remedies, the quoted language usefully highlights appellants' inability to carry their burden. They can point to nothing in the record indicating Congress's clear and manifest intent to preempt the field of compensatory damages for workplace injuries sustained by undocumented aliens." *Id.* at 241.

[3] Numerous federal district courts have found likewise, *see Owino v. CoreCivic, Inc.*, No. 17-cv-1112 JLS (NLS), 2018 WL 2193644, at *18, *20 (S.D. Cal. May 14, 2018) (holding IRCA does not preempt California wage and hour protections as applied to federal immigration detainees); *Chao Chen v. Geo Grp., Inc.*, 287 F. Supp. 3d 1158, 1165-66 (W.D. Wash. 2017) (holding Washington minimum wage law not field preempted by IRCA in case on behalf of immigration detainees); *Bear v. Delaware Cty., Ohio*, No. 2:14-cv-0043, 2016 WL 234848, at *21-*22 (S.D. Ohio Jan. 20, 2016) (holding IRCA did not preempt state tort damages for lost future U.S. earnings to undocumented individual's estate); *Saucedo v. NW Mgmt. & Realty Servs., Inc.*, No. 12-cv-0478-TOR, 2013 WL 12097442, at *3-*4 (E.D. Wash. Oct. 10, 2013) (holding damages award for undocumented workers under state migrant worker protection statute not preempted by IRCA or precluded by *Hoffman*); *Vazquez v. Heartland Express Inc. of Iowa*, No. 4:11CV01561AGF, 2013 WL 12330372, at *1 (E.D. Mo. Jan. 25, 2013) (holding *Hoffman* did not preclude lost

The district court nowhere acknowledged that the Tennessee common law prohibition against retaliation for the assertion of workers' compensation rights was presumptively protected as a valid exercise by Tennessee of its police powers. Instead, it framed that law as one "regulating illegal immigration in the workplace", *Torres*, 2018 WL 3474088 at *4.[4] It then went on to hold that IRCA precluded all remedies sought by Mr. Torres given the federal interest in occupying the field of immigration, *id.* at *4, *8. That Mr. Torres may avail himself of remedies under a state antiretaliation law, however, does not render that law a regulation of "illegal

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wages damages for undocumented worker in state tort action); *Kalyta v. Versa Prod., Inc.*, No. CIV.A. 07-1333 MLC, 2011 WL 996168, at *7 (D.N.J. Mar. 17, 2011) (holding IRCA does not preempt "lost wages damages for undocumented workers in the personal injury tort context"); *Hocza v. City of New York*, No. 06 CIV. 3340, 2009 WL 124701, at *4 (S.D.N.Y. Jan. 20, 2009) (holding lost earnings damages available to undocumented worker alleging violations of state tort and labor law).

[4] The district court's reliance on *Martinez v. Lawhon*, No. M2015-00635-SC-R3-WC, 2016 WL 6840487, at *1-2, *27-28 (Tenn. Nov. 21, 2016), for the proposition that the state power at issue here is that of "regulating illegal immigration in the workplace" is misplaced. The specific provisions at issue there reduced workers' compensation benefits for undocumented workers, *id.* at *10, and imposed a monetary penalty on employers for knowingly hiring undocumented workers, *id.* at *8. The court held that the former provision was preempted given its stated purpose of "clos[ing] the door to illegal workers in this state," and because it conflicted with IRCA by creating "a perverse incentive for employers to hire undocumented workers over other workers, especially in high-risk jobs that often result in workers' compensation claims." *Id.* at *10 (internal quotation marks and citations omitted). The court held the penalty provision, which relied on finding the employer "knowingly" employed an undocumented worker, was expressly preempted under IRCA's savings clause. *Id.* at *8. *Martinez* is therefore not only inapposite since it did not deal with a generally applicable workplace protection, as here, but actually supports a finding against preemption.

immigration in the workplace." *See Arizona*, 567 U.S. at 451. Instead, it is a generally applicable workplace protection available to all workers, regardless of immigration status.[5] As the Supreme Court of Tennessee noted when it recognized the right of workers to be free from retaliation for seeking workers' compensation benefits, the law is intended to regulate safety in the workplace by ensuring that "[r]etaliatory discharges" do not "completely circumvent [the workers' compensation] legislative scheme." *Clanton v. Cain-Sloan Co.*, 677 S.W.2d 441, 444 (Tenn. 1984). Tennessee's legislative scheme is applicable to documented and undocumented workers alike. Tenn. Code Ann. § 50-6-102 (12)(A) (defining "employee" under workers' compensation statute to "include[] every person, including a minor, whether lawfully or unlawfully employed"). In opining that the State of Tennessee had impermissibly intruded upon an area of federal dominance, the district court misconceived the state law at issue—and, more crucially, completely ignored Tennessee's well-established authority to regulate employment, health and safety to protect workers within the State.

Notably, the district court further failed to recognize how IRCA's goals are in fact advanced by respecting and giving full effect to Tennessee's police powers. In *Berdejo v. Exclusive Builders, Inc.*, 865 F. Supp. 2d 617, 624-25 (M.D. Pa. 2011),

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[5] *See Madeira*, 469 F.3d at 245 ("courts have generally concluded that uniform application of workers' compensation laws best serves the interests of both federal and state law.").

the district court held IRCA did not preclude an undocumented worker who brought a state tort claim based on a workplace injury from seeking lost earnings. The court pointed out that "disallowing claims for lost earnings would have the perverse incentive of shielding an employer from tort liability to an unauthorized alien employee, undercutting IRCA's provisions fining employers for employing unauthorized aliens." *Id.* at 625 n.6. This is the case here. *See also Flores v. Amigon*, 233 F. Supp. 2d 462, 464 (E.D.N.Y. 2002) (stating that "if employers know that they will not only be subject to" penalties under IRCA "when they hire illegal aliens, but they will also be required to pay them at the same rates as legal workers for work actually performed, there are virtually no incentives left for an employer to hire an undocumented alien in the first instance").[6]

[6] Similarly, although not in the preemption context, federal courts have determined that federal workplace remedies can harmoniously coexist with and advance the purposes of IRCA. *See, e.g.*, *Patel v. Quality Inn S.*, 846 F.2d 700, 704-05 (11th Cir. 1988) (noting that the Fair Labor Standards Act's applicability to undocumented workers reduces employers' incentive to hire them and is therefore in line with IRCA); *Lamonica v. Safe Hurricane Shutters, Inc.*, 711 F.3d 1299, 1307 (11th Cir. 2013) (holding undocumented workers can recover unpaid wages under the Fair Labor Standards Act, and noting consistency with IRCA's purposes); *Bollinger Shipyards, Inc. v. Dir., Office of Worker's Comp. Programs*, 604 F.3d 864, 874 (5th Cir. 2010) (holding undocumented worker who had proffered a false Social Security number to obtain employment could receive benefits under the Longshore and Harbor Workers' Compensation Act); *Rivera v. NIBCO, Inc.*, 364 F.3d 1057, 1067-68 (9th Cir. 2004) (noting that the court "seriously doubt[s]" that *Hoffman* "applies in Title VII cases" given the material differences between the substance and enforcement of the two legislative schemes); *De La Rosa v. N. Harvest Furniture*, 210 F.R.D. 237, 239 (C.D. Ill. 2002) (opining that *Hoffman* inapplicable to Title VII

As the above case law recognizes, States historically possess the power to fashion rights and remedies to effectively address "essentially local problems", *DeCanas* at 356-57, such as workplace health and safety standards. Nothing in IRCA suggests that Congress meant to supplant Tennessee's ability to do that here. Moreover, that Tennessee's retaliatory discharge claim might *arguendo* simply be in some "tension" with IRCA does not compel its preemption. *See Chamber of Commerce of U.S. v. Whiting*, 563 U.S. 582, 607 (2011) (observing that "preemption analysis does not justify a freewheeling judicial inquiry into whether a state statute is in tension with federal objectives; such an endeavor would undercut the principle that it is Congress rather than the courts that preempts state law.") (internal quotation marks and citation omitted).

B. State Court Authority Roundly Rejects the Notion that the States' Police Powers are Pre-Empted by Federal Immigration Policy.

Numerous state courts, in rejecting IRCA and *Hoffman*-based preemption challenges, have determined that the denial of equal state law rights and remedies to unauthorized workers would in fact frustrate IRCA's purposes because of the perverse incentives that would result. They have based this holding on States' traditional police powers to regulate their residents' working conditions and safety.

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claims and denying motion to compel immigration status information as irrelevant to backpay time period).

In exercising these powers many States, including Tennessee, have made the informed judgment that protecting undocumented workers lifts standards for all workers within their jurisdictions. *See, e.g.*, *Balbuena v. IDR Realty LLC*, 845 N.E.2d 1246, 1257 (N.Y. 2006); *Silva v. Martin Lumber Co.*, No. M2003-00490-WC-R3-CV, 2003 WL 22496233, at *2 (Tenn. Workers Comp. Panel Nov. 5, 2003); *Torres v. Precision Indus., P.I. Inc.*, No. W2014-00032-COA-R3CV, 2014 WL 3827820, at *9 (Tenn. Ct. App. Aug. 5, 2014).

For example, in *Sanchez v. Dahlke Trailer Sales, Inc.*, 897 N.W.2d 267, 270 (Minn. 2017), under facts similar to those here, *id.* at 270-71, the Supreme Court of Minnesota recently held that IRCA did not preempt an undocumented employee's workers' compensation retaliatory discharge claim. Because the retaliation claim stood in a generally applicable statute "at the intersection of labor law and tort law," it did not regulate immigration but, rather, "firmly qualif[ied] as an area of traditional state power" that could not be easily preempted. *Id.* at 275. The court determined the claim did not conflict with IRCA since "the workers' compensation antiretaliation statute d[id] not *require*" the defendant to "continue to employ an employee after becoming aware that he is undocumented", *id.* at 276 (emphasis in original); instead, it simply prohibited the employer "from discharging an employee because he sought workers' compensation benefits", *id. Sanchez* also found obstacle preemption inapplicable since the equal enforcement of labor laws against employers of

undocumented workers indeed "furthers the IRCA's goal of discouraging employers from hiring unauthorized aliens." *Id.* at 277. The court pointed out that "[i]f the workers' compensation antiretaliation statute does not apply to employers of undocumented workers, then those employers are in a position to save costs", which would incentivize the hiring of undocumented workers. *Id.*[7]

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[7] The courts of other states have repeatedly found this rationale compelling in upholding state tort, workers' compensation, and other employment protections against IRCA preemption challenges. *See, e.g., Balbuena*, 845 N.E.2d at 1257 (tort and workplace safety related claims where court noted that "limiting a lost wages claim by an injured undocumented alien would lessen an employer's incentive to comply with the Labor Law and supply all of its workers the safe workplace that the Legislature demands") (citations omitted); *Design Kitchen and Baths v. Lagos*, 882 A.2d 817, 826 (Md. 2005) (commenting that without workers' compensation protections, "unscrupulous employers could, and perhaps would, take advantage of [undocumented workers] and engage in unsafe practices with no fear of retribution"); *Correa v. Waymouth Farms, Inc.*, 664 N.W.2d 324, 331 n.4 (Minn. 2003) ("to the extent that denying unauthorized aliens benefits . . . gives employers incentive to hire unauthorized aliens in expectation of lowering their workers' compensation costs, the purposes underlying the IRCA are not served"); *Grocers Supply, Inc. v. Cabello*, 390 S.W.3d 707, 718 (Tex. App. 2012) (noting "it could be argued employers might have a higher incentive for hiring illegal aliens if Congress superseded liability for those individuals' injuries" in personal injury tort action); *Asylum Co. v. D.C. Dep't of Employment Servs.*, 10 A.3d 619, 633 (D.C. 2010) ("denying compensation coverage to undocumented aliens creates powerful incentives for employers to hire such individuals") (citation omitted); *Rajeh v. Steel City Corp.*, 813 N.E.2d 697, 731 (Ohio Ct. App. 2004) (holding workers' compensation statute applicable to undocumented worker and noting that if undocumented workers "were exempt from collecting workers' compensation, underhanded employers might be prone to hire" them); *Tyson Foods, Inc. v. Guzman*, 116 S.W.3d 233, 244 (Tex. App. 2003) (holding that *Hoffman* does not preclude an undocumented worker from seeking damages for lost earning capacity); *Reinforced Earth Co. v. W.C.A.B. (Astudillo)*, 749 A.2d 1036, 1039 (Pa. Commw. Ct. 2000), *aff'd on other grounds*, 570 Pa. 464, 810 A.2d 99 (2002) (stating that denial of workers' compensation benefits would encourage employers to "actively

Moreover, the Supreme Court of California squarely addressed the availability to undocumented workers of remedies in the context of unlawful discharge claims in *Salas v. Sierra Chemical Co.*, 327 P.3d 797 (Cal. 2014). In determining whether IRCA preempted California's employment anti-discrimination law and its remedies from being applied to undocumented workers, *Salas* first noted that the "regulation of the employment relationship is within the states' police powers," and found no evidence that Congress intended "to preclude the states from applying to unauthorized aliens the states' own worker protection labor and employment laws." *Id.* at 806. Further, *Salas* observed, awarding unlawful discharge remedies to unlawfully terminated undocumented workers would, in fact, further IRCA's goals by removing an economic incentive for employers to hire them in the first place. *Id.* at 808. Finally, because IRCA "prohibits an employer from continuing to employ an unauthorized alien upon discovery of the worker's unauthorized status", the court held that remedies for a discharge claim are preempted *only* to the extent that backpay is awarded to an undocumented worker "for loss of employment during the" period *after* which the employer learned the worker lacked work authorization. *Id.* at 807.[8]

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seek out illegal aliens rather than citizens or legal residents because they will not be forced to insure against or absorb the costs of work-related injuries").

[8] *Salas* noted that its "preemption analysis for the post-discovery period is limited to employers who discover the plaintiff employee's unauthorized status after

Decisions such as these illustrate the failure of the court below to recognize Tennessee's significant interest in enforcing workplace protections not conditioned on immigration status, especially those addressing health and safety, and the lack of Congressional intent to override that interest. As *Sanchez* and *Salas* make clear, the claim asserted by Mr. Torres is not a regulation of immigration; rather, it falls squarely within a state's historic police power to regulate employment and public health, an instance in which "the presumption against preemption can be no stronger[.]" *Grocers Supply, Inc.*, 390 S.W.3d at 713. By ignoring this and Congressional intent, the district court reached a result that would frustrate, not support, IRCA's goals, and intrude upon an area of established State sovereignty in so doing.

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the employee has been discharged or not rehired. Not addressed here is a situation in which an employer has knowingly hired or continued to employ an unauthorized alien in violation of federal immigration law . . . Because imposing full liability for lost wages would provide a disincentive for such immigration law violations, thereby furthering the goals of federal immigration law, in these situations arguably federal law would not preempt lost wages remedies for violations of state laws like California's [Fair Employment and Housing Act]." *Salas*, 327 P.3d at 807 n.3.

Mr. Torres's claim falls under this alternative situation highlighted by *Salas*. By failing to require Mr. Torres to show any proof of work authorization upon hire, *Torres*, 2018 WL 3474088 at *2, Precision hired and continued to employ him in violation of IRCA. Imposing full liability here would "provide a disincentive for such immigration law violations[.]" *Salas*, 327 P.3d at 807 n.3. *See also Asgar-Ali v. Hilton Hotels Corp.*, 798 N.Y.S.2d 342, *3-4 (Sup. Ct. 2004) (holding worker's immigration status irrelevant to his claim for lost earnings, especially where no indication worker violated IRCA and employer did not verify employee's work authorization prior to lawsuit).

C. Denying Substantive Rights and all Corresponding Remedies to Mr. Torres Runs Counter to Employment *and* Immigration Policy.

The district court's wholesale denial of *any and all* remedies for Mr. Torres's claim[9] severely undercuts state employment protections *and* IRCA, and is without comparable precedent. Although the court below shied away from articulating an explicit holding that IRCA and *Hoffman* extinguished Mr. Torres' right to be free from retaliation for seeking workers' compensation benefits, its decision had that precise effect. By denying him any remedies for Precision's retaliation, the court effectively stripped that right away from him—and, for all practical purposes, exonerated Precision of any liability. Taken to its logical conclusion, the district court's reasoning would eviscerate States' ability to protect undocumented workers from any type of workplace abuse, including the nonpayment of wages or the most egregious harassment or safety violations.

As noted above, when confronted with challenges to undocumented workers' state-law claims based on IRCA or *Hoffman*, courts have consistently held that the substantive state workplace protection and part or all of its remedies remain in force. *See, e.g.*, *Madeira*, 469 F.3d at 223 (claim under construction safety statute); *Rosas v. Alice's Tea Cup, LLC*, 127 F. Supp. 3d 4 (S.D.N.Y. 2015) (claim for unpaid

[9] *Torres,* 2018 WL 3474088 at *7 (holding that backpay, compensatory, and punitive damages are precluded and noting that "*any* award ultimately based in that claim would remain contrary to federal law because it arose from an illegal employment relationship") (emphasis added).

wages); *Berdejo*, 865 F. Supp. 2d 617 (tort claim based on workplace injury); *Sanchez*, 897 N.W.2d 267 (claim for workers' compensation retaliatory discharge); *Salas*, 327 P.3d 797 (claims under state anti-discrimination laws); *Rajeh*, 813 N.E.2d 697 (claim for workers' compensation benefits). *Cf. supra* note 6 (collecting cases holding IRCA and *Hoffman* do not bar claims or relief for undocumented workers subjected to violations of federal workplace protections). Even *Hoffman*, a non-preemption case, assumed the continued existence of the worker's substantive rights and refused to deprive him of all remedies. *Hoffman*, 535 U.S. at 152 (disclaiming any conclusion that "the employer gets off scot-free", and pointing out the NLRB had imposed "significant" other "traditional remedies sufficient to effectuate national labor policy[.]"). In effectively nullifying Mr. Torres's substantive rights under Tennessee common law, the district court's decision thus collides with *Hoffman*, going far further than *Hoffman* either contemplated or supports.

The district court's sweeping decision is even more of an outlier given the facts of Mr. Torres's case. As explained by Plaintiff-Appellant, Precision violated IRCA by failing to verify Mr. Torres's employment authorization upon his hire; Mr. Torres never tendered fraudulent documents to secure his employment. Plaintiff-Appellant's Opening Br. at 4-5, 29-30, 43-49 (Doc. No. 19). Mr. Torres therefore secured his employment through Precision's failure to fulfill its "affirmative duty" under IRCA "to determine that [its] employees are authorized" to work by inspecting

employees' documents. *New El Rey Sausage Co., Inc. v. U.S. I.N.S.*, 925 F.2d 1153, 1158 (9th Cir.1991). As the Supreme Court has noted, the document verification system that Precision flouted in this case is "critical to the IRCA regime" and its enforcement relies on employer verification of "the identity and eligibility of all new hires[.]" *Hoffman*, 535 U.S. at 147-48.

Here, therefore, it is Precision that "directly contraven[ed] explicit congressional policies." *Id* at 148. Its failure to comply with IRCA's employment authorization verification system placed it in the same position it would have been in had it required Mr. Torres to complete the I-9 form, and then failed to act after Immigration & Customs Enforcement notified it that Mr. Torres lacked work authorization. *See New El Rey Sausage Co., Inc.*, 925 F.2d at 1158 ("Notice that these documents are incorrect places the employer in the position it would have been if the alien had failed to produce the documents in the first place: it has failed to adequately ensure that the alien is authorized."). Moreover, Mr. Torres obtained work authorization subsequent to his discharge, but before Precision likely would have terminated him based on any lack of work authorization. *See* Plaintiff-Appellant's Opening Br. at 5-6, 13. A substantial portion of any award of backpay would therefore correspond to a period in which Mr. Torres had work authorization.

When considered in light of the facts before the district court, it becomes even clearer that the decision below erroneously precludes all relief for Mr. Torres while

severely subverting IRCA's purposes. "To refuse to allow recovery against a person responsible for an illegal alien's employment who knew *or should have known* of the illegal alien's status would provide an incentive for such persons to target illegal aliens for employment in the most dangerous jobs or to provide illegal aliens with substandard working conditions." *Madeira*, 469 F.3d at 248 (quoting *Rosa v. Partners in Progress, Inc.*, 868 A.2d 994, 1000 (N.H. 2005)) (emphasis added). The district court's decision—even if unintentionally—does just this. It signals to unscrupulous employers that they can knowingly hire undocumented workers in violation of IRCA, terminate them when they seek workers' compensation, and face no consequences as a result. The resulting *de jure* creation of a uniquely exploitable worker underclass would significantly undermine Tennessee's interest in ensuring the safety of all its workers, and contradicts IRCA's legislative design wherein employ*er* liability is a key tool in discouraging employers from violating its terms. *See Lucas v. Jerusalem Cafe, LLC*, 721 F.3d 927, 936 (8th Cir. 2013) (examining IRCA legislative history and discussing importance of employer liability to advance its policies); *New El Rey Sausage Co.*, 925 F.2d at 1158 (discussing employer's affirmative duties under IRCA's document "verification system").

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II. The Decision Below Renders Undocumented Workers Even More Vulnerable to Abuse, While Undermining the Rights of All Workers.

By foreclosing a retaliatory discharge claim to Mr. Torres, the district court's decision severely undermines the rights of undocumented workers, who comprise a sizable percentage of the American workforce while suffering disproportionately from dangerous working conditions, abusive employers, and lack of recourse for their grievances.[10] Multiple federal courts have acknowledged the extreme vulnerability of undocumented workers to workplace abuse.[11] These cases

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[10] *See generally* Annette Bernhardt et al., *Broken Laws, Unprotected Workers: Violations Of Employment And Labor Laws In America's Cities*, NATIONAL EMPLOYMENT LAW PROJECT (2009), available at https://tinyurl.com/ycka3y76 (a 2008 survey of 4,387 low-wage immigrant workers in three cities suggested that immigrants are disproportionately likely to experience wage and hour violations); *See also* Chirag Mehta et al., CHICAGO'S UNDOCUMENTED IMMIGRANTS: AN ANALYSIS OF WAGES, WORKING CONDITIONS, AND ECONOMIC CONTRIBUTIONS 27-29 (Univ. of Illinois at Chicago Ctr. for Urban Economic Development 2002) (finding undocumented workers in Chicago are more vulnerable to unsafe working conditions than their documented counterparts, but their claim filing rates fail to account for their reported rates of serious injury).

[11] *Arizona v. United States*, 567 U.S. 387, 405 (2012) ("In the end, IRCA's framework reflects a considered judgment that making criminals out of aliens engaged in unauthorized work—aliens who already face the possibility of employer exploitation because of their removable status—would be inconsistent with federal policy and objectives"); *United States v. Brignoni-Ponce*, 422 U.S. 873, 879 (1975) ("The aliens themselves are vulnerable to exploitation because they cannot complain of substandard working conditions without risking deportation."); *Cazorla v. Koch Foods of Mississippi, L.L.C.*, 838 F.3d 540, 562–64 (5th Cir. 2016) (citing studies of immigrant worker abuse in the American poultry industry). *See also Lives on the Line: The Human Cost of Cheap Chicken*, OXFAM AMERICA at 27, 36 (2015), available at https://tinyurl.com/h3dwtjz (noting reluctance among the large number

demonstrate that the stratagems available to unscrupulous employers of undocumented workers extend beyond retaliatory discharge to reports to immigration officials.[12] [13] Rendering workplace protections "inapplicable" to undocumented workers "would leave helpless the very persons who most need protection from exploitative employer practices[.]" *N.L.R.B. v. Apollo Tire Co.*, 604 F.2d 1180, 1184 (9th Cir. 1979) (Kennedy, J., concurring). It would also cause working conditions for *all* workers to suffer. *See Balbuena*, 845 N.E.2d at 1257; *Silva*, No. M2003-00490-WC-R3-CV, 2003 WL 22496233, at *2; *Torres*, W2014-

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of immigrant workers in the meat and poultry industry to report workplace injury for fear of retaliation).

[12] *See* Tom Fritzsche et al., *Unsafe at These Speeds: Alabama's Poultry Industry and its Disposable Workers*, SOUTHERN POVERTY LAW CTR. at 15 (2013), available at https://tinyurl.com/y7elvd9s (showing plant employers often treat workers as "disposable resources," using threats of deportation and firing to silence their complaints); *See also* 151 CONG. REC. E2605–04 (Dec. 17, 2005) (statement of Rep. Conyers), 2005 WL 3453763 (in discussing amendments to 8 U.S.C. § 1367, noting that "[t]hreats of deportation are the most potent tool abusers of immigrant victims use to maintain control over and silence their victims and to avoid criminal prosecution").

[13] This manifests in case law. *See, e.g.*, *Sure–Tan, Inc. v. NLRB*, 467 U.S. 883, 886–87 (1984) (employer reported five undocumented workers after they voted in favor of union representation); *Does I thru XXIII v. Advanced Textile Corp.*, 214 F.3d 1058, 1062–63 (9th Cir. 2000) (court allowed the plaintiffs to plead their claims anonymously due to their fear of retaliatory deportation); *Singh v. Jutla & C.D. & R's Oil, Inc.*, 214 F. Supp. 2d 1056, 1057 (N.D. Cal.2002) (employer recruited an undocumented worker and then reported him to the INS after he filed an FLSA claim for unpaid wages).

00032-COA-R3CV, 2014 WL 3827820, at *9; *Rajeh*, 813 N.E.2d at 703.

Disenfranchising undocumented workers endangers a significant population already living and working in the United States: roughly 11 million undocumented immigrants reside in the United States, comprising nearly 5% of the American workforce.[14] Given immigrant workers' concentration in dangerous jobs, they face higher rates of workplace injuries, health and safety violations, and fatalities.[15] Although the overall worker fatality rate in the United States has dropped in the past few decades, the percentage of those fatalities involving foreign-born workers has *increased* at roughly the same rate.[16] Moreover, studies have shown that undocumented workers are injured in the workplace at significantly higher rates than their documented counterparts.[17]

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[14] Gustavo López, Kristen Bialik and Jynnah Radford, *Key Findings about U.S. Unauthorized Immigrants*, PEW RESEARCH CTR. (Sept. 14, 2018), https://tinyurl.com/ycjg4zu8 (last accessed Nov. 8, 2018).

[15] Pia Orrenius and Madeline Zavodny, *Do Immigrants Work in Riskier Jobs*? 46 DEMOGRAPHY 535, 548 (2009), available at https://tinyurl.com/yau2gwq7.

[16] *Id.* (revealing an excess of 358 immigrant fatalities annually as compared with the number of deaths projected had those immigrants been native-born); *Strategic Plan: Fiscal Years 2014-2018*, UNITED STATES DEPT. OF LABOR at 31, available at https://tinyurl.com/y8q6wtvn (noting immigrant workers experience higher rates of harm in the workplace).

[17] *See, e.g.*, Kevin Riley and Doug Morier, *Patterns of Work-Related Injury and Common Injury Experiences of Workers in the Low-Wage Labor Market, Report to the Commission on Health and Safety and Workers' Compensation*, CALIFORNIA

Workers without legal status also suffer disproportionate workplace abuse: 37% of undocumented workers report minimum wage violations, as opposed to only 15% of documented workers;[18] nearly 85% of unauthorized workers, compared with 68% of authorized workers, report not receiving mandatory overtime pay.[19] In one study of low-wage workers, 43% of workers who pursued unions or made work-related complaints experienced retaliation; in almost half of these incidents, employers threatened discharge or immigration reporting.[20]

> They have us under threat . . . all the time. They know most of us are undocumented—probably two-thirds. All they care about is getting bodies into the plant. My supervisor said they say they'll call the INS if we make trouble.
>
> —Northwest Arkansas plant worker[21]

DEPARTMENT OF INDUSTRIAL RELATIONS at 7, March 2015, available at https://tinyurl.com/y7nc4rlt.

[18] Annette Bernhardt et al., *Broken Laws, Unprotected Workers: Violations Of Employment And Labor Laws In America's Cities*, NATIONAL EMPLOYMENT LAW PROJECT at 42 (2009), available at https://tinyurl.com/ycka3y76.

[19] *Id.* at 44.

[20] *Id.* at 25.

[21] Lance Compa et al., *Blood, Sweat, and Fear: Workers' Rights in U.S. Meat and Poultry Plants*, HUMAN RIGHTS WATCH at 101 (2004), available at https://tinyurl.com/y8wm3cc2.

Tennessee reflects these national trends, with the same implications for the safety of its undocumented workers: of the over 330,000 immigrants living in Tennessee, fully 37 percent are undocumented.[22] The State's immigrant population has doubled since 2000, and increased six-fold since 1990.[23] Immigrant workers tend to be employed in hazardous occupations: construction, demolition, and agriculture,[24] [25] precisely the types of jobs where workers can benefit the most from the protection of workplace safety and anti-retaliation laws.

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[22] *Immigrants in Tennessee*, AMERICAN IMMIGRATION COUNCIL (October 6, 2017), https://tinyurl.com/y9dbh47u (last accessed Nov. 7, 2018); *Estimated Unauthorized Immigrant Population, by State, 2014*, PEW RESEARCH CTR., https://tinyurl.com/y9grnh4v (last accessed Nov. 7, 2018).

[23] *See State Immigration Data Profiles: Tennessee*, MIGRATION POL'Y INSTITUTE, https://tinyurl.com/yd28vsnz (last accessed Nov. 7, 2018).

[24] *Tennessee Workers, Dying for a Job: A Report on Worker Fatalities in Tennessee, 2012 & 2013*, KNOX AREA WORKERS MEMORIAL DAY COMMITTEE at 3, 34 (April 2014), available at https://tinyurl.com/y7mj8h7b.

[25] Immigrant populations in Kentucky, Michigan, and Ohio share similar characteristics. *See Immigrants in Kentucky*, AMERICAN IMMIGRATION COUNCIL, Oct. 13, 2017, https://tinyurl.com/y97no24m (last accessed Nov. 7, 2018) (30 percent of immigrants undocumented and major work industries include agriculture, fishing, and forestry); *Immigrants in Michigan*, AMERICAN IMMIGRATION COUNCIL, Oct. 13, 2017, https://tinyurl.com/yauozkky (last accessed Nov. 7, 2018) (20 percent of immigrants undocumented and major work industries include agriculture, fishing, and forestry); *Immigrants in Ohio*, AMERICAN IMMIGRATION COUNCIL, Oct. 4, 2017, https://tinyurl.com/y9dhjoy8 (last accessed Nov. 7, 2018) (19 percent of immigrants undocumented and major work industries include technical and scientific services, agriculture, fishing, and forestry).

The experience of Omar Herrera (a pseudonym), a Tennessee worker, exemplifies this: Mr. Herrera had worked for over a year for a paving company when he suffered a serious back injury while pushing a heavy cart full of concrete down a hill. He attempted to ignore his injury and keep working, but soon fell to the ground and could not get back up. Mr. Herrera left the job site in an ambulance and later filed a workers' compensation claim. Within a couple of weeks, his employer terminated him, allegedly because of his undocumented status. Prior to his injury, his employer had never required him to fill out an I-9 form or to otherwise demonstrate that he possessed work authorization.[26]

By denying Mr. Torres all relief for a retaliatory discharge claim related to his workplace injury, the district court's decision if not corrected will only exacerbate the unsafe working conditions and fear of retaliatory discharge already experienced by the undocumented worker population. This would hamper all workers' ability to organize and advocate for their rights[27] and would decrease the incentives for

[26] Email communications from Bryce Ashby, counsel for Plaintiff-Appellant, to Christopher Ho and Marisa Díaz, counsel for *Amici* (Oct. 5, 2018 and November 5, 2018) (on file with author).

[27] Rebecca Smith and Eunice Hyunhye Cho, *Workers' Rights on ICE: How Immigration Reform Can Stop Retaliation and Advance Labor Rights*, NATIONAL EMPLOYMENT LAW PROJECT at 2 (Febr. 2013), available at https://tinyurl.com/yavptvja.

employers to ensure a safe workplace. *All* workers, and especially those employed in dangerous occupations, would be harmed as a result.

CONCLUSION

For the foregoing reasons, *Amici* respectfully urge the Court to reverse the decision below.

Dated: November 8, 2018

Respectfully submitted,

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LEGAL AID AT WORK

By: /s Marisa Díaz
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STATEMENT OF RELATED CASES

Amici are not aware of any related cases pending in this Court.

CERTIFICATE OF COMPLIANCE WITH RULE 32

This brief complies with the type-volume limit of FED. R. APP. P. 29(a)(5) and 32(a)(7)(B), because this brief contains under 6,500 words, excluding the portions of the brief exempted by FED. R. APP. P. 32(f). This brief contains 6,202 words.

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 proportionally spaced typeface using Microsoft Word in 14-point Times New Roman font.

LEGAL AID AT WORK

Date: November 8, 2018

/s Marisa Díaz
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CERTIFICATE OF SERVICE

Case Name: **RICARDO TORRES, v. PRECISION INDUSTRIES, INC.,**
Case Nos.: **18-5850**

I hereby certify that on November 8, 2018, I electronically filed the Following documents with the Clerk of the Court by using the CM/ECF system:

BRIEF OF TENNESSEE IMMIGRANT AND REFUGEE RIGHTS COALITION, LATINO MEMPHIS, ET AL. AS AMICI CURIAE IN SUPPORT OF PLAINTIFF-APPELLANT RICARDO TORRES

I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the CM/ECF system.

I declare under penalty of perjury under the laws of the United States that the foregoing is true and correct, and that this declaration was executed on November 8, 2018, at San Francisco, California.

/s Marisa Díaz
MARISA DÍAZ