Case No. 20-5492

IN THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

RICARDO TORRES,

Plaintiff-Appellee,

v.

PRECISION INDUSTRIES, INC., AKA P.I. INC.,

Defendant-Appellant.

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-APPELLEE RICARDO TORRES

Marisa Díaz
Christopher Ho
LEGAL AID AT WORK
180 Montgomery Street, Suite 600
San Francisco, California 94104
Telephone: (415) 864-8848

Attorneys for TENNESSEE IMMIGRANT AND REFUGEE RIGHTS COALITION, LATINO MEMPHIS, ET AL.

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REQUEST FOR ORAL ARGUMENT

Amici request permission to participate in oral argument, due both to their expertise concerning the important intersectional legal questions raised as well as the unique, real-world perspectives *Amici* can offer for the Court's consideration.

IDENTITY AND INTERESTS OF AMICI

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

INTRODUCTION AND SUMMARY OF ARGUMENT

This Court should affirm the district court's ruling that federal immigration law does not preempt the award of backpay or damages to Plaintiff-Appellee Ricardo Torres ("Mr. Torres") for Defendant-Appellant Precision Industries, Inc.'s ("Precision") violation of Tennessee's law barring retaliation for filing a workers' compensation claim. The district court recognized that federal law does not preempt Mr. Torres's state-law remedies, as they fall within Tennessee's historic police powers to regulate employment and health and safety. Moreover, it correctly concluded that the Immigration Reform and Control Act of 1986 ("IRCA"), 8 U.S.C.

§ 1324a et seq., neither occupies the field of labor and workers' compensation laws nor conflicts with an award of state-law remedies.

In arguing that IRCA and Mr. Torres's state-law remedies conflict, Precision fails to overcome the well-established presumption against preemption in cases such as this. Instead, it ignores this presumption entirely. Moreover, notwithstanding the fact-bound analysis required by conflict preemption doctrine, Precision's sweeping preemption arguments are entirely untethered to the facts before the Court. Unsurprisingly, Precision fails to demonstrate—as it cannot—that Tennessee law and the remedies awarded thereunder conflict in any way with IRCA where, as here, the employer has violated IRCA. *Amici* join in Mr. Torres's discussion of preemption doctrine, and write here to expand on the State police powers at issue and conflict preemption analysis.

A reversal of the district court's order would render a significant portion of the labor force even more vulnerable to exploitation, while undermining the rights of all workers, frustrating Congressional intent, and stymieing Tennessee's established prerogatives in the process.

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ARGUMENT

I. The district court properly ruled that IRCA does not preempt an award of state-law remedies to Mr. Torres.

a. The Court must ground its analysis in the presumption against preemption of Mr. Torres's state-law remedies, the particular facts of his case, and IRCA's legislative scheme.

i. IRCA presumptively does not preempt Tennessee's historic police power to award workers' compensation anti-retaliation remedies.

The established presumption against federal preemption of laws enacted pursuant to a State's historic police powers unequivocally applies here, despite Precision's failure to acknowledge it. "[B]ecause the States are independent sovereigns in our federal system, we have long presumed that Congress does not cavalierly preempt state-law causes of action," particularly those enacted pursuant to a State's historic police powers. *Medtronic, Inc. v. Lohr*, 518 U.S. 470, 485 (1996). "[C]onsistent with . . . federalism concerns," *id.* at 485, this presumption ensures Congress "will not unduly interfere with the legitimate activities of the States." *Madeira v. Affordable Hous. Found., Inc.*, 469 F.3d 219, 237 (2d Cir. 2006) (quoting *Younger v. Harris*, 401 U.S. 37, 44 (1971)).

A party asserting federal preemption of a State police power, therefore, must demonstrate that Congress clearly and manifestly intended this result. *See Arizona v. United States*, 567 U.S. 387, 400 (2012) (noting "courts should assume that the

historic police powers of the States are not superseded unless that was the clear and manifest purpose of Congress") (citation omitted); *Silkwood v. Kerr-McGee Corp.*, 464 U.S. 238, 255 (1984) (party seeking to supersede traditional state law has burden to show preemption).

This weighty presumption applies here. "States possess broad authority under their police powers to regulate the employment relationship to protect workers within the State," which includes "laws affecting occupational health and safety[ ] and workmen's compensation laws[.]" *DeCanas*, 424 U.S. at 356. *See Metro. Life Ins. Co. v. Massachusetts*, 471 U.S. 724, 756 (1985) (The States' power to regulate the workplace is intertwined with their historic and expansive "police powers to legislate as to the protection of the lives, limbs, [and] health . . . of all persons." (citation omitted). Accordingly, the presumption against preemption of state laws falling in this area strongly counsels against preemption challenges based on IRCA. *See, e.g.*, *Incalza v. Fendi N. Am., Inc.*, 479 F.3d 1005, 1013 (9th Cir. 2007) (holding IRCA did not preempt California common law employment claim); *Madeira*, 469 F.3d at 223 (holding IRCA did not preempt undocumented worker from recovering lost earnings under New York workplace safety law).[1]

[1] *See also*, *Chao Chen v. Geo Grp., Inc.*, 287 F. Supp. 3d 1158, 1165-66 (W.D. Wash. 2017) (holding IRCA does not preempt immigration detainees' claims under Washington minimum wage law); *Berdejo v. Exclusive Builders, Inc.*, 865 F. Supp. 2d 617, 624-25 (M.D. Pa. 2011) (holding IRCA did not preclude lost earnings

The state-law cause of action at issue here—retaliatory discharge for filing a workers' compensation claim—and its corresponding remedies clearly fall within Tennessee's police power to regulate employment and "the protection of the lives, limbs, [and] health" of its residents, *Metro. Life Ins. Co.*, 471 U.S. at 756. Tennessee enacted its workers' compensation scheme to "provid[e] more adequate means of compensating victims of accidents occurring during employment." *Clanton v. Cain-Sloan Co.*, 677 S.W.2d 441, 443 (Tenn. 1984). This scheme applies to all workers, regardless of immigration status.[2] Tenn. Code Ann. § 50-6-102 (12)(A) (defining

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remedy under undocumented worker's state tort claim); *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 Services, Inc.*, No. 12-CV-0478-TOR, 2013 WL 12097442, at *3-*4 (E.D. Wash. Oct. 10, 2013) (holding IRCA did not preempt damages award for undocumented workers under state migrant worker protection statute); *Vazquez v. Heartland Express Inc. of Iowa*, No. 4:11CV01561AGF, 2013 WL 12330372, at *1 (E.D. Mo. Jan. 25, 2013) (holding federal law did not preclude lost wages damages for undocumented worker in state tort action); *Kalyta v. Versa Products, Inc.*, No. CIV. A. 07-1333 MLC, 2011 WL 996168, at *7 (D.N.J. Mar. 17, 2011) (holding IRCA does not preempt undocumented workers' lost wages damages under personal injury claims); *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).

[2] Although Precision does not assert field preemption, that this generally applicable workplace protection applies to undocumented workers "does not render it a regulation of immigration," *Arizona*, 567 U.S. at 451 (Alito, J., concurring and dissenting) (quoting *DeCanas*, 424 U.S. at 355). Brief of Tennessee Immigrant and Refugee Rights Coalition, Latino Memphis, et al. as *Amici Curiae* in Support of

"employee" under workers' compensation statute to include persons "unlawfully employed"). The Tennessee Supreme Court has recognized the cause of action at issue here as a "necessary" mechanism to ensure retaliatory discharges do not "completely circumvent [Tennessee's workers' compensation] legislative scheme." *Clanton,* 677 S.W.2d at 444.

Precision's assertion that IRCA preempts Mr. Torres's state-law remedies flies in the face of the presumption against just such a result.

ii. A proper conflict preemption analysis must be tethered to this case's facts and to IRCA's enforcement scheme.

The determination of whether Congress has clearly and manifestly intended to supersede a State's police power must be grounded in the specific facts and federal enforcement scheme at issue in a given case. Conflict "preemption analysis," the only species of preemption Precision advances on appeal, "does not justify a freewheeling judicial inquiry into whether a state statute is in tension with federal objectives." *Chamber of Com. of U.S. v. Whiting*, 563 U.S. 582, 607 (2011) (citation omitted). Instead, federal authority, including that of this Court, *see Torres v. Precision Indus., Inc.*, 938 F.3d 752, 756-57 (6th Cir. 2019), requires that courts' preemption analyses be tightly bound to a case's specific facts and applicable laws.

Plaintiff-Appellant ("Amicus Brief in 18-5850") at 12-15, *Torres v. Precision Industries, Inc.*, 938 F.3d 752 (6th Cir. 2019) (No. 18-5850), 2018 WL 5905788.

See, e.g., *Incalza*, 479 F.3d at 1010 ("A hypothetical conflict is not a sufficient basis for preemption.") (citation omitted); *Madeira*, 469 F.3d at 243 ("The particular circumstances in which the state and federal laws interact must be carefully considered in deciding whether" IRCA preempts state law remedies.). Federal law preempts a state's historic police power "only where" the actual circumstances at issue demonstrate the "conflict is so direct and positive that the two acts cannot be reconciled or consistently stand together." *Id.* at 241-42 (citation omitted).

Under a properly fact-bound preemption analysis, courts have consistently held that awarding undocumented workers state-law remedies for violations of state workplace rights does not present a "direct and positive" conflict with IRCA. For example, the Ninth Circuit in *Incalza* affirmed IRCA did not preempt a California state law termination claim. 479 F.3d at 1013. There, Fendi terminated Incalza after his work visa became invalid. The court held IRCA did not preempt Incalza's remedies, considering it significant that not only did Fendi not discharge Incalza because of his lack of work authorization, but that under IRCA it could instead have lawfully placed him on unpaid leave, and the damages awarded corresponded to a time period in which Incalza had work authorization. *Id.* at 1010-13. No conflict between IRCA and state law was present since "it was possible to comply with and satisfy the purposes of both." *Id.* at 1013.

Similarly, in *Madeira,* the Second Circuit looked to the specific facts before it to conclude IRCA did not preempt a state-law lost earnings award to an undocumented worker whose employment ended due to a workplace injury. 469 F.3d at 226-249. Among other factors, the court noted that, unlike reinstatement, a lost earnings award would not require the employer to violate IRCA, and that the jury considered the worker's immigration status when determining the amount of the award. *Id.* at 247-49. *Madeira* also found significant that "the IRCA violation prompting employment was committed by the" *employer*, not the employee. *Id.* This counseled against preemption because IRCA's enforcement scheme focused on the employer, *id.* at 231, and a refusal "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," *id.* at 248 (citation omitted)—thwarting IRCA's objective of preventing the employment of undocumented immigrants. *See id.* at 245-46, 248; *see also Berdejo*, 865 F. Supp. 2d at 625 n.6 (denying lost earnings awards to undocumented workers would "undercut[ ]" IRCA's employer compliance provisions).[3]

[3] Countless state courts affirm this reasoning in upholding state employment protections against IRCA preemption challenges. *See, e.g.*, *Abel*

Verdon Const. v. Rivera, 348 S.W.3d 749, 754-55 (Ky. 2011) (ruling Kentucky workers' compensation statute not preempted by IRCA, noting finding preemption would contravene IRCA and "provid[e] a financial incentive for unscrupulous employers to hire unauthorized workers and engage in unsafe practices"); *Sanchez v. Dahlke Trailer Sales, Inc.*, 897 N.W.2d 267, 278 (Minn. 2017) (holding that "workers' compensation antiretaliation statute does not conflict with the IRCA" since "removing labor protections would undermine [IRCA's] goal by making the employment of undocumented workers cost-effective"); *Salas v. Sierra Chem. Co.*, 327 P.3d 797, 808 (Cal. 2014) (observing that precluding state remedies to undocumented workers for unlawful discharge would result in "lower employment costs", thus encouraging employers to violate IRCA); *Balbuena v. IDR Realty LLC*, 845 N.E.2d 1246, 1257 (N.Y. 2006) (noting that limiting lost wages to an injured undocumented worker "would lessen an employer's incentive to comply with the Labor Law and supply all of its workers" with a "safe workplace") (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) (observing that denying workers' compensation benefits to undocumented workers undermines IRCA since it "gives employers incentive to hire unauthorized aliens in expectation of lowering their workers' compensation costs"); *Grocers Supply, Inc. v. Cabello*, 390 S.W.3d 707, 718 (Tex. App. 2012) (noting "employers might have a higher incentive" to hire undocumented workers "if Congress superseded liability for those individuals' injuries" in personal injury tort action); *Asylum Co. v. D.C. Dep't of Emp. Services*, 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, "employers might be prone to hire" them); *Tyson Foods, Inc. v. Guzman,* 116 S.W.3d 233, 244 (Tex. App. 2003) (holding *Hoffman* did not preclude an undocumented worker from seeking lost earnings damages); *Reinforced Earth Co. v. W.C.A.B. (Astudillo)*, 749 A.2d 1036, 1039 (Pa. Commw. Ct. 2000) (stating that denial of workers' compensation benefits would encourage employers to "seek out" undocumented workers "because they will not be forced to insure against or absorb the costs of work-related injuries").

As in *Incalza* and *Madeira*, courts assessing preemption challenges look to a case's specific facts in view of IRCA's enforcement scheme. Of particular relevance here, see *infra* at 13, 16, is the central role employer compliance plays in achieving IRCA's objectives. IRCA places "part of the burden of enforcement on employers." *New El Rey Sausage Co. v. U.S. I.N.S.*, 925 F.2d 1153, 1154 (9th Cir. 1991). Employers fulfill this burden by complying with their "affirmative duty to determine that their employees are [work] authorized." *Id.* at 1158. This employment verification system, operationalized through the Form I-9, is "critical to the IRCA regime." *Hoffman Plastic Compounds, Inc. v. N.L.R.B.*, 535 U.S. 137, 147-48 (2002); *see also Kansas v. Garcia*, 140 S. Ct. 791, 797 (2020) (noting that IRCA's prohibition on knowingly hiring undocumented workers is enforced through its employment verification system, including the Form I-9); *Bollinger Shipyards, Inc. v. Dir., Office of Worker's Comp. Programs*, 604 F.3d 864, 874 (5th Cir. 2010) (opining that in order to "forcefully" combat the employment of undocumented workers, "Congress . . . focused foremost on the employer").

The nature of IRCA's sanctions also evidence its dependence on employer compliance to achieve its goals. IRCA imposes "civil and criminal sanctions" upon employers who fail to comply with its employment verification system or knowingly continue to employee individuals who lack work authorization. 8 U.S.C. §§ 1324a(e)(4), (f); 8 C.F.R. § 274a.10. In contrast, IRCA subjects employees to civil

and criminal penalties only if they use fraudulent documents to obtain employment, *Arizona*, 567 U.S. at 405; it does "not otherwise prohibit undocumented aliens from seeking or maintaining employment." *Madeira*, 469 F.3d at 231.

The specific facts of this case, viewed in the IRCA context, must ground the Court's preemption analysis. As discussed below, IRCA does not preempt Mr. Torres's state-law remedies.

b. The particular circumstances before the Court demonstrate that IRCA does not conflict with Mr. Torres's state-law remedies.

Precision has failed to meet the "high threshold" to demonstrate a clear and manifest Congressional intent that IRCA preempt Mr. Torres's state-law remedies. *Whiting*, 563 U.S. at 607. Indeed, Precision completely ignores the presumption against preemption and, instead, relies almost entirely on *Hoffman*, 535 U.S. 137, a case not involving preemption of state law. Moreover, Precision invites this Court to reach an erroneous and overbroad conflict preemption holding based on purely hypothetical preemption questions wholly untethered to "the precise facts" of this case and unnecessary to its decision. *Torres*, 938 F.3d at 757 (citation omitted).

Hoffman is simply inapplicable here. There, the Supreme Court held that the National Labor Relations Board ("NLRB") exceeded its remedial discretion by awarding backpay to an undocumented worker. 535 U.S. at 149. The Court reached this holding by reconciling the National Labor Relations Act with IRCA. *Id.* But as

numerous federal courts have noted, *Hoffman* does not involve federal preemption of a state law, much less one created pursuant to a State's historic police powers. *See, e.g.*, *Bollinger Shipyards, Inc.*, 604 F.3d at 875 (explaining *Hoffman* entailed reviewing NLRB's orders "that are in tension with other federal laws"); *Madeira*, 469 F.3d at 237 (finding *Hoffman* inapplicable to preemption question at issue given it "sought to reconcile two *federal* statutes"); *Rivera v. NIBCO, Inc.*, 364 F.3d 1057, 1066 (9th Cir. 2004) (noting the question at issue in *Hoffman* involved reconciling IRCA with the NLRA).[4] Even Precision acknowledges this. Defendant-Appellant's Opening Br. ("OB") at 50 ("The logic in *Hoffman* applied to two conflicting federal policies[.]").[5]

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[4] State courts have also recognized *Hoffman*'s inapplicability to IRCA's preemption of state law. *See, e.g.*, *Salas*, 327 P.3d at 804 ("The answer cannot be found in *Hoffman*, which did not decide any issue regarding federal preemption of state law[.]")

[5] Even in cases where *Hoffman* is legally analogous, Courts of Appeals have determined that federal workplace remedies can harmoniously coexist with IRCA. *See, e.g.*, *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 ("FLSA"), and noting consistency with IRCA's purposes); *Bollinger Shipyards, Inc.*, 604 F.3d at 874-77 (holding that awarding benefits under a federal workers' compensation scheme to an undocumented worker who had proffered a false Social Security number to obtain employment did not "undermine[ ] the congressional policies embedded in the IRCA"); *Patel v. Quality Inn S.*, 846 F.2d 700, 704-05 (11th Cir. 1988) (noting that FLSA's applicability to undocumented workers reduces employers' incentive to hire them and is therefore consistent with IRCA).

Precision moreover fails to acknowledge IRCA's contrary legislative history. A House Committee Report concerning IRCA states "[i]t is not the intention of the Committee that the employer sanctions provisions of the bill be used to undermine or diminish in any way labor protections in existing law[.]" H.R. Rep. No. 99–682, part I, 99th Cong., 2d Sess., at 45, 51–56, reprinted in 1986 U.S. Code Cong. & Admin. News, at 5662. Although *Hoffman* assigned this history little weight, as the Second Circuit noted, it did not do so in the context of a preemption analysis. Therefore, even if the Court "afford[s] the House Report little weight," the Report "usefully highlights [Precision's] inability to carry [its] burden" since it cannot point to anything "in the record indicating Congress's clear and manifest intent to preempt" Mr. Torres's remedies. *Madeira*, 469 F.3d at 241. The district court appropriately adopted this reasoning here. *See Torres v. Precision Indus., Inc.*, 437 F. Supp. 3d 623, 641-42 (W.D. Tenn. 2020).

A careful analysis of the facts actually before the Court further reveals the absence of a "direct and positive" conflict, *Madeira*, 469 F.3d at 241-42. Here, Precision indisputably ran afoul of IRCA by violating its employment verification scheme. *Torres*, 437 F. Supp. 3d at 644. As noted above, this severely undermines IRCA's objectives, given its primary reliance on employer compliance to achieve its goals. The district court also determined that Precision terminated Mr. Torres not due to his lack of work authorization, but because he had filed a workers'

compensation claim. In fact, the district court found that Precision did not even know Mr. Torres was undocumented until *after* his termination.[6] *Id.* at 628-29, 643. What is more, the district court's backpay award corresponds solely to a time period during which Mr. Torres was work-authorized. *Id.* at 639.

Perhaps recognizing these facts strongly counsel *against* preemption, see *supra* at 7-11, 8 n.3, Precision bases its preemption argument almost entirely on the erroneous assertion that Mr. Torres violated IRCA by using an invalid Social Security number on the W-4 tax withholding form he submitted for payroll purposes. OB at 55-58. But *Garcia*, 140 S. Ct. at 801-07, directly undercuts this assertion.

In *Garcia*, the Supreme Court held IRCA did not preempt state-law prosecutions that were based on the defendants' use of fraudulent W-4 forms, because "the submission of tax withholding forms is not part of" IRCA's employment verification system. *Id.* at 804. As such, "using another person's Social Security number on tax forms threatens harm that has no connection with immigration law." *Id.* at 805. Nor did Mr. Torres's submission of a W-4 form have

[6] Although Precision challenges only the district court's holding regarding obstacle conflict preemption, OB at 53, the district court correctly noted that Precision's retaliatory motive behind Mr. Torres's termination, and absence of any motive related to Mr. Torres's work authorization, belie any argument that it would have been impossible to comply with both IRCA and Tennessee law. *See Torres*, 437 F. Supp. 3d at 642-43.

anything to do with securing "continued employment." OB at 57. Precision did not require a W-4 as a condition of employment, *Torres*, 437 F. Supp. 3d at 645, and federal law "does not require the discharge of an employee who fails" to submit a W-4, *Garcia*, 140 S. Ct. at 798. Instead, federal regulations instruct employers how they can still comply with tax withholding laws even in a W-4's absence. *Id.*

Even assuming *arguendo* that a W-4 were necessary to maintain employment, *Garcia* also directly undermines Precision's assertion that because continued employment is a "benefit" of IRCA, IRCA prohibits the submission of "any falsified document bearing on that benefit[.]" OB at 55-58. "This argument conflates the benefit that results from complying with the federal employment verification system (verifying authorization to work in the United States) with the benefit of actually getting a job." *Garcia*, 140 S. Ct. at 805. IRCA regulates only the former. *See id.* at 804-06.[7]

[7] As *Garcia* noted, employees may be required to submit "all sorts of information," 140 S. Ct. at 805, that is unrelated to work authorization, including a W-4 form. Under Precision's sweeping argument, IRCA could preempt damages awards to undocumented workers based on submission of any document containing fraudulent information related to, for example, educational degrees or criminal history since, per Precision, this information could "bear[]" on the "benefit of continued employment," OB at 57-58.

The provisions Precision cites in support of its argument—8 U.S.C. §§ 1324a(a)(2)[8] and 1324c(a)—do not suggest otherwise. Section 1324a(a)(2) prohibits employers' knowing, continued employment of undocumented workers. As such, it regulates employer conduct and only as to verifying work authorization. In relevant part, Section 1324c(a) prohibits the use of "false documents to obtain employment." *Madeira*, 469 F.3d at 231; *see also Hoffman*, 535 U.S. at 148 (noting Section 1324c(a) applies to the use of false documents "for purposes of obtaining employment"); *Bollinger Shipyards, Inc.*, 604 F.3d at 874 (same). Mr. Torres indisputably did not submit his W-4 to obtain employment. *See Torres*, 437 F. Supp. 3d at 645. Simply put, Mr. Torres nowhere violated IRCA.

Under the facts, and consistent with *Garcia*, Precision cannot demonstrate Mr. Torres's state-law remedies conflict with IRCA. As to Mr. Torres's backpay award, even if the Court were to consider *Hoffman* applicable, the factors present there are not present here. There, the Court found IRCA precluded a backpay award 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." *Hoffman*, 535 U.S. at 149. Here, Mr. Torres obtained his employment through Precision's violation of IRCA, not any violation of his own, and his backpay

[8] *Amici* interpret Precision's citations to "8 U.S.C. § 1324a(2)," OB at 54, 57-58, as an intended reference to 8 U.S.C. § 1324a(a)(2).

award corresponds to a time period in which he *lawfully* earned wages. *Torres*, 437 F. Supp. 3d at 633, 639. This Court therefore need not, and should not, decide hypothetically whether Mr. Torres could be awarded backpay for a different time period, or whether an employee's own IRCA violation could preclude such an award. *See Torres*, 938 F.3d at 757 (citing to *Ashwander v. Tennessee Valley Auth.*, 297 U.S. 288, 347 (1936) (Brandeis, J., concurring) in stating courts must make a preemption ruling "[no] broader than is required by the precise facts to which it is to be applied"); *Incalza*, 479 F.3d at 1012-13 (declining to decide what damages would be available to an undocumented worker since damages pertained to period plaintiff was work authorized).

Precision also cannot point to a clear and manifest Congressional intent to preempt Mr. Torres's punitive and emotional distress damages. Unlike backpay, such damages neither represent nor replace wages. As such, their award, especially under the facts of this case, stands in no tension with IRCA. *See Incalza*, 479 F.3d at 1011 ("IRCA's purposes are not contravened" where no payment of wages is involved); *cf. Saucedo,* 2013 WL 12097442, at *4 (relying on *Patel*, 846 F.2d at 704, when noting an award of state-law statutory damages does not conflict with IRCA since "the prospect of earning wages", not "winning damages . . . is what draws" undocumented immigrants to the U.S.). This is especially true given the purpose of Tennessee's retaliatory discharge claim is "not to protect the right to work, but rather

to prevent a chilling effect on employees asserting their rights under the Tennessee Workers' Compensation Act." *Torres v. Precision Indus., P.I. Inc.*, No. W2014-00032-COA-R3CV, 2014 WL 3827820, at *5 (Tenn. Ct. App. Aug. 5, 2014).

Under the claim at issue here, punitive damages punish the employer for its conduct and deter others from engaging in "conduct which would frustrate" Tennessee's workers' compensation laws. *Clanton*, 677 S.W.2d at 445 (citation omitted). The district court awarded Mr. Torres emotional distress damages due to the manner in which he was terminated. *Torres*, 437 F. Supp. 3d at 646. Neither remedy compensates him for wages, let alone for any work never performed or not lawfully permitted. Accordingly, IRCA does not foreclose these traditional state tort remedies to undocumented workers. *See, e.g.*, *Fernandez v. Tamko Bldg. Prod. Inc.*, No. 3:12-CV-00518-SDD, 2013 WL 3759796, at *2 (M.D. La. July 15, 2013) (holding lack of work authorization does not preclude recovery of state tort damages); *Chopra v. U.S. Professionals, LLC*, No. W2004-01189-COA-R3CV, 2005 WL 280346, at *4 (Tenn. Ct. App. Feb. 2, 2005) (affirming federal law did not extinguish undocumented plaintiff's ability to obtain state-law compensatory and punitive damages); *cf. Singh v. Jutla & C.D. & R's Oil, Inc.*, 214 F. Supp. 2d 1056, 1061 (N.D. Cal. 2002) (permitting undocumented worker to seek compensatory and punitive damages under FLSA).

Far from conflicting with IRCA, the award of state-law remedies here is fully consistent with and, indeed, furthers IRCA's goal of preventing the employment of undocumented workers by "eliminating employers' economic incentive to hire" them in the first place. *Patel*, 846 F.2d at 704. Both this objective and Tennessee's workers' compensation scheme would be substantially undermined by precluding full remedies for Mr. Torres. Doing so would signal to employers that they can hire undocumented workers in violation of IRCA, terminate them when they seek workers' compensation, and face no or lesser consequences as a result. *See Madeira*, 469 F.3d at 248. Because Precision has failed to demonstrate IRCA supersedes Tennessee's police powers implicated here, the Court should affirm the decision below.

II. Precluding remedies to Mr. Torres and other undocumented workers who face retaliation would undermine the rights and safety of all works.

Denying Mr. Torres any remedies for retaliation based on filing a workers' compensation claim would effectively deny him his right to be free from such retaliation. This is but an application of the ancient legal maxim *ubi jus, ibi remedium*—"Where there is a right, there is a remedy."[9]

[9] *Legal Maxims*, BLACK'S LAW DICTIONARY (11th ed. 2019). As Chief Justice Marshall stated, "[E]very right, when withheld, must have a remedy, and every injury its proper redress." *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 163 (1803) (quoting 3 WILLIAM BLACKSTONE, COMMENTARIES *23, *109). This maxim

Undocumented workers compose a significant subset of the workforce in the U.S. and Tennessee in industries with high rates of workplace injuries. Fears of immigration and job-related retaliation make such workers particularly vulnerable to workplace abuse. Without meaningful anti-retaliation remedies, reporting becomes a "Hobson's choice," and "employees understandably might decide that matters had best be left as they are." *Mitchell v. Robert DeMario Jewelry, Inc.*, 361 U.S. 288, 293 (1960). Undermining workplace protections hurts not only undocumented workers; it also endangers the rights and safety of all workers. When remedies for injuries and retaliation are weakened, so too are the incentives for employers to rectify unsafe practices. "[I]t needs no argument to show that fear of economic retaliation might often operate to induce aggrieved employees quietly to accept substandard conditions." *Id.* at 292 (citing *Holden v. Hardy*, 169 U.S. 366, 397 (1898)).

Undocumented workers in the United States—of whom there are approximately eight million—are an integral part of the nation's workforce and work alongside U.S. citizens.[10] They are concentrated in industries with

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is "as basic and universally embraced" as it was two hundred years ago. Akhil Reed Amar, *Of Sovereignty and Federalism*, 96 YALE L.J. 1425, 1485-86 (1987).

[10] *Immigrants in the U.S.*, AMERICAN IMMIG. COUNCIL (Aug. 6, 2020), https://perma.cc/T3T2-QJBV.

disproportionately high levels of injury and death, such as agriculture, manufacturing, construction, and food services.[11] About half of all crop farmworkers in the United States—more than one million—are undocumented.[12] Tennessee reflects these national trends; it is home to over 348,000 immigrants, of whom roughly 130,000 are undocumented.[13] Tennessee's undocumented community is overrepresented in similarly high-risk industries.[14] Annually in the U.S., approximately 4,800 workers are killed on the job, and almost three million others become ill or injured, often in these same industries.[15]

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[11] Pia Orrenius & Madeline Zavodny, *Do Immigrants Work in Riskier Jobs?*, DEMOGRAPHY (Aug. 2009), at 535, 536, 540, https://perma.cc/9S7E-6GVM.

[12] Marcelo Castillo & Skyler Simnitt, "Legal Status and Migration Practices of Hired Crop Farmworkers," *Farm Labor*, U.S. DEP'T OF AGRIC. (last updated Apr. 22, 2020), https://perma.cc/T9S4-MBW6.

[13] *Immigrants in Tennessee*, AMERICAN IMMIGR. COUNCIL (Aug. 6, 2020), https://perma.cc/AN62-3SLJ.

[14] *Id.*; *Profile of the Unauthorized Population: Tennessee*, MIGRATION POL'Y INST., https://perma.cc/8LYL-XV9E.

[15] Construction, transportation and warehousing, agriculture, and manufacturing are among the deadliest industries. *Number and Rate of Fatal Work Injuries by Industry Sector*, U.S. BUREAU OF LABOR STAT. (2018), https://perma.cc/9NH4-NCD7.

Courts have recognized the extreme vulnerability of undocumented workers to workplace abuse.[16] Undocumented workers face increased risks of harassment, injuries, wage violations, and other abuses.[17] Studies reveal that while undocumented workers experience more workplace injuries and are subject to more wage violations than nonimmigrant workers, they report injuries and violations less frequently.[18] Undocumented workers walk a tightrope to protect their jobs and

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[16] *See* Amicus Brief in 18-5850 at 268-27 (citing *Arizona*, 567 U.S. at 405 (noting undocumented workers "face the possibility of employer exploitation because of their removable status"); *U.S. 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, 558 n.59, 561 n.69, 562–64 (5th Cir. 2016) (citing studies of immigrant worker abuse in the poultry industry)); *Castillo v. Morales, Inc.*, No. 2:12-CV-650, 2015 WL 13021899, at *7 (S.D. Ohio Dec. 22, 2015) ("Workers who lack legal immigration status may fear that participating in a legal action could trigger adverse immigration consequences.").

[17] Amicus Brief in 18-5850 at 28-29; Orrenius & Zavodny, *supra* note 11, at 548 (revealing an excess of immigrant fatalities due to their distribution across industries); Lynn Dombrowski et al., *Low-Wage Precarious Workers' Sociotechnical Practices Working Towards Addressing Wage Theft*, PROCEEDINGS OF THE 2017 CHI CONF. ON HUMAN FACTORS IN COMPUTING SYS. (May 2017), https://perma.cc/5UXL-YSDW ("On average, such wage violations are widespread among low-wage, precarious workers (affecting between 10 to 25%) and are typically significantly higher amongst undocumented residents (affecting closer to 70%)."); Rebecca Smith et al., *Undocumented Workers*, NAT'L EMP'T LAW PROJECT (2015), at 2, https://perma.cc/RBD5-5XYZ.

[18] Deborah Berkowitz, *Unintended Consequences of Limiting Workers' Comp Benefits for Undocumented Workers*, NAT'L EMP'T LAW PROJECT (May 23, 2017), https://perma.cc/7GRE-7DBU; *Lives on the Line: The Human Cost of Cheap Chicken*, OXFAM AMERICA (2015), at 27, 31, 36, https://perma.cc/842W-4E5B

health while avoiding workplace retaliation, which often includes immigration-related threats.[19] 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).

Foreclosing remedies "virtually guts" anti-retaliation protections, *Contreras v. Corinthian Vigor Ins. Brokerage, Inc.*, 25 F. Supp. 2d 1053, 1058 (N.D. Cal. 1998), leaving workers without a critical means to uphold basic workplace rights. The experience of Maricruz Ladino exemplifies both the vulnerabilities of undocumented workers and the importance of remedies. She came forward to report rampant sexual assault and harassment among farmworker women despite her fears of immigration and job-related consequences, including termination.[20] Indeed, once

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(noting reluctance among many immigrant workers in meat and poultry industries to report workplace injury for fear of retaliation).

[19] Monica Campbell, *Farmworkers Are Getting Coronavirus*, THE WORLD (July 29, 2020, 3:45 PM EST), https://perma.cc/F3FC-TTBD. This manifests in case law. *See, e.g.*, *Does I thru XXIII v. Advanced Textile Corp.*, 214 F.3d 1058, 1062–63 (9th Cir. 2000) (court allowed plaintiffs to plead claims anonymously due to their fear of retaliatory deportation); *Singh*, 214 F. Supp. 2d at 1057 (employer reported undocumented worker to then-INS after he filed claim for unpaid wages).

[20] Sasha Khokha, *Silenced by Status, Farm Workers Face Rape, Sexual Abuse: Transcript*, NAT'L PUB. RADIO (Nov. 5, 2013, 5:26 PM ET),

she spoke out, her employer threatened her and eventually fired her: "Then there were threats . . . that if I continued with the case, I would be deported."[21] Despite these risks, she sued the company and ultimately settled her claim.[22]

Workers speaking out can inform broader, industry-wide policy changes. Notably, due to cases like that of Ms. Ladino, farms in California with over 50 employees must now participate in sexual harassment trainings to ensure basic workplace safety.[23]

Conversely, without remedies for undocumented workers, employers lose a critical deterrent against unsafe policies, and all workers suffer. As the Ohio Court of Appeals analogously observed, "If illegal aliens were injured, the employer would not lose any money because the aliens could not collect workers' compensation. Therefore, the employer may become lax in workplace safety, knowing it would suffer no consequences if its employees were injured at work." *Rajeh*, 813 N.E.2d

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https://perma.cc/UPU5-JZHZ; *Rape in the Fields: Transcript*, FRONTLINE (June 25, 2013), https://perma.cc/35SP-G6M7.

[21] *Id.*

[22] *Id.*; Gabriel Thompson, C*hasing the Harvest,* LONGREADS (May 2017), https://perma.cc/27VW-D866.

[23] Khokha, *supra* note 20.

at 703. Employers who expose undocumented workers to unsafe or unhealthy conditions expose their entire workforce to the same risks.

Workers need meaningful anti-retaliation protections to freely report workplace injuries or labor violations. When those protections are weakened, even for just a subset of workers, more workers are more likely to stay silent, leading to preventable injuries. Cultural shifts in the reporting of sexual harassment illustrate the critical role of coworkers' reporting in one's decision to report abuse. According to a 2016 report by the U.S. Equal Employment Opportunity Commission, 60 to 70 percent of women have experienced sexual harassment during their careers, yet approximately 70 percent of those women never complained internally to their employers.[24] The #MeToo movement, however, has encouraged more people to report illegal harassment.[25] Simply put, when one employee reports a labor violation, it breaks down the culture of silence around reporting and uplifts conditions for all workers.

The COVID-19 pandemic only points to the need for meaningful anti-retaliation protections that encourage workers to report problems. Currently, reports

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[24] Chai R. Feldblum & Victoria A. Lipnic, *Select Task Force on the Study of Harassment in the Workplace*, U.S. EQUAL EMP'T OPPORTUNITY COMM'N (June 2016), https://perma.cc/M4VT-7CYC.

[25] *Id*.

indicate that some employers are pressuring individuals to continue working despite extremely high risks of contracting COVID-19.[26] At least one federal suit has been filed against a company for threatening to fire employees who did not continue working despite potential COVID-19 exposure.[27] In recent months, COVID-19 outbreaks have been reported at farms and food processing plants nationwide.[28] At one Tennessee farm, 100 percent of farmworkers tested positive for the virus.[29] Safeguards against retaliation for reporting workplace injuries are paramount, since

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[26] At Primex Farms, a California dried fruit and nut producer, a quarter of its 400-person workforce contracted COVID-19. Primex neither acknowledged the outbreak nor provided its employees—who work in close quarters—with masks or other protection. Workers organized a strike and demanded a state investigation; Primex thereupon fired forty workers. Campbell, *supra* note 19; *see also COVID's Hidden Toll: Transcript*, FRONTLINE (July 21, 2020), https://perma.cc/HS7D-XVGT (noting over 14,000 meatpacking workers have been exposed to COVID-19 through work).

[27] Manuela Tobias, *San Joaquin Valley Company 'Encouraging' COVID-19 Infected Employees to Work, Lawyer Says*, CAL MATTERS (July 28, 2020), https://perma.cc/EGT6-TJW3.

[28] Josh Funk, *Stopping Virus a Huge Challenge at U.S. Meat Plants*, AP NEWS (Apr. 23, 2020), https://apnews.com/3245fe475b5552e493cfeb288ce04131; *COVID's Hidden Toll*, *supra* note 26.

[29] Sam Luther, *Rhea Co. Farm Leader Says All of Their Nearly 200 Employees Have Virus,* ABC NEWS CHANNEL 9 (May 26, 2020), https://perma.cc/K7SD-LREK.

COVID-19 threatens the health and safety of all workers, and their broader communities, regardless of immigration status.

This Court should affirm that federal immigration law does not preempt the award of state-law remedies to Mr. Torres. Without a remedy, there is effectively no right. *See Marbury*, 5 U.S. (1 Cranch) at 163. Foreclosing meaningful relief to workers like Mr. Torres would exacerbate the unsafe working conditions and fear of retaliation already experienced by undocumented workers, leading to more dangerous workplaces for all.

CONCLUSION

The Court should affirm the decision below.

Dated: August 12, 2020

Respectfully submitted,

Marisa Díaz
Christopher Ho
LEGAL AID AT WORK

By: /s/ Marisa Díaz
MARISA DÍAZ

Attorneys for TENNESSEE IMMIGRANT AND REFUGEE RIGHTS COALITION, LATINO MEMPHIS, ET AL

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 limitation of FED. R. APP. P. 29(a)(5) and 32(a)(7)(B), because this brief contains 6,298 words excluding the portions of the brief exempted by FED. R. APP. P. 32(f).

This brief comports with the typeface requirements of Rule 32(a)(5) and the type style requirements of Rule 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

Dated: August 12, 2020

/s/ Marisa Díaz
Marisa Díaz

CERTIFICATE OF SERVICE

Case Name: **RICARDO TORRES v. PRECISION INDUSTRIES, INC., AKA P.I. INC.**
Case Nos.: **20-5492**

I hereby certify that on August 12, 2020, 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-APPELLEE 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 August 12, 2020, at Oakland, California.

/s/ Marisa Díaz

MARISA DÍAZ