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August 29, 2011

The Honorable Tani Cantil-Sakauye, Chief Justice, and the  
Associate Justices of the Supreme Court of California  
350 McAllister Street  
San Francisco, CA 94102-4797

**Re: Turcios v. Superior Court, No. S 195956**  
*(Application for Leave to File Amicus Curiae Letter and  
Amicus Curiae Letter in Support of Petitioner Eliseo Turcios)*

To Chief Justice Cantil-Sakauye and the Associate Justices of the  
Supreme Court of California:

**Application for Leave to File Amicus Curiae Letter**

The Legal Aid Society – Employment Law Center (“LAS-ELC”) is a San Francisco-based, non-profit public interest law firm that has for decades advocated on behalf of the workplace rights of members of historically underrepresented communities, including persons of color, women, recent immigrants, individuals with disabilities, and the working poor. Founded in 1916 as the first legal services organization west of the Mississippi, LAS-ELC has litigated numerous cases in which the rights of undocumented workers to be protected against employment abuses have been at issue. Among LAS-ELC’s published decisions in this regard are *Contreras v. Corinthian Vigor Insurance Brokerage, Inc.* (N.D. Cal. 1998) 25 F.Supp.2d 1053, and *Contreras v. Corinthian Vigor Insurance Brokerage, Inc.* (N.D. Cal. 2000) 103 F.Supp.2d 1180, in which, for the first time since the enactment of the Immigration Reform and Control Act of 1986 (“IRCA”), a federal court found it unlawful for employers to retaliatorily report to immigration authorities undocumented workers who had asserted their workplace rights; *Singh v. Jutla* (N.D. Cal. 2002) 214 F.Supp.2d 1056, which reaffirmed the vitality of the same rights and remedies after *Hoffman Plastic Compounds, Inc. v. NLRB* (2002) 535 U.S. 137, which made back pay unavailable to undocumented workers under the National Labor Relations Act; and *Rivera v. NIBCO, Inc.* (9th Cir. 2004) 364 F.3d 1057, *cert. denied* (2005) 544 U.S. 905, in which the Ninth Circuit upheld a protective order barring a defendant from engaging in discovery to ascertain the immigration status of the plaintiffs in a Title VII employment discrimination action; holding that their immigration status was irrelevant to their standing to bring suit and that such discovery would impermissibly chill the ability of workers to enforce their workplace rights.

LAS-ELC respectfully submits that the legal issues raised by Mr. Turcios in his Petition for Review are a matter of substantial public interest, and that it can present authorities and analysis that may be of assistance to this Court in considering the petition. Accordingly, we seek leave to file this amicus curiae letter.

### **Amicus Curiae Letter In Support of Petitioner Turcios**

Amicus LAS-ELC addresses in particular two related arguments made below by Real Party In Interest Pacific Gas & Electric Company (“PG&E”): 1) that the Legislature’s 2002 enactment of SB 1818<sup>1</sup> does not apply to cases such as this one, where workers have suffered personal injuries in industrial accidents; and 2) that SB 1818, despite its plain language, leaves undisturbed *Rodriguez v. Kline* (1986) 186 Cal.App.3d 1145, and *Metalworking Machinery, Inc. v. Superior Court* (1977) 69 Cal.App.3d 791, two pre-SB 1818, pre-IRCA cases in which the courts found the immigration status of the plaintiffs to be relevant to the extent of their remedies.

#### **1. On Its Face, SB 1818 Represents A Clear Policy Choice of the Legislature To Protect Immigrant Workers, And It Cannot Sensibly Be Limited As PG&E Suggests**

Labor Code § 1171.5, which codifies SB 1818, provides in pertinent part that “[f]or purposes of enforcing state labor and employment laws, . . . no inquiry shall be permitted into a person’s immigration status” except where it is “shown by clear and convincing evidence that the inquiry is necessary in order to comply with federal immigration law.” § 1171.5(b). PG&E argues that even though Mr. Turcios was injured in the course of his employment, and even assuming that PG&E may indeed be partially liable for his workplace injuries, he is nonetheless not covered by § 1171.5’s unequivocal prohibition against immigration-related discovery. This assertion, however, is unpersuasive.

To begin with, subsection (a) of Labor Code § 1171.5, which sets forth the Legislature’s policy purposes, could hardly be phrased more broadly; it describes state policy with respect to “[a]ll protections, rights, and remedies available under state law,” and establishes that those protections are available “to all individuals regardless of immigration status who have applied for employment, or who are or who have been employed, in this state.” Nowhere is it stated that the protections conferred by this statute are afforded only as against “employers.” To read into this sweeping and unambiguous language a *sub silentio* exception for third-party tortfeasors in industrial accidents would frustrate the Legislature’s plain purpose in enacting SB 1818, that of enabling workers to seek legal redress for injuries suffered in the workplace irrespective of their immigration status.

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<sup>1</sup> Codified at Cal. Civ. Code § 3339(a), Cal. Gov’t Code § 7285(a), Cal. Health & Safety Code § 24000, and Cal. Lab. Code 1171.5(a).

Certainly there is no reason why tort remedies available to all workers should be denied to those whose immigration status may make them particularly vulnerable to workplace abuses -- particularly where, as pointed out elsewhere, it was the precise intent of the Legislature to create a level playing field under state law for such workers in *Hoffman*'s wake. Workplace injuries, of course, are no different and no less serious when they are attributable to an entity other than the worker's nominal employer. Accordingly, there is no articulable rationale for permitting potentially liable third parties to conduct invasive and intimidating discovery into a worker's immigration status, when their doing so could have precisely the same chilling effect upon the assertion of workplace rights as if the discovery were undertaken by the employer itself.

In *Farmers Brothers Coffee v. Workers' Compensation Appeals Board* (2005) 133 Cal.App.4th 533, for example, the Second District Court of Appeal unambiguously held that Labor Code § 1171.5 made immigration status irrelevant to workers' compensation coverage. It is unclear why there would be any sensible basis for finding such status relevant and discoverable by third-party tortfeasors sued in connection with the very same injuries.<sup>2</sup> As a remedial statute intended to address the potential consequences of *Hoffman* upon workplace protections for immigrant workers, Labor Code § 1171.5 should be construed broadly, and consistent with the Legislature's plain intent, so as to effectuate its purposes. *Murphy v. Kenneth Cole Productions* (2007) 20 Cal.4th 1094, 1103 ("statutes governing conditions of employment are to be construed broadly in favor of protecting employees.").

## **2. PG&E Cannot Look To SB 1818's "Declaratory of Existing Law" Provision to Eviscerate The Statute's Plain Purpose**

PG&E places great stock in the argument that SB 1818's statement that "[t]he provisions of this section are declaratory of existing law", indicates that the Legislature intended to leave all contrary prior law, including the decades-old, pre-IRCA decisions in *Rodriguez* and *Metalworking Machinery*, untouched. Leaving aside the clear policy purposes of the Legislature discussed above, this argument fails on independent grounds, as an examination of SB 1818's legislative history makes clear.

When a bill is considered by the California State Senate, provided that it progresses far enough through the legislative process, it eventually becomes the subject of a "third reading." A

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<sup>2</sup> *Farmers Brothers* also pointed out that if an injured worker were required to demonstrate legal proof of his or her documented status as a condition of receiving workers' compensation benefits, it would "thrust [the WCAB] into the role of determining employers' compliance with the IRCA. . . . as well as the immigration status of each injured employee . . . Thus, the remedial purpose of workers' compensation would take on an enforcement purposes, in direct *conflict* with the IRCA." *Id.* at 540-41. In any event, the determination of an individual's immigration status is within the expertise of the appropriate federal agencies, not that of the judiciary. *NLRB v. Apollo Tire Co., Inc.* (9th Cir. 1979) 604 F.2d 1180, 1183 ("Questions concerning the status of an alien and the validity of his papers are matters properly before the Immigration and Naturalization Service.").

third reading, which takes place immediately prior to a floor vote on the bill, includes the preparation of a bill analysis.<sup>3</sup> This Court has looked to third reading analyses as an aid to discerning the Legislature's intent in enacting legislation, *see, e.g., Sharon S. v. Superior Court* (2003) 31 Cal.4th 417, 459.

In the Senate's third reading analysis of SB 1818,<sup>4</sup> the text of the bill is first set forth, including subsection d), which states that "[t]he provisions of this bill are declaratory of existing law."<sup>5</sup> It is then followed immediately by the following section:

*EXISTING LAW provides:*

- 1) *A framework for the enforcement of minimum labor standards relating to employment, civil rights, and special labor relations.*
- 2) *Authority to various state agencies to remedy specific violations where an employee has suffered denial of wages due, proven discrimination, unlawful termination, suspension, or transfer, for the exercise of their rights under the law.*
- 3) *For remedies such as reinstatement and back pay awards for monies due the employee in order to make them whole.*

It is in this context that SB 1818's "declaratory of existing law" language is properly understood. Far from constituting a wholesale ratification of the entire body of pre-existing California law, including decisions such as *Rodriguez* and *Metalworking Machinery* that (as explained in the Petition for Review) are facially at odds with SB 1818, the Legislature was simply indicating that nothing in the bill was meant to disturb the existing legal framework established for the protection of workers who had been unlawfully treated. Indeed, any other understanding of subsection d) would render SB 1818 a nullity inasmuch as it would leave standing case law inconsistent with its plain remedial purpose, that of ensuring that all persons in California would enjoy equal rights and remedies in the workplace irrespective of immigration status.

This nonsensical construction of SB 1818 is to be avoided. In the analogous case of *Shoemaker v. Myers* (1990) 52 Cal.3d 1, for example, this Court held that an employee's claim under a "whistleblower" statute was not pre-empted by the Workers' Compensation Act.

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<sup>3</sup> Office of Legislative Counsel of California, "Overview of Legislative Process" (available online at <http://www.leginfo.ca.gov/bil2lawx.html>).

<sup>4</sup> A true and correct copy of the third reading analysis of SB 1818 is appended hereto as Attachment A for the convenience of the Court. It is also available online at [http://www.leginfo.ca.gov/pub/01-02/bill/sen/sb\\_1801-1850/sb\\_1818\\_cfa\\_20020823\\_000220\\_asm\\_floor.html](http://www.leginfo.ca.gov/pub/01-02/bill/sen/sb_1801-1850/sb_1818_cfa_20020823_000220_asm_floor.html).

<sup>5</sup> This language appears in subsection c) of Labor Code § 1171.5.

*Shoemaker* noted that if the Legislature had considered existing workers' compensation remedies adequate to address the problem of retaliation against whistleblowing public employees, it would not have enacted the statute:

We do not presume that the Legislature performs idle acts, nor do we construe statutory provisions so as to render them superfluous. The whistleblower statute was a legislative expression intended to encourage and protect the reporting of unlawful governmental activities, and to effectively deter retaliation for such reporting. The Legislature clearly intended to afford an additional remedy to those already granted under other provisions of the law; otherwise [former Government Code] section 19683 [the whistleblower statute] would be rendered meaningless.

*Id.* at 22. This Court should reject PG&E's attempt to read SB 1818 out of existence by its very own terms.

### **3. The Courts Have Recognized the Need to Limit or Bar Immigration-Related Discovery Because of Its *In Terrorem* Effects**

Finally, the courts have long understood that permitting defendants freely to discover sensitive matters relating to a plaintiff's immigration status would have a deeply chilling effect that would severely undercut their ability to enforce their legal rights.<sup>6</sup> *See, e.g., In re Reyes* (5th Cir. 1987) 814 F.2d 168, 170, *cert. denied sub nom. Griffin & Brand of McAllen v Reyes* (1988) 487 U.S. 1235 (denying discovery concerning plaintiffs' immigration status, noting that such discovery could inhibit their pursuit of their legal rights "because of possible collateral wholly unrelated consequences, [and] because of embarrassment and inquiry into their private lives"); *Montelongo v. Meese* (5th Cir. 1986) 803 F.2d 1341, 1352 n.17 (noting that district court barred inquiry into class members' immigration status); *John Dory Boat Works, Inc.* (1977) 229 N.L.R.B. 844 (enjoining employer from calling employees' immigration status into question, noting that the impact upon witnesses of immigration-related questions at Board proceeding "ranged from unsettling to devastating and certainly affected their ability to testify.").

More recently, the U.S. Court of Appeals for the Ninth Circuit affirmed the validity of a protective order barring the defendant employer in a Title VII case from attempting to discover

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<sup>6</sup> Apart from the specter of deportation, a number of criminal statutes could be implicated by such discovery. *See* 18 U.S.C. § 1015 (prohibiting making a false claim of U.S. citizenship in order to engage in employment); 18 U.S.C. § 1546 (prohibiting false attestation on an employment verification form); 42 U.S.C. § 408(a)(7)(B) (prohibiting false use of a social security number). Employer knowledge of adverse plaintiff testimony in these areas, or other information indicating that an employee lacks current work authorization, could require an employer to terminate the worker. 8 U.S.C. § 1324a(a)(2). Information that an employee at some time in the past lacked work authorization or misrepresented his or her immigration status to the employer could also be grounds for termination. Clearly, even an attenuated possibility that an adverse disclosure might result in such severe job consequences would inhibit many if not most reasonable plaintiffs from continuing to press their claims.

the plaintiffs' immigration status. Finding that such information was irrelevant to their standing to enforce their rights against national origin discrimination, the Ninth Circuit, the panel wrote:

Granting employers the right to inquire into workers' immigration status in cases like this would allow them to raise implicitly the threat of deportation and criminal prosecution every time a worker, documented or undocumented, reports illegal practices or files a Title VII action. Indeed, were we to direct district courts to grant discovery requests for information related to immigration status in every case involving national origin discrimination under Title VII, countless acts of illegal and reprehensible conduct would go unreported.

*Rivera v. NIBCO, Inc.*, 364 F.3d 1057, 1065 (9th Cir. 2004), *cert. denied*, 544 U.S. 905 (2005).

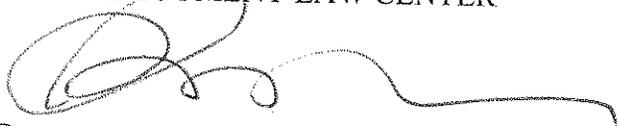
To the extent that tort actions have the beneficial effect of discouraging and deterring future harm, *see, e.g., Burgess v. Superior Court* (1992) 2 Cal.4th 1064, 1081, it would be against public policy to chill immigrant workers, among the most vulnerable in the labor market, from bringing meritorious personal injury actions to challenge unsafe and hazardous working conditions that adversely affect all workers. Yet that would be a likely consequence of permitting the irrelevant and invasive discovery being sought in this matter by PG&E – discovery that the Legislature sought to limit in its swift enactment of SB 1818. Such an anomalous result should be avoided.

#### 4. Conclusion

For the foregoing reasons, amicus curiae Legal Aid Society – Employment Law respectfully urges this Court to grant Mr. Turcios' Petition for Review, and to correct the erroneous ruling of the court below.

Respectfully submitted,

Christopher Ho  
Araceli Martínez-Olguín  
The LEGAL AID SOCIETY –  
EMPLOYMENT LAW CENTER

By: 

CHRISTOPHER HO

Counsel for Amicus Curiae

## **EXHIBIT A**

BILL ANALYSIS

SB 1818  
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SENATE THIRD READING  
 SB 1818 (Romero)  
 As Amended August 22, 2002  
 Majority vote

SENATE VOTE : 23-14LABOR AND EMPLOYMENT 6-1

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Ayes: Koretz, Negrete McLeod,		
	Chu, Havice, Migden,	
	Shelley	
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Nays: Wyland		
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SUMMARY : Amends the Civil, Government, Health and Safety and Labor Codes to include legislative findings and declarations regarding the protections, rights and remedies of employees, regardless of immigration status, under state law. Specifically, this bill :

1) States legislative findings that:

- a) All protections, rights and remedies available under state law are available to all individuals who have applied for employment, or who are or who have been employed, in this state, regardless of immigration status. (Excludes reinstatement remedies prohibited by federal law from this protection.)
- b) For purposes of enforcing state labor, employment, civil rights, and employee housing laws, a person's immigration status is irrelevant to the issue of liability.
- c) In proceedings or discovery undertaken to enforce state laws no inquiry shall be permitted into a person's immigration status except where there is clear and convincing evidence that such inquiry is necessary in order to comply with federal immigration law.
- d) The provisions of this bill are declaratory of existing law.

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e) The provisions of this bill are severable and that invalidity of one provision will not affect other provisions.

EXISTING LAW provides:

- 1) A framework for the enforcement of minimum labor standards relating to employment, civil rights, and special labor relations.
- 2) Authority to various state agencies to remedy specific violations where an employee has suffered denial of wages due, proven discrimination, unlawful termination, suspension, or transfer, for the exercise of their rights under the law.
- 3) For remedies such as reinstatement and back pay awards for monies due the employee in order to make them whole.

FISCAL EFFECT : None

COMMENTS : In March 2002, the United States Supreme Court ruled, in a 5 - 4 decision, that the federal Immigration Reform and Control Act of 1986 (IRCA) precluded back pay awards to undocumented workers, even though they might be victims of unfair labor practices, because the workers were never legally authorized to work in the United States [ Hoffman Plastic Compounds, Inc. v. NLRB 122 S. Ct. 1275 (2002)].

On July 19, 2002, the National Labor Relations Board (NLRB) released a memorandum from the Office of the General Counsel, which sets forth guidance as to procedures and remedies concerning employees who may be undocumented aliens in light of the Supreme Court's decision. The memorandum notes that the decision has left intact several basic principles as set forth in prior court and NLRB decisions, and that the Supreme Court decision reaffirmed the Court's prior holding that undocumented

aliens are employees under the National Labor Relations Act (NLRA), and thereby enjoy protections from unfair labor practices.

The memorandum advises that while conditional reinstatement remains appropriate to remedy the unlawful discharge of undocumented employees whom an employer knowingly hires, where a respondent as in Hoffman, established that it would not have

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hired or retained the employee, had it known of his undocumented status, reinstatement is not appropriate.

Conversely, the memorandum asserts that even though Supreme Court decision was limited to precluding back pay for employees, where the employer did not have knowledge of the employee's immigration status, back pay is also inappropriate where the employer knew of the employee's immigration status.

Additionally, the memorandum contends that as the Supreme Court did not preclude back pay for undocumented workers for work previously performed under unlawfully imposed terms and conditions, but rather precluded back pay for "work not performed," that back pay in situations such as a unilateral change of pay or benefits is appropriate.

The author and proponents argue that the Hoffman decision has the potential effect of undercutting state remedies for illegal labor practices, and that this measure is needed to keep our state's labor and civil rights' remedies intact, and enhance compliance. Proponents, contend that the Supreme Court's recent decision in Hoffman promotes and rewards the unscrupulous practice of hiring and then retaliating against undocumented workers. They also assert that by allowing employers to use undocumented workers as strikebreakers, the Supreme Court has undermined the rights of all union members. Additionally, employers who fear unionized workers who are fighting for better wages and working conditions now have an added incentive to hire undocumented workers, knowing that they will not have to compensate the workers they fire for otherwise unlawful union activities.

Analysis Prepared by : Liberty Sanchez / L. & E. / (916)  
319-2091

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I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct. Executed on August 29, 2011 at San Francisco, California.

  
Djuna Gray