IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA
SIXTH APPELLATE DISTRICT

No. H048665

RIGOBERTO JOSE MANUEL
Plaintiff and Petitioner

vs.

SUPERIOR COURT OF SANTA CLARA COUNTY,
Respondent.

BRIGHTVIEW LANDSCAPE SERVICES, INC.
Defendant and Real Party in Interest.

APPLICATION FOR LEAVE TO FILE *AMICUS CURIAE* BRIEF AND [PROPOSED] *AMICUS CURIAE* BRIEF OF BET TZEDEK, CALIFORNIA RURAL LEGAL ASSISTANCE FOUNDATION, CENTER FOR WORKERS' RIGHTS, CENTRO LEGAL DE LA RAZA, LEGAL AID AT WORK, LEGAL AID OF MARIN, PUBLIC COUNSEL, WOMEN'S EMPLOYMENT RIGHTS CLINIC OF GOLDEN GATE UNIVERSITY SCHOOL OF LAW, WORKSAFE, CALIFORNIA EMPLOYMENT LAWYERS ASSOCIATION, SEIU CALIFORNIA, CENTRO DE LOS DERECHOS DEL MIGRANTE, INC., NATIONAL DOMESTIC WORKERS ALLIANCE, AND NATIONAL IMMIGRATION LAW CENTER IN SUPPORT OF PLAINTIFF AND PETITIONER RIGOBERTO JOSE MANUEL

From Order Compelling Response to Discovery
County of Santa Clara Superior Court, No. 19cv355747
The Honorable Socrates P. Manoukian
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CERTIFICATE OF INTERESTED ENTITITES OR PERSONS

Pursuant to California Rules of Court, Rule 8.208, I hereby certify that no entity or person has an ownership interest of 10 percent or more in proposed *amici curiae* Bet Tzedek, California Rural Legal Assistance Foundation, Center for Workers' Rights, Centro Legal de la Raza, Legal Aid at Work, Legal Aid of Marin, Public Counsel, Women's Employment Rights Clinic of Golden Gate University School of Law, Worksafe, California Employment Lawyers Association, California State Council of Service Employees, Centro de los Derechos del Migrante, Inc., National Domestic Workers Alliance, and the National Immigration Law Center. I further certify that I am aware of no person or entity, not already made known to the Justices by the parties or other *amici curiae,* having a financial or other interest in the outcome of the proceedings that the Justices should consider in determining whether to disqualify themselves, as defined in Rule 8.208(e)(2).

DATE: June 1, 2021 By: _____
Marisa Díaz

APPLICATION FOR LEAVE TO FILE *AMICUS CURIAE* BRIEF IN SUPPORT OF PLAINTIFF AND PETITIONER RIGOBERTO JOSE MANUEL; PROPOSED BRIEF

Pursuant to California Rules of Court 8.520, Legal Aid at Work, *et al.*, respectfully apply to this Court for leave to file an *amicus curiae* brief in support of Plaintiff and Petitioner Rigoberto Jose Manuel's Petition for Writ of Mandate or Other Appropriate Relief. This request is timely made within fourteen days of Real Party in Interest, BrightView Landscape Services, Inc.'s Preliminary Opposition to the Petition for Writ of Mandate. (Cal. Civ. Proc. Code § 12a.) The proposed brief is lodged concurrently with this application.

CERTIFICATION OF NON –PARTICIPATION

Pursuant to California Rule of Court 8.200(c)(3), *amici curiae* certify that no counsel for either party authored the brief in whole or in part, no party or party's counsel contributed money that was intended to fund preparing or submitting the brief, and no person or entity contributed money that was intended to fund preparing or submitting the brief.

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STATEMENTS OF INTEREST OF PROPOSED *AMICI CURIAE*

Legal Aid at Work (LAAW) and thirteen other Proposed *Amici* submit this brief in support of Plaintiff and Petitioner Rigoberto Jose Manuel. Proposed *Amici* are each non-profit organizations, with no parent corporations or publicly traded stock.

Proposed *Amici* are non-profit public interest organizations, legal professional organizations, and unions dedicated to defending and expanding the rights of workers, including immigrant workers, in the state of California and beyond. They include organizations with extensive experience and recognized expertise in the issues raised herein, including California's laws related to immigration-status discovery and federal immigration law's impact on undocumented workers' state-law rights. The proposed *amicus curiae* brief draws on this expertise to provide the Court with necessary additional context regarding SB 1818's enactment, federal immigration law's application to SB 1818 and state-law workplace rights and remedies more generally, and the real-world consequences of the Superior Court's order. The expertise and experience of Proposed *Amici* will assist the Court in resolving the important legal issues presented in this case.

Proposed *Amici* are concerned about the significant erosion of immigrant and non-immigrant workers' rights alike that would result should discovery of the nature allowed by the Superior Court be permitted. They respectfully submit this proposed *amicus curiae* brief in support of Plaintiff-Petitioner's position that the Superior Court's Order on Motion to Compel Further Responses to Discovery must be vacated and reissued so as to deny Respondent's motion to compel the discovery at issue.

The individual organizations are described below:

Bet Tzedek - Hebrew for the "House of Justice" - was established in 1974, and provides free legal services to seniors, the indigent, and the disabled. Bet Tzedek represents Los Angeles County residents on a non-sectarian basis in the areas of housing, welfare benefits, consumer fraud, and employment. Bet Tzedek's Employment Rights Project assists low-wage workers through a combination of individual representation before the Labor Commissioner, litigation, legislative advocacy, and community education. Bet Tzedek's interest in this case comes from 20 years of experience advocating for the rights of low-wage immigrant workers in California. As a leading voice for Los Angeles's most vulnerable workers, Bet Tzedek has an interest in

ensuring that immigrant workers are able to vindicate their workplace rights and protections.

California Rural Legal Assistance Foundation (CRLAF) is a nonprofit legal service provider that represents low-income individuals across rural California and engages in regulatory and legislative advocacy. Since 1986, CRLAF has represented California's low-wage workers, particularly farmworkers, in class and representative actions. CRLAF has recovered wages and other compensation for thousands of farmworkers, nearly all of whom are seasonal. These workers have been subjected to illegal tactics to deny, interfere with or impede them from taking their breaks; to schemes intended to defraud them of minimum wages, contract wages and overtime wages, due to them; and been forced to endure working conditions which expose them to pesticides, heat stress, and acute and sustained ergonomic stress. CLRAF drafted an early version of Senate Bill No. 1818, successfully proposed a version of the bill to the ultimate author, and lobbied for its passage and signature. CRLAF represents California's farmworkers and other low-wage workers regardless of immigration status. Even though Senate Bill No. 1818 set a clear standard regarding the discovery of an individual's immigration status, many employers

continue to inquire about workers' immigration status during discovery to intimate, exploit, and retaliate against workers.

The **Center for Workers' Rights** is a Sacramento-based, non-profit legal services and advocacy organization whose mission is to create a community where workers are respected and treated with dignity and fairness. To bring that vision into reality, we provide legal representation to low-wage workers, advocate for initiatives to advance workers' rights, and promote worker education, activism, and leadership in the greater Sacramento area. The Center for Workers' Rights represents immigrant workers, regardless of immigration status in claims for wages at the California Labor Commissioner's Office and complaints with the Department of Fair Employment and Housing.

Founded in 1969, **Centro Legal de la Raza** is a legal services agency protecting and advancing the rights of low-income and immigrant communities through legal representation, education, and advocacy. By combining quality legal services with know-your-rights education and youth development, Centro Legal ensures access to justice for thousands of individuals throughout Northern and Central California. Centro Legal has an interest in the outcome of this case because its workers' rights practice provides legal assistance to

hundreds of low-wage and immigrant workers each year, including many who would be impacted by the discovery issues as to immigration status presented by this case.

Legal Aid at Work (LAAW), formerly the Legal Aid Society-Employment Law Center, is a California based non-profit public interest law firm whose mission is to defend, preserve, and advance the workplace rights of underrepresented low-wage workers, including immigrant and undocumented immigrant workers. In this regard, LAAW has litigated cases in both federal and state courts addressing the rights of immigrant workers, including *Salas v. Sierra Chemical Co.*, (2014) 59 Cal.4th 407, *Rivera v. NIBCO, Inc.* (9th Cir. 2004) 364 F.3d 1057, *Arias v. Raimondo* (9th Cir. 2017) 860 F.3d 1185, *Contreras v. Corinthian Vigor Ins. Brokerage* (N.D. Cal 2000) 103 F.Supp.2d 1180, and *Singh v. Jutla* (N.D. Cal 2002) 214 F.Supp.2d 1056. LAAW has additionally participated as *amicus curiae* in many cases nationally involving the rights of immigrant workers, including in *Torres v. Precision Industries, Inc.* (6th Cir. 2021) 995 F.3d 485. LAAW has also collaborated extensively with state and federal policymaking agencies to clarify the nature and scope of the employment protections available to immigrant workers, including through the development of

regulations implementing the California Fair Employment and Housing Act and Title VII of the Civil Rights Act of 1964.

Legal Aid of Marin represents mostly low-income Spanish speaking immigrants who often are turned away from all legal services because of their immigration status. We represent workers in claims before the Labor Commissioner. Since the law allows undocumented immigrants to pursue wage claims, any type of discovery into their status would be improper.

Public Counsel is the nation's largest public interest law firm specializing in the delivery of pro bono services. Founded in 1970, Public Counsel is dedicated to advancing equality, justice and economic opportunity by delivering pro bono legal services and impact litigation to low-income individuals and communities in Los Angeles County. In 2020, Public Counsel staff and 3000 pro bono partners provided legal services to 19,000 individuals and their families and conducted impact litigation on behalf of millions of people. Public Counsel advocates for civil rights across program areas, including immigration, housing, education, and employment discrimination, and represents low-wage workers in employment disputes.

The **Women's Employment Rights Clinic (WERC)** of Golden Gate University School of Law is an on campus clinical education program focused on the employment rights of low-wage and immigrant workers. WERC faculty and students provide free legal services, including advice, counseling, and representation of workers in a variety of employment-related matters on both individual and class-wide claims. WERC regularly assists immigrant workers, including undocumented workers, with claims of unpaid wages, discrimination and harassment, and retaliation before administrative agencies and in state and federal court.

Worksafe is a California-based non-profit organization dedicated to advocating for worker health and safety through education, training, and advocacy. Millions of low-wage and immigrant workers often toil long hours in harsh and hazardous work environments in California. Their health and safety depends on their ability to be able to exercise their rights, however, rampant discrimination and retaliation, particularly immigration based retaliation has resulted in a chilling effect on workers' ability to exercise their rights. Given that immigrant workers are disproportionately injured or killed at work, their ability to speak up about workplace conditions is critically

important to their health and safety in the workplace. Worksafe has been actively advocating for strengthened worker voice and protection regarding workplace retaliation. Anything that diminishes accessibility to judicial recourse for low wage workers and immigrant workers is detrimental to their ability to exercise their rights to stand up for safety and health in the workplace. We believe that Brightview Landscape's discovery inquiry into Mr. Manuel's immigration status is an illegal scare tactic. If employees are afraid of retaliation for enforcing their legal rights during or post employment, then we will have a legal system unable to do its job of protecting our nation's most vulnerable. Worksafe has an interest in this case because workers should be protected from questions about immigration status when irrelevant in retaliation or health and safety complaints.

The **California Employment Lawyers Association (CELA)** is an organization of California attorneys whose members primarily represent employees in a wide range of employment cases, including individual, class, and representative actions enforcing California's employment laws. CELA has a substantial interest in protecting the statutory and common law rights of California workers and ensuring the vindication of the public policies embodied in California

employment laws. The organization has taken a leading role in advancing and protecting the rights of California workers, which has included submitting *amicus curiae* briefs and letters and appearing before the California Supreme Court in employment rights cases such as *Dynamex Operations W. v. Superior Court*, 4 Cal. 5th 903 (2018), *Murphy v. Kenneth Cole Productions, Inc.* (2007) 40 Cal.4th 1094, *Gentry v. Superior Court* (2007) 42 Cal.4th 443, *Brinker Restaurant Corp. v. Superior Court* (2012) 53 Cal.4th 1004, *Iskanian v. CLS Transportation Los Angeles, LLC* (2014) 59 Cal.4th 348, and *Ayala v. Antelope Valley Newspapers, Inc.* (2014) 59 Cal.4th 522, as well as in cases before the Ninth Circuit.

California State Council of Service Employees (SEIU California) is a non-profit labor organization affiliated with the Service Employees International Union ("SEIU") consisting of over 700,000 members in California. SEIU California's mission is to improve the lives of working people and their families and lead the way to a more just and humane society. SEIU fights for jobs with decent wages, healthcare, pensions, better working conditions, and more opportunities. SEIU California strives to build greater unity among all SEIU locals in California and to mobilize its membership to pursue an

action-oriented, issue-driven agenda. SEIU California accomplishes its mission through: Member and Public Education, Member Mobilization, Voter Registration, "Get out the Vote" efforts, Legislative Advocacy in the Capitol and in Districts, and Activists' Training. SEIU California works in the areas of healthcare, long term care, public services (both state workers and local), and building services.

Centro de los Derechos del Migrante, Inc. (CDM, or the Center for Migrant Rights) is a U.S. section 501(c)(3) migrant workers' rights organization with offices in Baltimore, Maryland; Mexico City; and Oaxaca, Mexico. CDM seeks to improve the working conditions of migrant workers in the United States through strategic litigation, policy advocacy and community education. CDM's migrant worker clients frequently face employer discovery requests on immigration status, which in many instances serve to chill workers' efforts to vindicate their labor rights. CDM therefore has a significant interest in ensuring that the protections of SB 1818 are properly applied to prohibit such inquiries.

The **National Domestic Workers Alliance (NDWA)** is the nation's leading advocacy organization advancing the dignity, rights

and recognition of millions of domestic workers in the United States. Powered by sixty-four affiliates, plus our local chapters in Atlanta, Durham, Seattle and New York City, of over 20,000 nannies, housecleaners, and home care workers in 36 cities and 17 states. Domestic workers continue to be excluded from some basic federal labor and safety-net protections afforded to all other workers. NDWA fights for equal and improved treatment for domestic workers in every sector.

The **National Immigration Law Center (NILC)** is the primary national organization in the United States exclusively dedicated to defending and advancing the rights of low-income immigrants and their families. Over more than 40 years, NILC has won landmark legal decisions protecting fundamental rights, and advanced policies that reinforce our nation's values of equality, opportunity, and justice NILC's interest in the outcome of this case arises from its long-standing advocacy and litigation to ensure that immigrant workers with low-income can effectively enforce their legal rights in the workplace.

Based on the foregoing, Proposed *Amici Curiae* respectfully request leave to submit the attached Amicus Curiae Brief.

Dated: June 1, 2021

Respectfully submitted,

Marisa Díaz
Laura Alvarenga Scalia
Legal Aid At Work

MARISA DÍAZ

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INTRODUCTION

Amici urge this Court to grant Plaintiff-Petitioner's Petition for Writ of Mandate to vacate the Superior Court's Order compelling intrusive and unnecessary discovery into his immigration status. The Order below clearly violates California's express policy embodied in Senate Bill No. 1818 (SB 1818), Sen. Bill No. 1818 (2001–2002 Reg. Sess.), which declares that "immigration status is irrelevant to the issue of liability," and permits immigration-status discovery under only *one* exception—where the propounding party seeks this information in relation to remedies and has "shown by clear and convincing evidence that the inquiry is necessary in order to comply with federal immigration law." (Gov. Code, § 7285(b).)[1] This exception is only applicable where a plaintiff is seeking remedies that, if awarded to an

[1] "Senate Bill No. 1818 . . . added to California's statutory scheme four nearly identical provisions: Civil Code section 3339, Government Code section 7285, Health and Safety Code section 24000, and Labor Code section 1171.5." (*Salas v. Sierra Chemical Co.* (2014) 59 Cal.4th 407, 418.) The Legislature amended these provisions in 2018, making them identical and expanding their application to "consumer protection", in addition to state labor, employment, civil rights, and housing laws. (Assem. Bill No. 1690 (2017-2018 Reg. Sess.).) Although both Government Code section 7285 and Labor Code section 1171.5 are directly relevant to the issues before the Court, this brief cites to Government Code section 7285 for simplicity.

undocumented worker, would conflict with federal immigration law. That is not the case here.

In failing to recognize this, the Superior Court compelled egregiously expansive immigration-status discovery that guts SB 1818 of all meaning. *Amici* join in Plaintiff-Petitioner's general discussion of SB 1818 and write here, among other things, to expand on SB 1818's statutory construction and purpose.

If not vacated, the Superior Court's Order will enable unscrupulous employers to use immigration-status discovery as another tool to exploit and retaliate against an already vulnerable and significant portion of California's workforce. This is precisely the result the Legislature intended to avoid in enacting SB 1818 and it must be prohibited.

ARGUMENT

I. Senate Bill No. 1818 unambiguously bars discovery into immigration status *unless* it relates to remedies and the requestor has shown by clear and convincing evidence that the discovery is necessary to comply with federal immigration law.

The Superior Court's Order permitting discovery into Plaintiff-Petitioner's immigration status because it "may be relevant" to liability,

(Petitioner's Appendix[2] (hereafter "PA"), Vol. 3, 403.), "amount[s] to improper judicial legislation," (*Frlekin v. Apple Inc.* (2020) 8 Cal.5th 1038, 1048, rehg. den. May 13, 2020, internal citation omitted.), that renders SB 1818's plain text, legislative history, and applicable binding judicial precedent meaningless. In determining legislative intent, courts start with the statutory text, "giving it a plain and commonsense meaning." (*Sass v. Cohen* (2020) 10 Cal.5th 861, 875, internal citation omitted.) Courts do not examine this "language in isolation, but in the context of the statutory framework as a whole in order to determine its scope and purpose and to harmonize the various parts of the enactment. ... If the statutory language permits more than one reasonable interpretation, courts may consider other aids, such as the statute's purpose, legislative history, and public policy." (*Ibid.*) Proper application of these principles makes clear that SB 1818 forbids the type of discovery permitted by the lower court here.

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[2] Citations to Petitioner's Appendix refer to the Appendix filed with the Court of Appeal, and direct the Court to the volume and page number of that Appendix.

a. The Superior Court's Order directly contravenes SB 1818's plain language prohibiting immigration-status discovery in relation to liability.

SB 1818's plain language unequivocally prohibits discovery into immigration status in relation to liability; moreover, it permits immigration-status discovery in relation to remedies only when the party requesting the information has shown by clear and convincing evidence that the discovery "is necessary in order to comply with federal immigration law." (Gov. Code, § 7285(b).) SB 1818 does not, as the Superior Court held, permit discovery into immigration status where it "may be relevant as a defense." (PA, Vol. 3, 403.)

Government Code section 7285 states, in relevant part:

> (a) All protections, rights, and remedies available under state law, *except any reinstatement remedy prohibited by federal law*, 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.
>
> (b) For purposes of enforcing state labor, employment, civil rights, consumer protection, and housing laws, a person's *immigration status* is *irrelevant to the issue of liability*, and in proceedings or *discovery* undertaken to enforce those state laws *no inquiry shall be permitted* into a person's immigration status *unless* the person seeking to make the inquiry has shown *by clear and convincing evidence that the inquiry is necessary in order to comply with federal immigration law*.
>
> (emphasis added).

SB 1818's express declaration that immigration status is "irrelevant" to liability (*Ibid.*) renders it undiscoverable for that purpose. California Code of Civil Procedure section 2017.010 permits discovery "regarding any matter, not privileged, that is relevant to the subject matter involved in the pending action . . . if the matter either is itself admissible in evidence or appears reasonably calculated to lead to the discovery of admissible evidence." Immigration status itself, or related inquiries attempting to "lead to the discovery" of immigration status, do not meet this standard for liability purposes. (See *Hernandez v. Paicius* (2003) 109 Cal.App.4th 452, 460, disapproved on another ground in *People v. Freeman* (2010) 47 Cal.4th 993 [holding plaintiff's immigration status was irrelevant to liability and, in the absence of a claim for loss of future earnings, was therefore inadmissible]; see also *Arnett v. Dal Cielo* (1996) 14 Cal.4th 4, 21 [noting that "[t]he Legislature has long been aware of the specific legal meaning of the term 'discovery'" and emphasizing the use of "*admissible in evidence*"

in describing the scope of permissible discovery in Cal. Civ. Proc. Code § 2017, the antecedent to section 2017.010].)[3]

Moreover, pursuant to SB 1818's plain text, immigration-status discovery in relation to remedies is not automatically allowed. Under SB 1818, "no inquiry *shall* be permitted into a person's immigration status" during "*discovery*" unless it falls under *one* exception—where the propounding party has demonstrated by clear and convincing evidence that "the inquiry is necessary in order to comply with federal immigration law." (Gov. Code, § 7285(b) (emphasis added).) "In common and ordinary usage 'shall' has a compulsory or mandatory meaning." (*People v. Municipal Court of Oxnard-Port Hueneme Judicial Dist.* (1956) 145 Cal.App.2d 767, 778.) "[T]he Legislature is very aware of the distinction between 'shall' and 'may,'" (*Cole v. Antelope Valley Union High School Dist.* (1996) 47 Cal.App.4th 1505, 1513.), and had it intended to allow discovery not falling within this

[3] Section 2017 of the Civil Code provision, in force at the time of SB 1818's enactment, is identical in all material respects to section 2017.010, therefore lending further support to this construction. (See *Apple Inc. v. Superior Ct.* (2013) 56 Cal.4th 128, 146 ["[T]he Legislature is deemed to be aware of existing laws and judicial decisions in effect at the time legislation is enacted and to have enacted and amended statutes 'in the light of such decisions as have a direct bearing upon them.'"], internal quotation marks and citation omitted.).

"clear and convincing" exception, "it would have used a different word." (*Ibid*.) Moreover, "the term 'discovery' . . . is to be given its well-established legal meaning of a formal exchange of evidentiary information between parties to a pending action." (*Arnett v. Dal Cielo*, *supra*, 14 Cal.4th 4, 24.) This clearly encompasses the discovery responses compelled by the lower court here.

This bright line prohibition on immigration-status discovery in relation to liability becomes still clearer when Gov. Code, § 7285(b)'s "clear and convincing" exception is read in reference to the preceding subsection, as it must be (*Sass v. Cohen*, *supra*, 10 Cal.5th 861, 875 [statutory language is not to be examined "in isolation"].) In that prior subsection, section 7285(a), the Legislature recognized that the only exception to the universal applicability, regardless of immigration status, of state-law rights and remedies related to "any reinstatement *remedy* prohibited by federal law." (Gov. Code, § 7285(a) (emphasis added).)[4] In order to effectuate this narrow exception regarding

[4] Although subsequent precedent has determined that federal law requires expanding this exception to include backpay remedies under certain circumstances (*Salas v. Sierra Chemical Co.*, *supra*, 59 Cal.4th 407, 414 [holding SB 1818 is not preempted by "federal immigration law except to the extent it authorizes an award of

remedies, SB 1818 allows discovery into immigration status, but *only* under the showing required by subsection (b). Unlike California Civil Procedure Code section 2017.010's relevancy standard, the "clear and convincing" standard requires the proponent to demonstrate "that it is highly probable that the facts which he asserts are true." (*Conservatorship of O.B.* (2020) 9 Cal.5th 989, 998.) For SB 1818's purposes, these "highly probable" facts must demonstrate that the immigration-status inquiry is necessary in order to avoid violating federal immigration law.

The Superior Court determined that, despite SB 1818's clear language to the contrary, discovery into Plaintiff-Petitioner's immigration status was still somehow permitted in relation to liability because it "may be relevant" to Defendant-Respondent's[5] defense. (PA, Vol. 3, 403, 405.) At no point did the lower court make the

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[backpay] after the employer's discovery of an employee's ineligibility to work in the United States"].), this does not alter the determination that SB 1818's plain language permits immigration-status discovery only in relation to remedies. In addition, as noted, *infra* at 20-21, others courts have noted that SB 1818's legislative history evinces a legislative intent to permit limited inquiries into immigration status in relation to backpay.

[5] As used throughout this brief, "Defendant-Respondent" refers to Real Party in Interest, BrightView Landscape Services, Inc.

determination required under Gov. Code, § 7285(b), let alone reconcile with its ruling SB 1818's unequivocal language prohibiting immigration-status discovery related to liability. Had the Legislature intended such a glaring exception to its prohibitions on discovery into immigration status, it would have said so. (See *Sullivan v. Oracle Corp.* (2011) 51 Cal.4th 1191, 1197 [rejecting an interpretation of SB 1818 that would have excluded out-of-state residents from its protections since "[t]he Legislature knows how to create exceptions . . . when that is its intent"].) Moreover, "'[u]nder the maxim of statutory construction, *expressio unius est exclusio alterius*, if exemptions are specified in a statute, [a court] may not imply additional exemptions unless there is a clear legislative intent to the contrary.'" (*Rojas v. Superior Court* (2004) 33 Cal.4th 407, 424, citations omitted.) As demonstrated above, and *infra* at 19-25, no such legislative intent is present here.

Although the Court need not look beyond SB 1818's text to determine that it prohibits immigration-status discovery related to liability (*Frlekin v. Apple Inc.*, *supra*, 8 Cal.5th 1038, 1046 ["If [statutory text] 'is clear and unambiguous our inquiry ends.']), other indicia of legislative intent confirm this construction.

b. SB 1818's legislative history resolves any doubt regarding the Legislature's intent to preclude all liability-related discovery into immigration status.

SB 1818's legislative history demonstrates that the Legislature intended to prohibit all immigration-status discovery in relation to liability, and to permit it as to remedies only under the "clear and convincing" exception, since it considered immigration-status inquiries a threat to the broader enforcement of workplace rights. The Legislature enacted SB 1818 to limit the possible effects of the United States Supreme Court decision, *Hoffman Plastic Compounds, Inc. v. NLRB* (2002) 535 U.S. 137, on the rights of California's workers and to expressly declare an employee's immigration status irrelevant to liability. (*Salas v. Sierra Chemical Co.*, *supra*, 59 Cal.4th 407, 419, 425.) "[T]he Legislature's desire to protect undocumented workers from sharp practices in the wake of *Hoffman*," (*Sullivan v. Oracle Corp.*, *supra*, 51 Cal.4th 1191, 1197, fn. 3.) was so strong that it enacted SB 1818 within barely five months of this decision.

In *Hoffman*, even while finding that the Immigration Reform and Control Act of 1986 (IRCA) rendered undocumented workers ineligible for backpay remedies under the National Labor Relations Act (NLRA), the Supreme Court reaffirmed that such workers still remained fully

protected by the NLRA and were entitled to its other remedies. (*Hoffman Plastic Compounds, Inc. v. NLRB* (2002) 535 U.S. 137, 144, 152 [noting that in *Sure-Tan v. NLRB* (1984) 467 U.S. 883, the Court had already "affirmed the Board's determination that the NLRA applied to undocumented workers."].) In other words, the Supreme Court deemed a worker's immigration status irrelevant to liability and relevant only as to remedies that, when awarded to undocumented workers, purportedly conflicted with federal immigration law. (Cf. *Rivera v. NIBCO, Inc.* (9th Cir. 2004) 364 F.3d 1057, 1075 ["*Hoffman* does not make immigration status relevant to the determination whether a defendant has committed national origin discrimination under Title VII."].)

In response to *Hoffman*, "[t]he Legislature sought to avoid any conflict with the IRCA by providing that an employee's immigration status was irrelevant to his or her . . . claim . . . except with regard to the issue of reinstatement, since the employer would be committing a federal crime by reinstating the undocumented employee." (*Farmer Brothers Coffee v. Workers' Comp. Appeals Bd.* (2005) 133 Cal.App.4th 533, 541 (citing to Sen. Com. on Labor and Industrial Relations, Rep. on Sen. Bill No. 1818 (2001–2002 Reg. Sess.) as

amended May 14, 2002).) Furthermore, in enacting SB 1818's "exception to the exclusion of evidence of the employee's immigration status 'where the person seeking to make this inquiry has shown by clear and convincing evidence that the inquiry is necessary in order to comply with federal immigration law,'" the Legislature intended to address "*Hoffman*'s backpay prohibition." (*Id.* at 541; cf. *Salas v. Sierra Chemical Co.*, *supra*, 59 Cal.4th 407, 426 [noting that undocumented workers *who consider backpay* "risk discovery of their unauthorized status"].)

As further evidence of the Legislature's intent to permit immigration-status discovery only in relation to remedies, in its consideration of SB 1818, the Legislature noted that the bill "prohibits an inquiry into a person's immigration status until a court or administrative agency considers a *remedy* which includes reinstatement or employment, *and that such inquiry is clearly compelled by other law*." (Sen. Com. on Labor and Industrial Relations, Analysis of Sen. Bill No. 1818 (2001-2002 Reg. Sess.) as amended May 9, 2002, pp. 1-

2 (emphasis added).)[6] The Legislature clearly recognized that to do otherwise would allow employers to hide behind an employee's alleged immigration status in order to avoid liability and diminish the enforcement of California's workplace protections. The Legislature highlighted employers' attempts to do just this in its comments on the bill:

> The Los Angeles Times reported on April 22nd that some firms are trying to use the Hoffman decision as basis for avoiding claims over workplace violations, seeking to use the ruling to avoid minimum wage and workers' compensation awards, *even asking for the documents of a worker who complained of sexual harassment*, according to advocates for low-wage workers.
>
> The Time's [sic] story also stated that in Los Angeles, a U.S. District Court judge decided the immigrant status of supermarket janitors was not relevant in a class-action suit that seeks to collect minimum wages for years of work. And a San Diego Superior Court judge decided a fast food employee who was paid $2 an

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[6] A true and correct copy of this committee bill analysis of SB 1818 is appended as Exhibit A to the Declaration of Marisa Díaz In Support of *Amici Curiae*'s Request for Judicial Notice, filed concurrently with this brief. It is also available online at https://leginfo.legislature.ca.gov/faces/billAnalysisClient.xhtml?bill_id=200120020SB1818 (last visited May 27, 2021).

California courts have looked to committee analyses as an aid to discerning the Legislature's intent in enacting SB 1818. (See, e.g., *Sullivan v. Oracle Corp.*, *supra*, 51 Cal.4th 1191, 1197, fn. 3 [examining Assembly and Senate committee analyses of Labor Code § 1171.5.).

> hour for seven years was entitled to $32,000 for missing minimum wage. In both cases, employers had unsuccessfully cited the Supreme Court decision.

(Sen. Com. on Labor and Industrial Relations, Analysis of Sen. Bill No. 1818 (2001-2002 Reg. Sess.) as amended May 9, 2002, p. 2 (emphasis added).)[7]

SB 1818's legislative history "leave[s] no room for doubt about this state's public policy with regard to the irrelevance of immigration status in enforcement of state labor, employment, civil rights, and" other laws. (*Hernandez v. Paicius supra*, 109 Cal.App.4th 452, 460.) SB 1818 effectuates this policy in part through its bright line prohibition on any immigration-status discovery in relation to liability and its narrow "clear and convincing" exception applicable to discovery relating to remedies.[8] A contrary construction would render SB 1818 a

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[7] A true and correct copy of this committee bill analysis of SB 1818 is appended as Exhibit A to the Declaration of Marisa Díaz In Support of *Amici Curiae*'s Request for Judicial Notice, filed concurrently with this brief. It is also available online at https://leginfo.legislature.ca.gov/faces/billAnalysisClient.xhtml?bill_id=200120020SB1818 (last visited May 27, 2021).

[8] The lower court suggests federal immigration law preempts this construction of SB 1818. (PA, Vol. 3, 404-405.) This suggestion flies in the face of binding precedent holding otherwise. (*Salas v. Sierra Chemical Co.*, *supra*, 59 Cal.4th at 327 ["Senate Bill No. 1818 . . . is not preempted by federal immigration law except to the

meaningless act of the Legislature, a result to be avoided. (See, e.g., *Shoemaker v. Myers* (1990) 52 Cal.3d 1, 22 ["We do not presume that the Legislature performs idle acts, nor do we construe statutory provisions so as to render them superfluous."]; *Cole v. Antelope Valley Union High School Dist.*, *supra*, 47 Cal.App.4th 1505, 1512 [noting that the use of the term "shall" in a statute is not to be construed as permissive "[i]f to construe it as directory would render it ineffective and meaningless"].)

Finally, as SB 1818 created "statutes governing conditions of employment" (see Lab. Code, § 1171.5; Gov. Code, § 7285(b).), it must "be construed broadly in favor of protecting employees." (*Murphy v. Kenneth Cole Productions, Inc.* (2007) 40 Cal.4th 1094, 1103.) The

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extent it authorizes an award of lost pay damages for any period after the employer's discovery of an employee's ineligibility to work in the United States"]; see also *Reyes v. Van Elk, Ltd.* (2007) 148 Cal.App.4th 604, 615, 618 [upholding Labor Code § 1171.5 against preemption argument, and noting that to do otherwise would undermine federal immigration law] (citing *Hernandez v. Paicius* (2003) 109 Cal.App.4th 452, 460); *Farmer Brothers Coffee v. Workers' Comp. Appeals Bd.*, *supra*, 133 Cal.App.4th 533, 540 [holding that Labor Code § 1171.5 "expressly declared immigration status irrelevant to the issue of liability to pay compensation to an injured employee" and rejecting argument that equal coverage of undocumented workers conflicted with *Hoffman*].)

only construction of SB 1818 consistent with this policy and the statutes' plain text and purpose is one that prohibits the type of discovery compelled by the lower court here.[9]

c. The only time immigration-status discovery could be necessary "to comply with federal immigration law" is where such discovery relates to the remedies of reinstatement or, in some cases, backpay.

Given extending liability protections to undocumented workers presents no conflict with federal immigration law, see *supra* at 19-21, SB 1818's language permitting immigration-status discovery only where "necessary in order to comply with federal immigration law"

[9] Other legal authority tracks this same interpretation of SB 1818 and further demonstrates that the Superior Court's Order contravenes applicable law. See Cal. Code Regs., tit. 2, § 11028 (emphasis added):

> (1) All provisions of the [Fair Employment and Housing Act] and these regulations apply to undocumented applicants and employees to the same extent that they apply to any other applicant or employee. An employee's or applicant's immigration status is irrelevant *during the liability phase* of any proceeding brought to enforce the Act.
> (2) Discovery or other inquiry into an applicant's or employee's immigration status shall not be permitted unless the person seeking discovery or making the inquiry has shown by clear and convincing evidence that such inquiry is necessary to comply with federal immigration law.

(Gov. Code, § 7285(b) (emphasis added).) refers solely to where such compliance might be jeopardized by awarding certain remedies to undocumented workers.[10] Courts have consistently concluded that the only remedies where a worker's immigration status might raise a conflict with federal immigration law are reinstatement, and under certain circumstances, backpay—neither of which are at issue here.

Reinstatement is not a remedy available to undocumented workers "since the employer would be committing a federal crime by reinstating the undocumented employee." (*Farmer Brothers Coffee v. Workers' Comp. Appeals Bd.*, *supra*, 133 Cal.App.4th 533, 541; see also *Salas v. Sierra Chemical Co.*, *supra*, 59 Cal.4th 407, 420 [commenting on this exception under SB 1818].) A backpay award, on the other hand, would conflict with federal immigration law only if it corresponds to "any period after the employer's discovery of an employee's ineligibility to work in the United States." (*Salas v. Sierra*

[10] Defendant-Respondent instead reads "necessary to comply with federal immigration law" (Gov. Code, § 7285(b).) as "necessary to a defense." As discussed *infra* at 29-34, even under this erroneous construction of SB 1818, discovery into Plaintiff-Petitioner's immigration status is not "necessary" to Defendant-Respondent's defense related to an alleged audit of its Employment Eligibility Verification Forms I-9.

Chemical Co., *supra*, 59 Cal.4th 407, 414.) Notwithstanding, federal immigration law does *not* prohibit backpay awards to undocumented workers for the period prior to the employer's discovery of their lack of work authorization. (*Id.* at 424.) As reasoned by the California Supreme Court, "allowing recovery of lost wages for the prediscovery period does not produce an 'inevitable collision between'" state law and federal immigration law. (*Id.* at 424–425.)

Courts have consistently held that other types of remedies are permitted regardless of a worker's immigration status.[11] For example,

[11] See, e.g., *Lamonica v. Safe Hurricane Shutters, Inc.* (11th Cir. 2013) 711 F.3d 1299, 1307 (holding undocumented workers can recover unpaid wages under the Fair Labor Standards Act (FLSA)); *Bollinger Shipyards, Inc. v. Director, OWCP* (5th Cir. 2010) 604 F.3d 864, 874-877 (holding that awarding benefits under a federal workers' compensation scheme to an undocumented worker did not "undermine[ ] the congressional policies embedded in the IRCA"); *Wielgus v. Ryobi Techs., Inc.* (N.D. III. 2012) 875 F.Supp.2d 854, 864 (allowing recovery of damages for lost future earnings); *Singh v. Jutla* (N.D. Cal 2002) 214 F.Supp.2d 1056, 1061 (permitting undocumented worker to seek compensatory and punitive damages under the FLSA); *Staff Mgmt. v. Jimenez* (Iowa 2013) 839 N.W.2d 640, 653 (holding IRCA does not preempt the payment of "healing period" benefits to undocumented workers under state law); *Correa v. Waymouth Farms, Inc.* (Minn. 2003) 664 N.W.2d 324, 329 (holding IRCA did not preclude award of workers' compensation benefits to undocumented workers); *Moyera v. Quality Pork Int'l* (2013) 284 Neb. 963, 978 (holding that a claimant's undocumented status does not bar an award of indemnity for permanent total loss of earning capacity under the Workers' Compensation Act).

in *Torres v. Precision Industries, Inc.* (6th Cir. 2021) 995 F.3d 485, 490, the Sixth Circuit held that federal immigration law does not preempt punitive or non-economic damages awarded to undocumented workers since these types of damages are "unrelated to an employee's immigration status" (*ibid.*), and are thus not in tension with federal immigration law. (*Id.* at 494-95.)

Accordingly, as it pertains to immigration-status discovery, unless a worker seeks backpay or reinstatement, SB 1818's "clear and convincing" exception cannot be met as a matter of law since the inquiry would not be "necessary in order to comply with federal immigration law." (Gov. Code, § 7285(b).) As noted by Plaintiff-Petitioner (PA, Vol. 3, 357 [stating that he is not seeking "reinstatement or lost wages"].), and acknowledged by the lower court (PA, Vol. 3, 403), Plaintiff-Petitioner does not seek backpay or reinstatement. As such, the immigration-status discovery sought by Defendant-Respondent must be precluded.

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II. Assuming, *arguendo*, that SB 1818 permits liability-related discovery into immigration status, the clear and convincing standard would still apply and the Court must consider such discovery's *in terrorem* effect.

If the Court were to determine that SB 1818 permits liability-related discovery into immigration status, which it should not, two additional safeguards would still prevent such discovery. First, the clear and convincing exception in Government Code § 7285(b) sets a high bar and that bar would not be met here. Second, the discovery sought by Defendant-Respondent should be precluded on the additional ground that the chilling effect such discovery would have on Plaintiff-Petitioner and immigrant workers more broadly clearly outweighs any potential benefit.

a. SB 1818's "clear and convincing" exception is not applicable based on a defense that an allegedly wrongful termination is justified by a Department of Homeland Security Form I-9 audit.

Even if SB 1818 were to allow immigration-status discovery in relation to liability, Defendant-Respondent would not be able to demonstrate that its defense based on an alleged Homeland Security Investigations (HSI)/Immigration and Customs Enforcement (ICE) audit of its Employment Eligibility Verification Forms I-9 (Form I-9) (PA, Vol. 3, 405.) renders discovery into Plaintiff-Petitioner's

immigration status "necessary in order to comply with federal immigration law." (Gov. Code, § 7285(b).) Defendant-Respondent's argument to the contrary relies on reading SB 1818's express language, "necessary to comply with federal immigration law" (Gov. Code, § 7285(b).) as "necessary to a defense." (Preliminary Opposition of Real Parties in Interest to Petition for Writ of Mandate, Prohibition, Certiorari, or Other Appropriate Relief, 21.)[12] Such an interpretation undermines the Legislature's express intent in enacting S.B. 1818, discussed *supra* at 13-24. Even under Defendant-Respondent's erroneous statutory construction, however, this argument fails because Plaintiff-Petitioner's immigration status, whether at the time of his employment or at present, is not necessary to this defense.

A Form I-9 audit is triggered by "the service of a Notice of Inspection (NOI) upon an employer compelling the production of Forms I-9." (U.S. Immig. & Customs Enforcement, Form I-9 Inspection Overview (Aug. 19, 2019) <https://www.ice.gov/factsheets/i9-inspection>

[12] The Superior Court, on the other hand, deemed it sufficient that "[i]t may well be" that the discovery at issue would turn up facts pertinent to Defendant-Respondent's Form I-9 audit defense. (PA, Vol. 3, 405.).

[as of May 27, 2021] (hereafter Form I-9 Inspection Overview).)[13] ICE agents or auditors then conduct an inspection of the Form I-9s for compliance and notify the employer of the results once the inspection is completed. (*Ibid*.) If ICE determines that an employee is unauthorized to work, it will issue a Notice of Suspect Documents, advising the employer of the possible penalties for continuing to employ that individual and providing the employer and employee with "an opportunity to present additional documentation to demonstrate work authorization if they believe the finding is in error." (*Ibid*.)

As demonstrated by the Form I-9 inspection process, and applicable laws, an employer's obligation to reverify the work authorization of, and potentially terminate, an employee is triggered by the Notice of Suspect Documents indicating that an employee may be unauthorized to work. (See 8 U.S.C. § 1324a(a)(2) [making it illegal for an employer "to *continue to employ*" a worker "knowing" they lack

[13] A true and correct copy of this Form I-9 Inspection Overview is appended as Exhibit B to the Declaration of Marisa Díaz In Support of *Amici Curiae*'s Request for Judicial Notice, filed concurrently with this brief. It is also available online at https://www.ice.gov/factsheets/i9-inspection (last visited May 27, 2021).

work authorization] (emphasis added); 8 C.F.R. § 274a.1(l) [defining "knowing" to include constructive knowledge]; see also PA, Vol. 2, 153 [alleged Notice of Suspect Documents].) Even work-authorized employees may be identified as having suspect documents, as demonstrated in this very case. (PA, Vol. 2, 150-157 [alleged Notice of Suspect Documents and email from ICE auditor].) If any employee identified in such a Notice, whether undocumented or documented, does not present the documentation necessary to reverify their work authorization, the employer is obligated to terminate the employee. (Form I-9 Inspection Overview.)

Thus, *regardless* of Plaintiff-Petitioner's actual immigration status at the time of his employment, if he had in fact been identified as lacking work authorization in an HSI Form I-9 audit, Defendant-Respondent would have been required to terminate his employment unless he presented documents to establish his work authorization. Much of the evidence at the heart of this defense, therefore, is already in Defendant-Respondent's possession,[14] and any elements of the

[14] See, e.g., PA, Vol. 2, 150-154 (alleged Notice of Suspect Documents); PA, Vol. 2, 155-157 (email from an ICE auditor providing

defense that require additional information from Plaintiff-Petitioner—such as whether he received notice of the alleged Form I-9 audit results—could be explored without inquiry into his immigration status.[15]

Therefore, even if one were to ignore SB 1818's clear, bright line prohibition on immigration-status discovery in relation to liability, the discovery permitted here would still fail to meet SB 1818's "clear and convincing" exception. The Superior Court's Order enables the Defendant-Respondent to inquire into egregiously broad immigration-status information when this inquiry is not necessary to comply with federal immigration law (Gov. Code, § 7285(b).) or to establish

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updates on the authorization of the employees highlighted in the alleged Notice of Suspect Documents and requesting additional information).

[15] Even if Plaintiff-Petitioner's immigration status at the time of his alleged wrongful termination "may well be," (PA, Vol. 3, 405.) relevant to Defendant-Respondent's allegation that he voluntarily quit upon notice of the Form I-9 audit results, this certainly falls short of clear and convincing evidence that it is "necessary" to this defense. Additionally, any minor benefit to Defendant-Respondent of obtaining this information is significantly outweighed by the *in terrorem* effect that permitting such discovery would cause. See *infra* at 34-39.

Defendant-Respondent's Form I-9 audit defense.[16] In addition to violating SB 1818, as described further below, such broad and intrusive discovery significantly chills immigrant workers' ability to assert their workplace rights.

b. The *in terrorem* effect of permitting discovery into Plaintiff-Petitioner's immigration status significantly outweighs any potential benefit of such discovery.

Assuming, *arguendo*, that SB 1818 does not bar the discovery at issue, the Court must still weigh the burden of such discovery against any benefit. (Code Civ. Proc., § 2017.020(a).) In doing so, it becomes clear that the discovery at issue must be precluded given "the substantial and particularized harm of the discovery—the chilling effect that the disclosure of [Plaintiff-Petitioner's] immigration status could

[16] The lower court also seems to erroneously suggest that if the Form I-9 audit had in fact occurred and Plaintiff-Petitioner lacked work authorization at the time, this "could constitute a complete defense." (PA, Vol. 3, 405.) That an employer may have had knowledge of an employee's lack of work authorization, however, does not extinguish an employee's wrongful termination claim since it is the employer's motivation, not the employee's actual work authorization, at issue. (See, e.g., *Sure-Tan, Inc. v. N.L.R.B.*, *supra*, 467 U.S. 883, 896 [noting that an employer motivated by retaliatory animus can be liable for wrongful discharge even though federal law would have required that employee's termination due to their lack of work authorization]; *Sanchez v. Dahlke Trailer Sales, Inc.* (Minn. 2017) 897 N.W.2d 267, 276 [same].).

have upon [his] ability to effectuate [his] rights—outweigh[s] [Defendant-Respondent's] interests in obtaining the information." (*Rivera v. NIBCO, Inc.*, *supra*, 364 F.3d 1057, 1064 [upholding protective order barring discovery into plaintiffs' immigration status in California Fair Employment and Housing Act (FEHA) and Title VII of the Civil Rights Act of 1964 action].)

As noted by the Ninth Circuit, this chilling effect impacts documented and undocumented immigrant workers alike. (*Rivera v. NIBCO, Inc.*, *supra*, 364 F.3d 1057, 1065.) Moreover, given the central role private lawsuits play in the enforcement of California's employment laws (see *Salas v. Sierra Chemical Co.*, *supra*, 59 Cal.4th 407, 420 [noting that the "FEHA's remedial scheme depends heavily on private causes of action"].), permitting discovery into employees' immigration status "constitutes a substantial burden" not only on individual plaintiffs but also "on the public interest" in ensuring civil rights laws are enforced. (*Rivera v. NIBCO, Inc.*, *supra*, 364 F.3d 1057, 1065–1066.)

Because of the well-documented *in terrorem* effect discovery into immigration status has on immigrant workers,[17] courts regularly deny such discovery given that the burdens and harm on plaintiff employees far outweigh any potential benefit for employer defendants. (See *In re Reyes* (5th Cir. 1987) 814 F.2d 168, 170 [issuing writ of mandamus directing district court to withdraw discovery order permitting inquiry into petitioners' immigration status since such discovery was irrelevant and "could inhibit petitioners in pursuing their rights in the case"].)[18]

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[17] See, e.g., *Cazorla v. Koch Foods of Miss., L.L.C.* (5th Cir. 2016) 838 F.3d 540, 564 (noting that allowing discovery of immigration-related information "may have a chilling effect extending well beyond this case, imperiling important public purposes"); *Lozano v. City of Hazleton* (M.D.Pa. 2007) 496 F.Supp.2d 477, 513-514 ("[F]ederal courts have recognized that inquiries into immigration status can have an *in terrorem*, effect, limiting the willingness of plaintiffs to pursue their rights out of fears of the consequences of an exposure of their position."); *Topo v. Dhir* (S.D.N.Y. 2002) 210 F.R.D. 76, 78 ("Courts have generally recognized the *in terrorem* effect of inquiring into a party's immigration status when irrelevant to any material claim.").

[18] See also, e.g., *Rosas v. Alice's Tea Cup, LLC* (S.D.N.Y. 2015) 127 F.Supp.3d 4, 11, 14 (granting protective order and reasoning that "even if evidence regarding immigration status were relevant, 'the risk of injury to the plaintiffs if such information were disclosed outweighs the need for its disclosure' because of the danger of intimidation and of undermining the purposes of the FLSA"); *Zeng Liu*

The same is the case here. The lower court's Order permits shockingly broad and intrusive discovery into Plaintiff-Petitioner's immigration status[19] that would clearly produce a chilling effect on his and other immigrant workers'—undocumented and documented alike (*Rivera v. NIBCO, Inc.*, *supra*, 364 F.3d 1057, 1065.)—assertion of their workplace rights. This would substantially burden Plaintiff-Petitioner and the broader public's interest in the enforcement of

v. Donna Karan Int'l, Inc. (S.D.N.Y. 2002) 207 F.Supp.2d 191, 192-193 (denying request for discovery related to workers' immigration status in a FLSA case and noting that "even if such discovery were relevant… the risk of injury to the plaintiffs if such information were disclosed outweighs the need for its disclosure"); *Cabrera v. Ekema* (2005) 265 Mich.App. 402, 403 (reversing order compelling production of plaintiffs' Social Security Numbers and concluding defendant had made the discovery request "for the improper purpose of intimidating plaintiffs from exercising their rights").

[19] To name only a few examples, Defendant-Respondent requests each document or thing containing Plaintiff-Petitioner's Social Security Number or a Social Security Number that he has used (PA, Vol. 1, 95, 97.), each document or thing that contains his Alien Registration Number or an Alien Registration Number that he has used (*Id.* at 99, 101.), each Form I-9 and Form W-4 that Plaintiff-Petitioner has provided to each employer he has had *since the termination* (*Id.* at 103, 105.), and *all* documents and things showing that Plaintiff-Petitioner was legally authorized to work in the United States *from the date of his termination* of employment with BrightView to the present (*Id.* at 109.).

California's civil rights laws. (*Id.* at 1065–1066; cf. *Salas v. Sierra Chemical Co.*, *supra*, 59 Cal.4th 407, 420.)

This burden far outweighs Defendant-Respondent's interest in obtaining this information. First, the information is irrelevant to its potential liability and to the remedies sought by Plaintiff-Petitioner, and therefore inadmissible. *See supra* at 14-15, 25-28.[20] Second, even if the discovery sought had any probative value in relation to Defendant-Respondent's Form I-9 defense, this value is minimal at best and the evidence in fact necessary to establish this defense is already readily available to Defendant-Respondent or obtainable without inquiry into

[20] In cases where immigration status is relevant to the remedies sought, courts have attempted to minimize the *in terrorem* effect of this type of discovery by bifurcating the proceeding so that discovery into immigration status is allowed only if the defendant employer is first held liable. (See, e.g., *Rivera v. NIBCO, Inc.*, *supra*, 364 F.3d 1057, 1075 [noting that if the district court bifurcates the proceeding, "the availability of backpay remedies for certain plaintiffs will be determined, if at all, only after the liability phase"].) California courts may order proceedings bifurcated on their own motion or on a motion by either party where "the ends of justice, or the economy and efficiency of handling the litigation would be promoted thereby." (Code Civ. Proc., § 598; see also *Horton v. Jones* (1972) 26 Cal.App.3d 952, 954–955 [providing the historical context of this "bifurcated trial rule"].).

Plaintiff-Petitioner's immigration status. *See supra* at 29-34. The discovery at issue must be precluded on this additional ground.

III. The Superior Court's Order would significantly undermine the rights of an already vulnerable, yet significant, portion of the California workforce, to the detriment of all workers.

If left to stand, the Superior Court's Order would severely undermine the rights of undocumented workers by allowing employers "to raise implicitly the threat of deportation and criminal prosecution every time a worker, documented or undocumented, reports illegal practices or files" an action alleging employment law violations. (*Rivera v. NIBCO, Inc.*, *supra*, 364 F.3d 1057, 1065.) The ensuing chill on the enforcement of workplace rights would harm all California workers.

Undocumented workers in the United States—of whom there are approximately eleven million—make up a critical and integral part of the nation's workforce.[21] They are concentrated in industries with disproportionately high levels of injury and death, such as agriculture,

[21] Daniel Costa, *California Leads the Way*, ECON. POL'Y INST., at 1 (Mar. 22, 2018), https://files.epi.org/pdf/143988.pdf.

manufacturing, construction, and food service.[22] California reflects these national trends; it is home to more than six million immigrants, of whom roughly 2.3 million are undocumented workers.[23] California's undocumented community is overrepresented in similar high-risk industries.[24] In 2019, approximately 4,200 workers were killed on the job in the U.S., often in these same industries.[25]

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[22] Jeffrey S. Passel & D'Vera Cohn, *Size of U.S. Unauthorized Immigrant Workforce Stable After the Great Recession*, PEW RES. CTR. (Nov. 3, 2016), at 11-12, 14, https://www.pewresearch.org/hispanic/wp-content/uploads/sites/5/2016/11/LaborForce2016_FINAL_11.2.16-1.pdf. See also Pia M. Orrenius & Madeline Zavodny, *Do Immigrants Work in Riskier Jobs?*, 46 DEMOGRAPHY 535, 535-536, 540 (Aug. 2009), https://perma.cc/9S7E-6GVM.

[23] Costa, *supra* note 21, at 4.

[24] *Profile of the Unauthorized Population: California*, MIGRATION POL'Y INST., https://www.migrationpolicy.org/data/unauthorized-immigrant-population/state/CA (last visited May 25, 2021).

[25] Construction, transportation and warehousing, and agriculture are among the deadliest industries. (*Number and Rate of Fatal Work Injuries, by Industry Sector*, U.S. BUREAU OF LAB. STAT. (2019), https://www.bls.gov/charts/census-of-fatal-occupational-injuries/number-and-rate-of-fatal-work-injuries-by-industry.htm.).

Undocumented workers frequently experience violations of their workplace rights. A survey of 4,387 low-wage workers in three major cities found that 37.1% of undocumented workers were victims of minimum wage violations and an astounding 84.9% were not paid overtime wages.[26] They also face increased risk of harassment, injuries and other abuses. Notwithstanding, while undocumented workers are subject to more labor violations and workplace injuries than nonimmigrant workers, they report injuries and violations less frequently.[27]

Although the risk of retaliation exists for any worker who asserts their labor and civil rights,[28] "undocumented workers confront the

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[26] Costa, *supra* note 21, at 6 (citing Annette Bernhardt et al., *Broken Laws, Unprotected Workers: Violations of Employment and Labor Laws in America's Cities*, NAT'L EMP. L. PROJECT (2009), available at https://tinyurl.com/ycka3y76.).

[27] Deborah Berkowitz, *Unintended Consequences of Limiting Workers' Comp Benefits for Undocumented Workers*, NAT'L EMP. L. 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 (noting reluctance among many immigrant workers in meat and poultry industries to report workplace injury for fear of retaliation).

[28] For example, in 2019, the Department of Fair Employment and Housing processed 2,717 retaliation claims. DEP'T OF FAIR EMP. &

harsher reality that, in addition to possible discharge, their employer will likely report them to" immigration authorities, leading to potential removal and criminal prosecution. (*Rivera v. NIBCO, Inc.*, *supra*, 364 F.3d 1057, 1064.)[29] Employers have a "perverse incentive" to ignore immigration laws until employees complain about workplace

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HOUSING ANN. REP., 9 (2019), accessible at https://www.dfeh.ca.gov/wp content/uploads/sites/32/2020/10/DFEH_2019AnnualReport.pdf.

[29] A plethora of cases recognizes and illustrates this increased risk for undocumented workers. (See, e.g., *Arizona v. United States* (2012) 567 U.S. 387, 405 [noting that undocumented workers "face the possibility of employer exploitation because of their removable status"]; *Sure-Tan v. NLRB*, *supra*, 467 U.S. 883, 887 [employer reported undocumented employees to the INS shortly after they voted to unionize, which led to their removal to Mexico]; *U.S. v. Brignoni-Ponce* (1975) 422 U.S. 873, 879 ["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.* (5th Cir. 2016) 838 F.3d 540, 558 n.59, 561 n.69, 562–64 [citing studies of immigrant worker abuse in the poultry industry]; *Fuentes v. INS* (9th Cir. 1985) 765 F.2d 886, 887, vacated as moot, (9th Cir. 1988) 844 F.2d 699 [employer reported undocumented workers to INS in retaliation for filing wage claims, leading to workers' placement in deportation proceedings]; *Singh v. Jutla*, *supra*, 214 F.Supp.2d, 1056, 1057 [a case involving similar facts, where the worker was in INS custody for fourteen months at the time of the decision]; *Contreras v. Corinthian Vigor Ins. Brokerage* (N.D. Cal 2000) 103 F.Supp.2d 1180, 1182-1183 [employer reported an employee to the INS in retaliation for the employee filing a wage claim, and the INS subsequently held the employee in its custody for a week].).

conditions, at which point immigration-status information is used in a retaliatory manner. (See *Reyes v. Van Elk, Ltd.*, *supra*, 148 Cal.App.4th 604, 617-18 (citing *Rivera v. NIBCO, Inc.*, *supra*, 364 F.3d 1057, 1072).) In fact, California Division of Labor Standards Enforcement reports indicate that over the last three years more than 270 immigration-related retaliation complaints have been filed with their office alone.[30] These numbers likely significantly underrepresent the prevalence of this type of relation given undocumented workers are often afraid to complain about substandard working conditions and labor violations.[31]

The extreme chilling effect created by immigration-status discovery such as that allowed by the lower court, *see supra* at 34-39, would only exacerbate the already vulnerable position of

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[30] See Annual Reports to the Legislature for 2017, 2018, 2019 accessible at https://www.dir.ca.gov/dlse/DLSEReports.htm.

[31] Monica Campbell, *Farmworkers Are Getting Coronavirus. They Face Retaliation for Demanding Safe Conditions*, THE WORLD (July 29, 2020, 3:45 PM EDT), https://perma.cc/F3FC-TTBD. Courts have recognized this legitimate fear. (See, e.g., *Does I thru XXIII v. Advanced Textile Corp.* (9th Cir. 2000) 214 F.3d 1058, 1062–63 [allowing plaintiffs to plead claims anonymously due to their fear of retaliatory deportation].).

undocumented workers and, in turn, diminish workplace protections for all. For example, in recent months, COVID-19 fatalities increased among California farm workers.[32] Reports also indicated that some employers were pressuring individuals to continue working despite extremely high risk of contracting COVID-19.[33] Employers who exposed undocumented workers to COVID-19, exposed their entire workforce, regardless of immigration status, to the same risks. The same is true of other workplace health and safety hazards. Simply put, fostering workers' ability to report violations of workplace rights uplifts conditions for all workers and is paramount to the effective enforcement of workers' rights across California.

The lower court's Order empowers unscrupulous employers to use immigration-status discovery as an additional tool in their arsenal

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[32] James Aranguren, *Coronavirus Devastates California Farm Workers*, CAPITOL WKLY. (Feb. 15 2021), https://capitolweekly.net/coronavirus-devastates-california-farm-workers.

[33] 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 31.).

to hamper workplace rights, even where this information is completely irrelevant to workers' claims. This will only exacerbate the fear of retaliation already experienced by immigrant workers, leading to more dangerous and abusive workplaces for all.

CONCLUSION

For the foregoing reasons, *Amici* respectfully urge the Court to vacate the decision below and order the subject discovery precluded.

Dated: June 1, 2021

Respectfully submitted,

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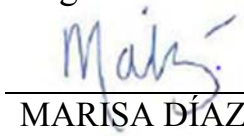
Laura Alvarenga Scalia
Legal Aid At Work



MARISA DÍAZ

CERTIFICATE OF COMPLIANCE

[Cal. Rule of Court 8.204(c)(1)]

The text is in this [proposed] *Amici Curiae* brief consists of **7368** words as counted by the word processing program used to generate this document.

Dated: June 1, 2021

Respectfully submitted,

LEGAL AID AT WORK

MARISA DÍAZ

PROOF OF SERVICE

STATE OF CALIFORNIA

Re: *Manuel v. Superior Court of Santa Clara County, et al.*, 6DCA No. H048665; S.C.S.C. No. 19CV355747

I am employed in the County of San Francisco, State of California. I am over the age of 18 and not a party to the above-entitled action. My business address is 180 Montgomery Street, Suite 600, San Francisco, CA 94104.

On June 1, 2021, I served the foregoing document(s) described as **Application for Leave to File Amicus Curiae Brief; Proposed Amicus Curiae Brief of Legal Aid at Work, et al. In Support of Plaintiff and Petitioner Rigoberto Jose Manuel. Request for Judicial Notice, Memorandum of Points and Authorities In Support; Declaration of Marisa Díaz and Proposed Order** on all appropriate parties in this action, as listed on the attached Service List, by the method stated:

☒ If Electronic Filing Service (EFS) is indicated, I electronically filed the document(s) with the Clerk of the Court by using the EFS/TrueFiling system as required by California Rules of Court, rule 8.70. Participants in the case who are registered EFS/TrueFiling users will be served by the EFS/TrueFiling system. Participants in the

case who are not registered EFS/TrueFiling users will be served by mail or by other means permitted by the court rules.

☒ If U.S. Mail service is indicated, I served the said document(s) by depositing a true copy thereof with the U.S. Postal Service, pursuant to Code of Civil Procedure section 1013a(3), with the postage fully pre-paid and addressed to each person indicated on the service list below.

I declare under penalty of perjury under the laws of the State of California that the above is true and correct.

Executed on June 1, 2021

Tishon Smith

SERVICE LIST

Re: *Manuel v. Superior Court of Santa Clara County, et al.*,6DCA No. H048665; S.C.S.C. No. 19CV355747

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Honorable Stephen Socrates P. Manoukian,
(Judge Presiding)
SANTA CLARA COUNTY SUPERIOR COURT
Department 20
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