Case No. 12-2170

IN THE UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

ELMER LUCAS, *et alia*,

Appellees,

vs.

JERUSALEM CAFE, LLC, *et alia*,

Appellants.

Appeal from the U.S. District Court for the Western District of Missouri
Honorable David Gregory Kays, District Judge
Case No. 4:10-CV-00582-DGK

REPLY BRIEF OF THE APPELLANTS

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In the first issue in their opening brief, the defendants explained how the plaintiffs in this case, all undocumented immigrants, lacked standing to sue for allegedly back-due minimum wage and overtime under the Fair Labor Standards Act of 1938, 29 U.S.C. §§ 201, *et seq.* ("FLSA") (Brief of the Appellants 43-59). Under the Immigration Reform and Control Act of 1986, 8 U.S.C. § 1324a ("IRCA"), as applied in *Hoffman Plastic Compounds v. Nat'l Labor Relations Bd.*, 535 U.S. 137 (2002), the plaintiffs' status as undocumented immigrants precludes their seeking such back-due wages, because the IRCA makes their employment and payment of *any* wages illegal in the first place.

In response, the plaintiffs do not contest that they are undocumented immigrants or that the IRCA absolutely prohibits employing them or paying them any wages. They fully admit "They are undocumented immigrants" (Brief of the Appellees 5). They also admit the IRCA makes it a federal crime to "engage in a … practice of employing [undocumented] immigrants" (Aple. Br. 22 n.2). The U.S. Secretary of Labor, who joined this case on appeal as *amicus curiae* for the plaintiffs, agrees: the IRCA "prohibits the employment of [undocumented immigrant] workers who are not authorized to work in the United States, and imposes criminal and civil penalties … on employers who knowingly hire employees who lack proper documentation" (Secretary of Labor's Brief 11).

Instead, the plaintiffs and the Secretary argue that, despite the IRCA's express prohibitions, they nonetheless should have standing to recover wages that under the IRCA could not legally have been paid.

They do so in four arguments: (1) the defendants have waived their standing challenge because it is actually an affirmative defense (Aple. Br. 16-17; Sec. Br. 23-24); (2) *Hoffman* denies undocumented immigrants standing under federal law only to seek wages for work not yet performed (Aple. Br. 23-29; Sec. Br. 9-15); (3) undocumented immigrants' standing to seek allegedly back-due wages under the FLSA is consistent with the IRCA despite the IRCA's express prohibitions (Aple. Br. 17-26, 30-33; Sec. Br. 15-22, 24-26); and (4) *Patel v. Quality Inn S.*, 8846 F.2d 700 (11th Cir. 1988), and its progeny remain viable law that this Court should follow to legalize judicially that which the IRCA makes statutorily illegal (Aple. Br. 22-26, 30-33; Sec. Br. 19-22). The Secretary also argues it is "entitled" to "deference" as to its interpretation of the laws at issue in this case (Sec. Br. 22-23).

These arguments are without merit. First, the defendants plainly challenge the plaintiffs' standing to sue, rather than raise some affirmative defense. Standing cannot be waived, even if raised for the first time on appeal. Whether Congress, in prohibiting the employment of undocumented immigrants in the IRCA, nonetheless intended such persons to be able to claim relief for unpaid wages under the FLSA, goes directly to whether such persons are within the FLSA's "zone of

interests." Later statutes can deny statutory standing previously would have been available under earlier statutes, and courts routinely hold as such.

Second, the plaintiffs' and Secretary's reading of *Hoffman* as allowing undocumented immigrants to claim back-due wages for work already performed, as opposed to unperformed work, runs counter to *Hoffman*'s plain language and its history. *Hoffman* plainly directs federal courts not to apply federal employment laws so as to condone past, present, or future violations of the IRCA. Under *Hoffman*, the IRCA must preclude undocumented immigrants from having standing to claim any wages under any federal labor laws, as to do so would untenably judicially legalize that which Congress expressly has declared to be illegal. *Patel* and its progeny conflict with this, and should be disregarded.

Finally, the Secretary of Labor is not "entitled" to "deference" from this Court as to its legal interpretations. *Hoffman* rejected the Government's similar argument to the Secretary's here. Having lost *Hoffman*, the Secretary now seeks to limit that decision as much as possible. But the Secretary's position is simply misplaced. Especially after *Hoffman*, this Court should reject the Secretary's invitation to override Congress's express intent.

The plaintiffs, as admitted undocumented immigrants whom it is unlawful to employ in the United States, lacked standing to claim wages under the FLSA that the IRCA makes illegal for them to have been paid in the first place.

A. The defendants' challenge to the plaintiffs' standing to claim back-due wages under the FLSA is both timely and cognizable.

In three paragraphs citing no authority, the plaintiffs argue the defendants "have waived their argument" that the plaintiffs lack standing (Aple. Br. 16-17). But "[s]tanding is a matter of jurisdiction," cannot be waived, and may be raised at any time. *Constitution Party of S.D. v. Nelson*, 639 F.3d 417, 420 (8th Cir. 2011). Standing can be "raised for the first time on appeal" or even "*sua sponte*." *Id.*

The plaintiffs attempt to avoid the non-waivability of standing by insisting the defendants' first issue "is not really a 'standing' argument," but instead "is akin to a defense asserted to a breach of contract claim that the contract violated public policy, or to an 'unclean hands' defense to a tort claim" (Aple. Br. 17).

But questioning whether the plaintiffs have standing to sue under the FLSA is not a defense like some kind of affirmative avoidance or justification at common law. Unlike generic common law claims, private rights of action in acts of Congress are subject to longstanding Article III and prudential standing requirements (Aplt. Br. 45-49). A plaintiff suing under an act of Congress must fit Congress's intent to allow him to bring that claim. Whether a plaintiff has standing is not an affirmative defense. It is a jurisdictional prerequisite.

At the root of the plaintiffs' argument otherwise is their observation that the IRCA was "enacted 48 years after the FLSA" (Aple. Br. 16). Essentially, the plaintiffs argue that, once standing to seek a particular relief is granted to a general

class of plaintiffs under one act of Congress at one point in time, Congress never thereafter may enact a later law excising a subclass from that general class. Indeed, the Secretary briefly argues this explicitly (Sec. Br. 25).

But that has never been the law of the United States, nor do either the plaintiffs or the Secretary cite any such authority. As the appellants explained in their opening brief (Aplt. Br. 46), application of the "zone of interests" test as to any one act vis-à-vis some type of plaintiff can change over time: it "varies according to the provisions of law at issue," as standing under a particular act can be "modified or abrogated by Congress …." *Bennett v. Spear*, 520 U.S. 154, 162-63 (1997). If, under present federal law, it "cannot reasonably be assumed that Congress intended to permit the [plaintiff's] suit," the plaintiff lacks standing. *Clarke v. Sec. Indus. Ass'n*, 479 U.S. 388, 399-400 (1987). Neither the plaintiffs nor the Secretary address this concept.

Indeed, for this reason, the IRCA already has been held to deny undocumented immigrants standing to sue for back wages under at least one other, preexisting act of Congress. In *Egbuna v. Time-Life Libraries, Inc.*, 153 F.3d 184, 187-88 (4th Cir. 1998), the Fourth Circuit held an undocumented immigrant's status under the IRCA deprived him of standing to maintain a cause of action under Title VII of the Civil Rights Act of 1964, 42 U.S.C. §§ 2000e, *et seq.*, which otherwise would have been available to him. That the IRCA was enacted 32 years

after Title VII did not matter. The defendants cited *Egbuna* in their opening brief (Aplt. Br. 12, 53), but neither the plaintiffs nor the Secretary mention it at all.

The defendants' standing challenge here is the same: Congress did not intend the FLSA's private right of action to claim back-due wages to provide a cause of action to undocumented immigrants for whom the IRCA prohibits payment of such wages. Does an undocumented immigrant nonetheless fit the "zone of interests" for standing to sue under the FLSA for exactly those wages that the IRCA prohibits? Or, is such standing "foreclosed by federal immigration policy, as expressed by Congress in the IRCA"? *Hoffman*, 535 U.S. at 140.

This is not an "affirmative defense." Rather, as in the statutory standing cases the defendants cited in their opening brief (Aplt. Br. 47-49), this question goes directly to the issue of whether, taking into account Congress's express proscriptions in the IRCA as *Hoffman* directs, paying wages to undocumented immigrants falls within the "zone of interests" protectable under the FLSA. If not, Plaintiffs lacked standing to sue under that Act.

Indeed, ultimately, both the plaintiffs and the Secretary are able to discuss this question as one of standing: whether "the benefits of the FLSA" can be "enforc[ed]" "on behalf of undocumented immigrants," the "employment of [whom is] unlawful" (Aple. Br. 14). The plaintiffs and the Secretary spend most of their briefs arguing this question without hindrance.

B. *Hoffman* directs that federal employment laws may not be applied so as to condone past, present, or future violations of the IRCA.

In their opening brief, the defendants applied *Hoffman*'s directive that federal employment laws – in that case the National Labor Relations Act of 1935, 29 U.S.C. §§ 151, *et seq.* ("NLRA") – may not be applied in a manner that "would unduly trench upon explicit statutory prohibitions critical to federal immigration policy, as expressed in IRCA" (Aplt. Br. 44, 53-55) (quoting 535 U.S. at 151).

In *Hoffman*, the Supreme Court reversed an award of back-due wages under the NLRA "to an undocumented alien who has never been legally authorized to work in the United States," as "such relief is foreclosed by federal immigration policy, as expressed" in the IRCA. *Hoffman*, 535 U.S. at 151. Specifically, "allowing [an] award [of] backpay to illegal aliens would … encourage the successful evasion of apprehension by immigration authorities, condone prior violations of the immigration laws, and encourage future violations." *Id.* at 151.

Both the plaintiffs and the Secretary seek to limit *Hoffman*'s holding to preclude undocumented immigrants from having standing only to seek "back pay … for work they did not actually perform" (Aple. Br. 26). According to the plaintiffs, "the issue [in *Hoffman*] was whether the [undocumented immigrant] worker was entitled to receive backpay for work not performed," and that *Hoffman* "held, based on IRCA, that undocumented immigrants could not recover backpay

for work never performed, because such an award would interfere with the immigration policy implemented in IRCA" (Aple. Br. 27).[1]

The plaintiffs thus seek to distinguish *Hoffman*: "Because the issue in ... *Hoffman* was whether backpay could be awarded for work never performed, [it is not] directly applicable to this case" (Aple. Br. 27). The Secretary also insists *Hoffman* concerned only "backpay for work that would have been performed but for an unlawful discharge," as opposed to "unpaid wages" (Sec. Br. 9).

These are incomplete and distorted readings of *Hoffman*. In fact, in *Hoffman*, the undocumented immigrant at issue was seeking back-due wages *both* for work performed *and* for work unperformed. The Supreme Court expressly foreclosed *any* wage recovery as contrary to the IRCA.

In *Hoffman*, José Castro worked in Hoffman Plastic's manufacturing plant. *Hoffman Plastic Compounds, Inc. v. Nat'l Labor Relations Bd.*, 237 F.3d 639, 641 (D.C. Cir. 2001). When a union began an organizing drive at the plant, Mr. Castro was one of several workers who distributed union materials to the others. *Id.* To thwart this, the company laid off without pay all the employees who had engaged in union organizing activities, including Mr. Castro. *Id.*

[1] The plaintiffs oddly state *Hoffman* was "decided two years after IRCA was enacted" (Aple. Br. 27). But the IRCA was enacted in 1986, *see* Pub.L. 99-603, 100 Stat. 3359 (Nov. 6, 1986), and *Hoffman* was handed down on March 27, 2001. 535 U.S. at 137. *Hoffman* was decided 15 years after the IRCA, not two.

An administrative law judge found the company had engaged in unfair labor practices in violation of the NLRA. *Id.* The ALJ held a separate hearing to compute back-due pay for the workers. *Id.*; *see also Hoffman Plastic Compounds, Inc.*, 314 N.L.R.B. 683, 685 (1994). During that hearing, Mr. Castro admitted he was a Mexican national who was living in the United States as an undocumented immigrant. *Hoffman*, 237 F.3d at 641. In response, the ALJ denied reinstatement to Mr. Castro, but *also* denied him any back-due wages whatsoever. *Id.*

The National Labor Relations Board ("NLRB") affirmed the denial of reinstatement, but reversed the denial of back-due wages up until the moment of Mr. Castro's immigration status became apparent. *Id.* Hoffman Plastics filed a petition for review to the D.C. Circuit, arguing "that both *Sure-Tan, Inc. v. NLRB*, 467 U.S. 883 … (1984), and the [IRCA], bar awards of any backpay to undocumented discriminatees." *Id.* at 640.

The D.C. Circuit disagreed with Hoffman Plastics. It held, "*Sure-Tan* supports backpay awards to undocumented discriminatees so long as the awards reflect the discriminatees' actual losses." *Id.* It upheld the post-IRCA "tweak" in the award as "fall[ing] within the [NLRB's] broad remedial discretion." *Id.*

The Supreme Court reversed. After reviewing the history and intent of the IRCA, it held allowing Mr. Castro to claim *any* wages was simply impermissible: "allowing the [NLRB] to award backpay to illegal aliens would unduly trench

upon explicit statutory prohibitions critical to federal immigration policy, as expressed in IRCA. It would encourage the successful evasion of apprehension by immigration authorities, condone prior violations of the immigration laws, and encourage future violations." *Hoffman*, 535 U.S. at 151-52.

Thereafter, on remand, the D.C. Circuit granted Hoffman Plastics' petition for review and barred *any* back-due wages to Mr. Castro. *Hoffman Plastic Compounds, Inc. v. Nat'l Labor Relations Board*, 2002 WL 1974028 (D.C. Cir. 2002) (unpublished judgment). Thus, nothing in the history or text of *Hoffman* indicates Court's decision concerned only "backpay for work that would have been performed but for an unlawful discharge," as opposed to "unpaid wages" (Sec. Br. 9). The Supreme Court held the IRCA foreclosed *any* wages.

As such, *Hoffman* is not limited merely to "say[ing] that a worker should not be awarded backpay for work never performed … if continued employment would have been illegal" (Aple. Br. 29). Rather, it logically and broadly directed that the NLRA not be applied so as to "*condone prior violations of the immigration laws*, and encourage future violations." *Hoffman*, 535 U.S. at 151 (emphasis added). To do so would "trench upon explicit statutory prohibitions critical to federal immigration policy, as expressed in [the] IRCA." *Id.*

The plaintiffs' and the Secretary's analyses conspicuously omit *Hoffman*'s direction not to "encourage the successful evasion of apprehension by immigration

authorities [or] condone prior violations of the immigration laws." The plaintiffs insist "It is one thing to say … that a worker should not be awarded backpay for work never performed as damages for illegal termination if continued employment would have been illegal. It is quite another to say that a worker, having actually worked, should not be properly paid for that work, and in fact may be paid at whatever wage the employer sees fit, or no wage at all" (Aple. Br. 29).

But *Hoffman* plainly directed that condoning *either* future *or* prior violations of the IRCA would "unduly trench" upon the IRCA. The only amount of wages the IRCA allows lawfully to be paid to undocumented immigrants is *zero*, because it makes it absolutely illegal to "engage in a … practice of employing such immigrants" (Aple. Br. 22). It "prohibits the employment of workers who are not authorized to work in the United States, and imposes criminal and civil penalties … on employers who knowingly hire employees who lack proper documentation" (Sec. Br. 11). In arguing undocumented immigrants nonetheless have standing to claim wages that IRCA prohibits them to be paid, the plaintiffs and the Secretary simply would "encourage the successful evasion of apprehension by immigration authorities [and] condone prior violations of the" IRCA. *Hoffman*, 535 U.S. at 151. The Supreme Court's plain-language directive does not allow for this.

The plaintiffs attack the defendants for omitting words in ellipses ("for years of work not performed") from *Hoffman* (Aple. Br. 29). But that passage merely

listed all the things the IRCA bars undocumented immigrants from otherwise recovering, as the Secretary points out (Sec. Br. 11) (federal employment laws cannot provide relief "to an undocumented worker 'for years of work not performed, for wages that could not lawfully have been earned, and for a job obtained in the first instance by a criminal fraud'").

Certainly, one of these is for unperformed work. But another is "wages that could not lawfully have been earned." The plaintiffs agree that, as undocumented immigrants, they could not lawfully earn any wages (Aple. Br. 22). Thus, as *Hoffman*'s history and text show, *all* wage recovery is barred to them, both during and after employment, because the IRCA absolutely prohibits any such employment. The defendants merely concentrate on the wages at issue in *this* case: those that "could not lawfully have been earned." *Hoffman*, 535 U.S. at 149.[2]

The plaintiffs' and Secretary's suggestion that *Hoffman* somehow allows the IRCA's express proscription on employing and paying undocumented immigrants to be overlooked in applying federal employments laws is without merit.

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[2] The plaintiffs also cite decisions holding that, under individual states' laws, employing undocumented immigrants is not an "illegal activity" (Aple. Br. 30). A state may so choose under its own laws. But the IRCA plainly does make that illegal under federal law (Aple. Br. 22; Sec. Br. 11). Under the IRCA, a contract to employ an undocumented immigrant is an "illegal contract," and "It is axiomatic that a contract with an illegal purpose bars enforcement of such contract; no damages are incurred by its breach." *Rivera v. Nibco, Inc.*, 384 F.3d 822, 823, 830-35 (9th Cir. 2004) (Bea, J., dissenting from denial of rh'g en banc) ("if plaintiffs do not have authorized immigration status, they are not entitled to be awarded back wages … from a job which they were incapable of holding").

C. Congress's decision in the IRCA absolutely to prohibit employing undocumented immigrants and paying them any wages denies them standing to seek the relief of back-due lawful wages under the FLSA, because paying such wages would be unlawful.

Ignoring the express directives of *Hoffman* and the IRCA, the plaintiffs and the Secretary go on to insist, "The interest Plaintiffs seek to protect – the right to recover minimum wage and overtime compensation for work already performed – is exactly what the FLSA is designed to protect" (Aple. Br. 19), and thus they have standing. The defendants have no quarrel with the notion that, but for the IRCA making it absolutely illegal to "engage in a … practice of employing such immigrants" and "prohibit[ing] the employment of workers who are not authorized to work in the United States" (Aple. Br. 22; Sec. Br. 11), the plaintiffs would be authorized to work and thus be entitled to wages under the FLSA.

The problem with the plaintiffs' argument, however, is that the IRCA has excised the subclass of undocumented immigrant workers from the general class of authorized, lawful American workers entitled to wages under the FLSA. Whereas the FLSA generally gives workers the right to certain wages, the IRCA makes it absolutely illegal to employ undocumented immigrants *at all* or pay them *any* wages (Aple. Br. 22; Sec. Br. 11). This is no different vis-à-vis the NLRA, another New Deal-era act, in *Hoffman*, and Title VII in *Egbuna*.

The plaintiffs and the Secretary, however, seek to draw the Court's attention away from this by stating repeatedly that "Jerusalem Café [*sic*] … fails to cite a

single case holding that undocumented immigrants cannot recover wages under the FLSA for work already performed" (Aple. Br. 21; Sec. Br. 24). Setting aside the applicability of *Hoffman* for a moment, the defendants fully admit the only one reported federal appellate decision directly concerning how the IRCA impacts the FLSA, *Patel*, disagrees with the defendants' standing challenge (Aplt. Br. 56-59).

The plaintiffs, however, attempt to suggest that three other reported appellate opinions besides *Patel* support their argument: *Del Rey Tortillaria, Inc. v. Nat'l Labor Relations Bd.*, 976 F.2d 1115 (7th Cir. 1992), *Bollinger Shipyards, Inc. v. Dir., Office of Workers' Compensation Programs*, 605 F.3d 864 (5th Cir. 2010); *Donovan v. Burgett Greenhouses*, 7759 F.2d 1483 (10th Cir. 1985) (Aple. Br. 23 n.3).[3] All three cases are inapposite.

Del Rey barred an award of back-due wages to undocumented immigrant under the NLRA, but expressly held, "Because an undocumented alien's right to backpay under the FLSA … is not at issue here, we do not reach th[at] issu[e]." 976 F.2d at 1112 n.7. *Bollinger* allowed an undocumented immigrant relief in workers' compensation as a redress for injury. 605 F.3d at 864. The defendants agree that, if an undocumented immigrant is injured or charged with a crime, he

[3] The Secretary also points to several reported post-*Hoffman* federal appellate opinions discussing the interplay of the IRCA and the FLSA in dicta, all of which also expressly rely on *Patel* (Sec. Br. 20). The defendants already mentioned these in their opening brief (Aplt. Br. 56 n.5). None of these cases directly concern the FLSA, but merely make analogies in the context of other laws (Aplt. Br. 56 n.5).

has all the rights of any other injured or criminally charged person. Finally, *Donovan* was decided one year *before* the IRCA came into effect. 759 F.2d at 1486. The defendants accept the straightforward *Sure-Tan* framework under which, as the previous immigration laws did not "mak[e] it unlawful for an employer to hire an [undocumented] alien," all recovery of wages was open to them (Aplt. Br. 51-52). The plaintiffs' analogy to these cases is without merit.

The plaintiffs and Secretary also cite district court and state cases agreeing that undocumented immigrants can recover under the FLSA (Aple. Br. 24-26, 32-33; Sec. Br. 20-22, 24-25). Conspicuously, however, each and every one of them decided after *Patel* expressly cites and follows *Patel*. Thus, while no cases directly support the defendants as to the FLSA, besides *Patel* and its district/state court progeny, no cases support the plaintiffs' and Secretary's argument, either. Thus, as the defendants explained, "whether an undocumented alien who alleges he worked in violation of the IRCA has standing to sue for allegedly back-due wages under the FLSA is a question of first impression in this Court" (Aplt. Br. 56).

In their opening brief, the defendants briefly pointed out Justice Breyer's reliance on *Patel* and its reasoning in his dissenting opinion in *Hoffman*, and noted the majority in *Hoffman* rejected that reasoning (Aplt. Br. 57 n.7). The plaintiffs counter that the cited portion of *Hoffman* "does not mention *Patel*, does not address the subject matter of *Patel*, and cannot in any way be construed as

rejecting *Patel*" (Aple. Br. 31). While the plaintiffs are correct that the majority in *Hoffman* did not mention *Patel* by name, they plainly rejected its reasoning.

Justice Breyer criticized the *Hoffman* majority for "rest[ing] its conclusion upon the immigration laws' purposes," reasoning, like the plaintiffs and the Secretary here, that "the general purpose of the [IRCA]'s employment prohibition is to diminish the attractive force of employment," and "[t]o permit the Board to award backpay [to undocumented immigrants] could not significantly increase the strength of this magnetic force …." 535 U.S. at 155 (Breyer, J., dissenting). In support of this proposition, he cited *Patel* and several pre-IRCA cases, quoting *Patel*'s second reasoning that undocumented "aliens enter the country 'in the hope of getting a job,' not gaining 'the protection of our labor laws.'" *Id.*

The majority disagreed. In holding "There is no reason to think that Congress nonetheless intended to permit backpay where but for an employer's unfair labor practices, an alien-employee would have remained in the United States illegally, and continued to work illegally," it observed "Justice BREYER contends otherwise" in his same passage citing to *Patel*, rejecting his criticism. *Id.* at 149.

Later, the majority expressly disapproved of Justice Breyer's view that awarding backpay to undocumented immigrants à la *Patel* "is entirely consistent with IRCA," as the IRCA "not only speaks directly to matters of employment but expressly criminalizes the only employment relationship at issue in this case." *Id.*

at 151 n.5. Plainly, the *Hoffman* majority rejected *Patel*'s reasoning that awarding back wages to undocumented immigrants fits the purposes of the IRCA, because the employment relationship at issue is *expressly prohibited* by the IRCA.

Thus, with only *Patel* to support their arguments, the plaintiffs and the Secretary are forced to argue that, despite *Hoffman*, the "Eleventh Circuit's analysis in *Patel* was correct, and Jerusalem Café's [*sic*] analysis is wrong" (Aple. Br. 31; Sec. Br. 19-22). Both the plaintiffs and the Secretary rely on the Eleventh Circuit's unpublished *per curiam* opinion in *Galdames v. N & D Inv. Corp,* 432 Fed. Appx. 801 (11th Cir. 2011), *cert. denied*, 1132 S.Ct. 1558 (2012), which briefly declined to revisit *Patel* (Aple. Br. 23-24; Sec. Br. 15, 19).

The plaintiffs state that, in *Galdames*, the "Eleventh Circuit itself has re-examined *Patel* in light of IRCA and *Hoffman,* and has allowed it to stand, holding again that undocumented immigrants may recover unpaid wages for work already performed" (Aple. Br. 23). But *Galdames* was primarily devoted to the procedural rule that "[e]arlier holdings by panels of this Court are binding 'unless and until they are clearly overruled by this court en banc or by the Supreme Court,'" and *Hoffman* did not overrule *Patel* because, "First, *Patel* ruled on the FLSA and *Hoffman Plastic* ruled on the NLRA." 432 Fed. Appx. at 803 (citation omitted).

The Secretary takes up this point and argues *Patel*/*Galdames* is correct because *Hoffman* "pertained to the NLRA, not the FLSA" (Sec. Br. 19). But

Patel's first reason for holding undocumented immigrants had standing to claim back-due wages despite the IRCA was that the pre-IRCA decision in *Sure-Tan* "weighs heavily in favor of Patel's contention that Congress did not intend to exclude undocumented aliens from the FLSA's coverage," because "Congress enacted both the FLSA and the NLRA as part of the social legislation of the 1930's. The two acts have similar objectives. More importantly the two acts similarly define the term 'employee,' and courts frequently look to decisions under the NLRA when defining the FLSA's coverage." *Patel*, 846 F.2d at 703.

Hoffman, however, explained the IRCA "significantly" changed the "legal landscape" that had existed at the time of *Sure-Tan* by "forcefully ma[king] combating the employment of illegal aliens central to the policy of immigration law." 535 U.S. at 147. Thus, the plaintiffs and Secretary are left with a paradox: advocating *Patel*'s holding that the FLSA and NLRA are similar and *Sure-Tan*'s NLRA framework applied to the FLSA while simultaneously arguing *Hoffman*'s NLRA holding, which overruled this part of *Sure-Tan*, cannot be applied to the FLSA because the FLSA and NLRA are different (per *Galdames*).

Rather, what the plaintiffs and Secretary beg this Court to do is engage in results-oriented jurisprudence: first determine the result they desire and only then craft a legal reasoning to reach it. In this case, however, their reasoning is two-

faced. If the NLRA and FLSA are different, then *Patel*'s first reason is wrong.[4] If the NLRA and FLSA are similar, then *Galdames*'s reasoning is wrong. The plaintiffs and the Secretary cannot have it both ways.

Thus, the plaintiffs and the Secretary are forced to concentrate on the second part of the *Patel*/*Galdames* reasoning, which both opinions share in common: "If employers are not required to pay undocumented immigrants the same as American citizens or immigrants with proper documentation, they won't [*sic*]. They will thus perpetuate a secondary labor market that undercuts wages and job opportunities for workers who must be paid minimum wage and overtime" (Aple. Br. 32) (paraphrasing *Patel*, 846 F.2d at 704).

In their opening brief, the defendants already explained the glaring flaw in this reasoning – a rationale the Eleventh Circuit itself described as "seemingly anomalous" (Aplt. Br. 58-59) (quoting *Patel*, 846 F.2d at 704). Even if, as the plaintiffs desire, persons unlawfully "employing" undocumented immigrants[5] paid technically statutory amounts of minimum wage (which, in itself, would be

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[4] This part of *Patel* is correct, and *Galdames* is wrong: as the two acts *are* similar, "courts frequently look to decisions under the NLRA when defining the FLSA's coverage." 846 F.2d at 703 (citing *Rutherford Food Corp. v. McComb*, 331 U.S. 722, 723 (1947); *Marshall v. Abbott Farms, Inc.*, 559 F.2d 1006, 1007 & n.1 (5th Cir. 1977)).

[5] The plaintiffs state the defendants "acknowledg[e] that they entered unlawful employment relationships with Plaintiffs" (Aple. Br. 33). This is untrue. The defendants admit no such thing, regardless of the jury's apparent contrary finding.

illegal), they "would still pay less than minimum wage," as they would "pay in cash" and "not pay payroll taxes," as the plaintiffs recognize (Aple. Br. 31). As the Secretary notes, employers of undocumented immigrants under the existing black market already "have lower labor costs and may thereby gain an unfair advantage over competitors who comply with the law" (Sec. Br. 18).

Judicially legalizing this existing illegal market not only would directly scoff at the IRCA's express prohibitions, but it demonstrably would not provide any "minimization" of the existing "incentive to hire such workers," which is *why those workers are hired under the present black market* (Aple. Br. 32). There is already "a secondary labor market that undercuts wages and job opportunities for workers who must be paid minimum wage and overtime" (Aple. Br. 32).

If the Government truly wanted to curb this black market, it would concentrate on securing the American border and supply-side enforcement of the laws prohibiting undocumented immigrants from entering the country.[6] *See, e.g.*, 8 U.S.C. § 1325 (prohibition on "improper entry by alien"). Judicial condonement would do nothing but perpetuate the black market for violating the IRCA.

The plaintiffs' and Secretary's argument is akin to saying it would aid federal drug policy to allow unpaid illegal narcotics distributors standing to enforce

[6] Presently, the "Federal Government … does not want to enforce the immigration laws as written, and leaves the States' borders unprotected against immigrants whom those laws would exclude." *Arizona v. United States*, 132 S.Ct. 2492, 2521 (2012) (Scalia, J., concurring in part and dissenting in part).

their illegal contracts in court despite Congress's prohibitions in the Controlled Substances Act, 21 U.S.C. §§ 801, *et seq.*, because otherwise there will exist a private incentive to perpetuate the black market in drugs (and the violence that accompanies it). They would have this Court enter the Never-Never Land of "enforcing" statutory prohibitions by judicially overriding the same.

Whatever the "seemingly anomalous" wisdom of the *Patel* prohibition-enforcement-by-judicial-legalization reasoning, the Supreme Court has firmly rejected the notion that allowing technical, under-the-table wage-paying of undocumented immigrants "is entirely consistent with IRCA." *Hoffman*, 535 U.S. at 151 n.5. For, the IRCA "not only speaks directly to matters of employment but expressly criminalizes the … employment relationship at issue" between undocumented immigrants and would-be employers. *Id.*

The Secretary takes the *Patel* argument further and implies that, under the defendants' argument, undocumented immigrants legally could be enslaved: "Defendants would thus have this Court rule that IRCA's prohibition on hiring unauthorized workers means that employers who nevertheless employ undocumented workers and reap the benefits of their labor are completely immune from any requirement to pay wages as mandated under the FLSA" (Sec. Br. 25).

This suggestion utterly forgets that the IRCA makes employing undocumented immigrants *absolutely illegal*. As the President noted upon signing

the IRCA, its undocumented immigrant employment prohibition is "the keystone and major element of the act," and was designed to "remove the incentive for illegal immigration by eliminating the job opportunities which draw illegal aliens here." Ronald Reagan, "Statement on Signing the Immigration Reform and Control Act of 1986" (Nov. 6, 1986), *available at* http://www.reagan.utexas.edu/archives/speeches/1986/110686b.htm.

The FLSA, like the NLRA, is not an enforcement mechanism of the IRCA. The IRCA provides its own enforcement provisions: "Employers who violate IRCA are punished by civil fines, and may be subject to criminal prosecution." *Hoffman*, 535 U.S. at 148 (citing 8 U.S.C. §§ 1324a(e)(4)(A) and 1324a(f)). If a person is illegally employing an undocumented immigrant, the response the IRCA allows is not to *pay* the undocumented immigrant, but rather to punish the person violating the IRCA by employing him. If an undocumented immigrant is held to work against his will, he would have a separate civil rights cause of action for peonage and slavery, as well as pendent claims for false imprisonment; the enslaver also would face prosecution. *See* 42 U.S.C. §§ 1983, 1994; U.S. Const. amend. XIII; *United States v. Farrell*, 563 F.3d 364 (8th Cir. 2009).

But that was not the plaintiffs' claim here. Rather, they claimed they were employed by the defendants and were paid – just not to the amount the FLSA ostensibly would require. But before the federal minimum wage was enacted in

the FLSA, there was no minimum wage, and thus the plaintiffs would have had no claim at all. In making employment of undocumented immigrants illegal in the IRCA, Congress merely returned them to that status. *Cf. Hoffman*, 535 U.S. at 148-49 (NLRA cannot provide back-due wages "that could not lawfully have been earned," as this would run "counter to policies underlying IRCA").

"It is the province of Congress, not the courts, to weigh one policy against another, while it is 'emphatically the province and duty of the judicial department to say what the law is.'" *Rivera*, 384 F.3d at 835 (Bea, J., dissenting from denial of rh'g en banc) (quoting *Marbury v. Madison*, 1 Cranch 137, 177 (1803)). Thus,

> It is dubious that Congress intended that the societal value of [wage and hour] cases to be so important that the court should allow unauthorized aliens to violate the Immigration law. Such a proposition is utterly without antecedent. There is nothing in either the *Hoffman* opinion or caselaw to suggest that the policy concerns underlying [the FLSA] trump the policy considerations of the IRCA. The "policy considerations" of the NLRA have been national policy since 1935, [three] years longer than those of the [FLSA]. On the … issue of … claimed [back due minimum wages], why can't that same 1986 Immigration Reform and Control Act trump the [1938 Fair Labor Standards Act] the way it did the 1935 Wagner Act?

Id.

As *Hoffman* broadly points out, the IRCA must trump contrary wage-paying employment laws, including the NLRA, Title VII, and yes, the FLSA. Congress has declared in the IRCA that undocumented immigrants cannot be employed or paid any wages. They cannot have standing to claim such wages under the FLSA.

D. The Secretary of Labor's interpretation of the laws at issue in this case is incorrect and is not entitled to any deference from this Court.

The Secretary also points to its "longstanding position" "that all workers are entitled to the minimum wage and overtime protections of the FLSA" (Sec. Br. 1). It invokes its "longstanding and consistent interpretation, articulated both before and after *Hoffman*, that the FLSA includes all workers regardless of immigration status" (Sec. Br. 15). It cites its own materials to show this (Aple. Br. 22).

Before *Hoffman*, of course, the Government's *also* took the position that undocumented immigrants are entitled to backpay under the NLRA. *See* Br. for the Nat'l Labor Relations Bd. in *Hoffman*, 2001 WL 1597748 at *15 (Nov. 10, 2001) ("Congress did not bar undocumented aliens from receiving back pay as a remedy for violations of federal labor laws, and indeed in IRCA it authorized increased enforcement of labor laws by the Department of Labor, in recognition of the fact that such enforcement (including the possibility of back pay awards for undocumented aliens) would deter employment of undocumented aliens and would therefore deter illegal immigration"). The Supreme Court rejected this position. *Hoffman*, 535 U.S. at 148-51.

Having lost *Hoffman*, the Government (through the Secretary) seeks to limit *Hoffman*'s holding so as to resurrect its rejected argument. But in this case, the Secretary's continued insistence on this same "interpretation" of the interplay of federal immigration and labor laws is just as wrong as it was in *Hoffman*.

Now, however, the Secretary insists it "is *entitled* to a degree of deference" from this Court (Sec. Br. 22) (emphasis added). But *Hoffman* expressly rejected any such deference. 535 U.S. at 144, 151 n.5. The Executive's preferred interpretation of laws is merely its suggestion. Indeed, especially recently, its interpretation of laws has been found not only wrong, but repugnant. *See, e.g.*, *Boumediene v. Bush*, 533 U.S. 723, 765 (2008) (accepting Government's position would make it "possible for the political branches to govern without legal restraint"); *United States v. Stevens*, 130 S.Ct. 1577, 1585 (2010) (Government's argument was "startling and dangerous"); *Hosanna-Tabor Evangelical Lutheran Church and School v. E.E.O.C.*, 132 S.Ct. 694, 706-07 (2012) (Government's "position" was "untenable," "remarkable," and had "no merit").

Simply put, federal courts of law "do not defer to the Government's reading of" the Constitution and our laws. *Holder v. Humanitarian Law Project*, 130 S.Ct. 2705, 2727 (2010). In this case, as in any other, that an argument comes from the Government gives it no more weight than from any other litigant. Just as in *Hoffman*, the Secretary's position in this case is contrary to the law. The Court should reject it.

Reply as to Issue II

In the second issue in their opening brief, the defendants explained how the district court erred in issuing an order in limine barring any mention of the plaintiffs' unlawful immigration status (Aplt. Br. 60-66). As they showed, this was because that evidence was relevant both the plaintiffs' right to recover and to the defendants' desired defense that they did not employ the plaintiffs because of that status. The order in limine effectively and improperly granted the plaintiffs summary judgment on that defendants. The defendants further explained how the last-minute vacation of the order in limine did not mitigate this error, because they were left with only a perfunctory, surprise basis on which to introduce this evidence.

In response, the plaintiffs and the Secretary fail to discuss *any* of the authorities on which the defendants rely in their opening brief. Instead, the plaintiffs argue "any error" in issuing the order in limine was "harmless," because some "evidence of Plaintiffs' immigration status came in, and ultimately the district court reversed its order" (Aple. Br. 33). As proof for this, they point to the course of discovery, in which the defendants "did not mention immigration status in written discovery" or in depositions (Aple. Br. 36).

The plaintiffs cite no authority that failure to ask certain questions in discovery related to a specific defense means that the defense cannot be – or was

not going to be – put on at trial. In this case, the plaintiffs' immigration status did not have to be a topic of discovery, because both sides knew the plaintiffs were undocumented (Transcript 403, 592-93). Indeed, that the defendants planned to put on their preferred defense is plain from their opposition to the plaintiffs' motion in limine (Joint Appendix 30). They desired to show that the plaintiffs' "illegal immigration status" was "the sole reason Defendants could not and did not employ Plaintiffs at Jerusalem Café [*sic*]" (Appx. 30).

As such, from the very start of trial, had the order in limine not been in place, the defendants' case would have been entirely different: that they did not employ the defendants solely because they were undocumented immigrants. "[W]hy aren't these guys on the payroll? Because Farid didn't want to put illegals on his payroll. Everybody that's on his payroll was legal" (Tr. 572). Instead, deprived of that defense, they were left to argue that "Plaintiffs volunteered to work for them without pay," which the district court found was "concocting a fantastic story" (Appx. 224). Only in the middle of the final witness's testimony, on the final day of trial, were the defendants able to introduce evidence for their actual defense from which, until then, they had been enjoined.

The plaintiffs, however, couch the timing of the immigration status coming in as "multiple times during the course of the Defendants' case-in-chief," "not once, but several times through their primary witness, during their case in chief,

and again during closing argument" (Aple. Br. 37). But this untenably downplays the course of the trial. After two-and-a-half days of the plaintiffs' case-in-chief, the defendants put on their case, which consisted of only two witnesses (Tr. 355). It was only in the middle of the testimony of the second witness, Farid Azzeh, that the district court dissolved its order in limine (Tr. 575-79). In the transcript, the turnabout comes only twenty pages before the end of testimony!

But for the order in limine, the entire course of the trial would have been different. The defense would have made the plaintiffs' immigration status the centerpiece of its case: that the defendants did not employ the plaintiffs because they were undocumented immigrants (Tr. 572). Instead, the court prohibited this defense until the middle of the final witness on the final day of trial, which conflicted with the defense they had put on until then. That was not "an adequate opportunity to present their case" without the order in limine (Aple. Br. 38).

Thus, as the plaintiffs aptly paraphrase, the "initial grant of the *in limine* motion still unfairly and irreparably harmed Defendants' case, because it changed how they presented their case, because they were not permitted an opportunity to cross examine [*sic*] Plaintiffs about this issue, and because counsel was unprepared to present testimony about this issue at the trial" (Aple. Br. 34).

The district court's error in suppressing any evidence of the plaintiffs' immigration status was anything but harmless.

Conclusion

This Court should reverse the district court's judgment and remand this case with instructions to dismiss the plaintiffs' complaint. Alternatively, the Court should reverse the district court's judgment and remand this case for a new trial.

Respectfully submitted,

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Certificate of Compliance With Type-Volume Limitation, Typeface Requirements, and Type Style Requirements

I hereby certify that this brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B)(ii), because this brief contains 6,996 words, excluding the parts of the brief exempted by Rule 32(a)(7)(B)(iii).

I further certify that this brief complies with the typeface requirements of Rule 32(a)(5) and the type style requirements of Rule 32(a)(6), because this brief has been prepared in a proportionally spaced typeface, Times New Roman size 14 font, using Microsoft Word 2010.

I further certify that the electronic copy of this Reply Brief of the Appellants filed via the Court's ECF system is an exact, searchable PDF copy thereof, that it was scanned for viruses using Microsoft Security Essentials and, according to that program, is free of viruses.

/s/Jonathan Sternberg
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Certificate of Service

I hereby certify that, on October 16, 2012, I electronically submitted the foregoing to the Clerk of the Court for the United States Court of Appeals for the Eighth Circuit for review by using the CM/ECF system.

/s/Jonathan Sternberg
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