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

BRIEF OF THE APPELLANTS

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ORAL ARGUMENT REQUESTED

Summary of the Case

Six Guatemalan nationals who admit they are undocumented aliens unlawfully living in the United States filed an action under the Fair Labor Standards Act alleging that, from 2007 to 2010, a Kansas City restaurant company, its owner, and a third person had employed them and failed to pay them the Act's required wages. The district court excluded any mention of the Guatemalans' immigration status in an order in limine, but dissolved that order toward the end of trial after the Guatemalans admitted their status. After a jury trial, the district court awarded the Guatemalans $283,728.08 in damages for back-due wages.

Under the Immigration Reform and Control Act, as applied in *Hoffman Plastic Compounds, Inc. v. Nat'l Labor Relations Bd.*, 535 U.S. 137 (2002), the Guatemalans' status as undocumented aliens denies them standing to claim any back-due wages under the Fair Labor Standards Act, as it would have been unlawful for them to have been paid those wages in the first place. Thus, the defendants were entitled to judgment as a matter of law. Alternatively, the defendants were entitled to a new trial, as the order in limine was prejudicial error.

Request for Oral Argument

The issues in this case are complex and include a weighty question of first impression in this Court. The interchange of oral argument would assist the Court in understanding and deciding them. Appellants request at least twenty minutes.

Corporate Disclosure Statement

Appellant Jerusalem Cafe, LLC, is a Missouri limited liability company that has no parent corporation. No publicly held corporation owns 10% or more of its stock.

Table of Contents

Table of Authorities

Cases

Constitution of the United States

United States Code

Federal Rules of Appellate Procedure

Federal Rules of Civil Procedure

Federal Rules of Evidence

Jurisdictional Statement

This is an appeal from a final order and judgment of the United States District Court for the Western District of Missouri in an action for allegedly back-due overtime and minimum wage under the Fair Labor Standards Act of 1938 ("FLSA"), 29 U.S.C. § 201, *et seq.*

The district court held it had jurisdiction pursuant to the FLSA itself, *id.* at § 216(b), as well as 28 U.S.C. §§ 1331 and 1337, as this was a civil action arising under the laws of the United States, specifically an Act of Congress regulating commerce. The appellants challenge the plaintiffs' standing to sue under the FLSA and, therefore, the district court's subject matter jurisdiction. *Infra* 43-59.

The district court entered its final order and judgment disposing of all parties' claims on December 12, 2011. On January 9, 2012, the appellants timely moved for judgment under Fed. R. Civ. P. 50(b) or for a new trial under Fed. R. Civ. P. 59. The district court denied their motion on May 10, 2012.

The appellants filed their notice of appeal on May 10, 2012. Under Fed R. App. P. 4(a)(1)(A) and 4(a)(4)(A), the notice of appeal was timely, as it was filed within thirty days of the district court's order denying their post-judgment motion. Therefore, this Court has appellate jurisdiction under 28 U.S.C. § 1291.

Statement of the Issues

I. The district court erred in denying the defendants judgment as a matter of law, because the plaintiffs, as admitted undocumented aliens to whom payment of any wages is prohibited by federal law, lacked standing to sue for back-due wages under the Fair Labor Standards Act. Employment statutes cannot be read in a manner that would trench upon explicit statutory prohibitions critical to federal immigration policy. As such, the FLSA cannot be read to allow undocumented aliens to claim back-due wages that would have been illegal for them to have been paid in the first place.

Hoffman Plastic Compounds, Inc. v. Nat'l Labor Relations Bd.,
535 U.S. 137 (2002)

Sure-Tan, Inc. v. Nat'l Labor Relations Bd., 467 U.S. 883 (1984)

Egbuna v. Time-Life Libraries, Inc., 153 F.3d 184 (4th Cir. 1998)

United Food & Commercial Workers Union v. Albertson's,
207 F.3d 1193 (10th Cir. 2000)

8 U.S.C. § 1324a

29 U.S.C. § 203

II. The district court erred in denying a new trial, because its order in limine barring any mention of the plaintiffs' unlawful immigration status was prejudicial error. The plaintiffs' immigration status was relevant both to the defendants' ability to contest the plaintiffs' right to recover and to the defense the defendants desired to present: that they did not employ the plaintiffs because the plaintiffs were undocumented aliens.

Brobst v. Columbus Servs. Int'l, 761 F.2d 148 (3d Cir. 1985)

Sperberg v. Goodyear Tire & Rubber Co., 519 F.2d 708 (6th Cir. 1975)

Rodrick v. Wal-Mart Stores E., L.P., 666 F.3d 1093 (8th Cir. 2012)

Elmahdi v. Marriott Hotel Servs., Inc., 339 F.3d 645 (8th Cir. 2003)

Fed. R. Evid. 401

Fed. R. Evid. 403

Statement of the Case

Plaintiffs Elmer Lucas, Margarito Rodas, Gonzalo Leal, Feliciano Macario, Bernabe Villavicencio, and Esvin Lucas are Guatemalan nationals who live in the United States as undocumented aliens. Defendant Jerusalem Cafe, LLC, was a Missouri company operating three food service establishments in Kansas City. Its owner was Defendant Farid Azzeh. The plaintiffs claimed Defendant Adel Alazzeh was its "manager," though he said he was merely a part-time caterer.

In 2010, the plaintiffs filed an action against the defendants under the Fair Labor Standards Act of 1938 ("FLSA") in the United States District Court for the Western District of Missouri, alleging that, between 2007 and 2010, they had been "employed" by Jerusalem Cafe, Mr. Azzeh, and Mr. Alazzeh and had not been paid the minimum wage or overtime the FLSA required, which they sought to recover. Mr. Azzeh and Mr. Alazzeh denied they had employed the plaintiffs.

Before trial, the court issued an order in limine barring any mention of the plaintiffs' immigration status. The case was tried before a jury over four days in November 2011. Toward the end of testimony, the court dissolved the order in limine. The jury returned verdicts for all plaintiffs against all defendants and found the defendants' alleged FLSA violations were willful. The court awarded the plaintiffs $283,728.08 in actual and liquidated wages and $157,188.63 in attorney fees and expenses. The defendants timely appealed to this Court.

Statement of Facts

A. The Plaintiffs and their Background

Plaintiffs Elmer Lucas, Margarito Rodas, Gonzalo Leal, Feliciano Macario, Bernabe Villavicencio, and Esvin Lucas all are from Guatemala, where they hold citizenship, and "are family and friends" who "spend time together" (Transcript 51, 218, 304-05, 398).

Elmer and Esvin Lucas are brothers (Tr. 34, 101, 303). Mr. Villavicencio and Mr. Rodas are the Lucases' brothers-in-law, married to two of the Lucases' sisters (Tr. 101-02, 303, 397). Mr. Leal grew up with the Lucases in the same village in Guatemala, where they also knew Mr. Rodas (Tr. 103, 218, 304, 397).

In 2001, Esvin Lucas became the first of the six plaintiffs to come to the United States, settling in Kansas City, Missouri (Tr. 104). He then brought Elmer Lucas, who was followed in turn by Mr. Villavicencio, Mr. Rodas, and Mr. Leal (Tr. 218, 469-70). Later, Elmer Lucas met and shared an apartment with Mr. Macario in the United States, whereupon Mr. Macario became the others' friend (Tr. 102, 304, 338).

All the "[p]laintiffs are undocumented" aliens; as Mr. Rodas put it in his "testi[mony] about their immigration status," they are "illegals" (Appendix 219, 243, 249; Tr. 403, 592). They admitted that anyone employing them in the United States would be engaging in an "unlawful employment relationship[]" (Appx.

249). For this reason, Esvin Lucas also went by the name "Luis Ramos," "a fictitious name" (Tr. 63, 100-01). Esvin Lucas never paid any taxes in the United States (Tr. 108). Similarly, Elmer Lucas's fictitious name was "Alex Ramos" (Tr. 239, 265). Mr. Leal had a bank account that he "never used" (Tr. 226-29).

B. The Defendants and their Background

Defendant Jerusalem Cafe, LLC, was a Missouri limited liability company operating as a Middle Eastern food company in Kansas City, Missouri; during the subject period of this case, 2007-2010, it operated in three locations: a restaurant and separate bakery, both in the Westport neighborhood, as well as another restaurant on 39th Street (Tr. 37-38, 461, 480, 536). Between 2004 and February 2007, Jerusalem Cafe also leased a warehouse in downtown Kansas City to produce foodstuffs for the company, especially pita bread (Tr. 523-24).

Jerusalem Cafe is "a family business of the Azzeh" family (Tr. 305). Besides Jerusalem Cafe, LLC, the other two defendants in this case are Farid Azzeh and his brother-in-law, Adel Alazzeh (Tr. 468).

Both Mr. Azzeh and Mr. Alazzeh are legal immigrants and naturalized American citizens (Tr. 449, 504). Mr. Azzeh immigrated to Kansas City from Jerusalem in 1978, where he originally worked as a civil engineer (Tr. 504. 506). Because he had experience working in restaurants during college, in 1992, when engineering work was slow, he opened a restaurant in Westport that eventually

became the Jerusalem Cafe (Tr. 506). Before this case, Mr. Azzeh and his business never had been the subject of any legal proceedings (Tr. 508).

Mr. Alazzeh immigrated to Kansas City in 1997 (Tr. 449). Between 2007 and 2010, he was employed full-time at two car dealerships, one of which he eventually owned, as well as part-time at the Jerusalem Cafe's Westport restaurant (Tr. 450, 458). His full-time jobs and main source of income were the car dealerships, where he worked as a salesman on commission selling used cars or, later, as the owner (Tr. 463-65, 475-76).

Conversely, Mr. Alazzeh was "just an employee" at Jerusalem Cafe and did not have the authority to determine pay, to hire and fire, or to determine work schedules (Tr. 457, 507, 530). Between 2007 and 2010, he only worked at Jerusalem Cafe for Mr. Azzeh between 15 and 60 hours per month handling catering, the volume of which varied, though he also occasionally went there to visit Mr. Azzeh (Tr. 458-59, 468, 507). Whereas he made more than $40,000 per year selling cars, his income from Jerusalem Cafe was less than $5,000 per year (Tr. 465). He never was involved in keeping Jerusalem Cafe's payroll or tax information (Tr. 510, 533). He never had "any responsibility with day-to-day operations in the management of any of the employees" (Tr. 508). Mr. Azzeh paid him every two weeks by check, never cash (Tr. 460). He had nothing to do with

the Jerusalem Cafe bakery location (Tr. 461-62). He had no contact with or choice in Jerusalem Cafe's vendors (Tr. 535).

Mr. Azzeh, rather than Mr. Alazzeh, was the exclusive owner of Jerusalem Cafe between 2007 and 2010 (Appx. 38; Tr. 444-45, 507). It was he who exercised all management responsibilities, directing "the day-to-day activity of employees" (Tr. 444-45). He was "always" at Jerusalem Cafe (Tr. 510). He was the company's exclusive selector of and contact with vendors (Tr. 535). He exclusively hired, trained, set the work schedules of, and fired employees (Tr. 445, 507, 537). It was he who decided on the employees' rates of pay (Tr. 522).

For payroll, Mr. Azzeh tracked employee hours in a handwritten report, which he translated into payroll reports based on the employees' respective pay rates and then sent to his accountant, who would cut and deliver paychecks for him to hand out to the employees (Tr. 509-10). At trial, Mr. Azzeh identified and explained these detailed time sheets and payroll reports from January 2010 (Tr. 514-21). Based on those reports, Mr. Azzeh's accountant also prepared Jerusalem Cafe's tax returns, which Mr. Azzeh additionally identified at trial (Tr. 530-32). He paid the accountant $160 per Jerusalem Cafe location per month (Tr. 509).

Mr. Azzeh knew of the Fair Labor Standards Act of 1938 ("FLSA"), including its minimum wage requirements and its requirement that work over 40 hours per week had to be paid by time-and-a-half (Tr. 445-46). Indeed, a poster on

the wall at Jerusalem Cafe explained this for the employees (Tr. 446). The Missouri Department of Labor once inquired into Jerusalem Cafe's payroll practices, but Mr. Azzeh "handed [the inquiry] to [his] lawyer to take care of" and never heard about it again (Tr. 446-47, 508). He explained he never paid overtime wages to anyone because none of his employees ever worked overtime (Tr. 447).

C. The Plaintiffs' and Defendants' Relationship

Mr. Alazzeh knew all the plaintiffs, first meeting Esvin Lucas under his assumed name, "Luis Ramos" (Tr. 450-51). Mr. Alazzeh did not know Mr. Lucas's real name until the proceedings below (Tr. 483-84). He met Mr. Lucas through other friends who cleaned his house and tried to help Mr. Lucas by referring him for construction work (Tr. 452). He also socialized with Mr. Lucas and helped him learn some English; once, he even got Mr. Lucas a lawyer to bond out of jail after an arrest (Tr. 452-54). Esvin Lucas admitted Mr. Alazzeh both had bonded him out of jail and had helped him get an apartment, even putting his utilities in Mr. Alazzeh's name (Tr. 123-24, 161, 456).

Thereafter, Mr. Alazzeh got to know the other plaintiffs through Mr. Lucas in the order they came to Kansas City (Tr. 470-71). On occasion, he helped them, too, with apartments, furniture, and utilities, and gave them gifts (Tr. 472-73). The only one of the plaintiffs Mr. Alazzeh said he did not know well was Mr. Macario (Tr. 471).

Mr. Azzeh met the Lucases, Mr. Villavicencio, Mr. Leal, and Mr. Rodas through Mr. Alazzeh and then, too, became "good friends" with them (Tr. 540). Mr. Azzeh knew they were all undocumented aliens (Tr. 592-93). Mr. Leal admitted he and Mr. Azzeh and Mr. Alazzeh socialized, including going to casinos and racetracks at night (Tr. 225).

Mr. Azzeh said he taught Esvin Lucas various construction skills (Tr. 540). He recommended Mr. Lucas's and the others' (except Mr. Macario's) construction and remodeling services to his relatives (Tr. 541-42). Esvin Lucas admitted he performed home maintenance work for Mr. Azzeh and his family (Tr. 114-15). Mr. Azzeh also knew the plaintiffs socially, spent holidays with them, and gave them gifts (Tr. 542). He also gave them interest-free loans and helped them store cars they bought to ship home to Guatemala (Tr. 542).

Esvin Lucas testified the plaintiffs bought cars from Mr. Alazzeh's dealership (Tr. 66, 125-36). He purchased two from Mr. Alazzeh between 2007 and 2008, one of which he bought used for $9,700 (Tr. 125, 130, 161, 469, 473). Elmer Lucas also bought a used car from Mr. Alazzeh, paying $2,000 up front followed by $1,200 per month (Tr. 133, 302). Mr. Villavicencio also bought a car from Mr. Alazzeh (Tr. 134, 431-32). Esvin Lucas initially said none of the plaintiffs ever paid for the cars, but rather the money was "discounted" from their work at Jerusalem Cafe (Tr. 67). Then, however, he admitted he paid Mr.

Alazzeh's dealership $3,000 as a down payment followed by $1,000 per month until it was paid off (Tr. 136). Mr. Alazzeh also once co-signed on a loan for another car for Esvin Lucas (Tr. 468-69).

Jerusalem Cafe never paid anyone in cash except Mr. Macario; Mr. Azzeh admitted Mr. Macario was an employee of Jerusalem Cafe for three weeks in January 2010, pointing to Mr. Macario's entries on the company's January 2010 time sheets (Tr. 520, 539, 569). Mr. Macario's entries were last in order on the reports because he had been Mr. Azzeh's most recent hire on the list (Tr. 570).

Unlike all the other employees, however, Mr. Macario was not on the January 2010 payroll report (Tr. 579-81). Mr. Azzeh explained that this was because Mr. Macario was paid in cash, as he did not have a "legal Social Security or green card" – he was not a "U.S. citizen or legal alien" (Tr. 582-83).

D. The Plaintiffs' Allegations about Work at Jerusalem Cafe

1. Esvin Lucas

Esvin Lucas said Mr. Alazzeh hired him to work at Jerusalem Cafe beginning in November 2001 (Tr. 64). He said that, during 2007-2010, he worked at the bakery as a cook, preparing all the food sold there as well as some for the other locations (Tr. 64-65). He said he worked 9:00 a.m. to 9:00 p.m., Monday to Friday, plus Saturday from 9:00 a.m. to 3:00 p.m., for a total of 66 hours per week (Tr. 67). He said he also cooked for himself and the other employees (Tr. 84).

Mr. Lucas identified what he said were photographs of him working there, wearing an apron and a Jerusalem Cafe t-shirt (Tr. 79-82). Mr. Alazzeh was not in any of the photographs (Tr. 143). Mr. Azzeh said the photograph did not show Mr. Lucas working as an employee, but rather it was possible Mr. Lucas was visiting the restaurant, posing for a photo, or just helping out (Tr. 556).

Mr. Lucas also identified a video he said he made to show his family in Guatemala about his life in the United States, including where he worked (Tr. 86-88). Mr. Alazzeh was not in the video, though it showed Mr. Azzeh on the phone (Tr. 143, 547). Mr. Azzeh said he remembered this event: Mr. Lucas only had been helping out because Mr. Azzeh was busy with remodeling (Tr. 547).

Mr. Lucas identified a Kansas City Health Department ID with an issue date of April 2008 that noted he worked at Jerusalem Cafe, which he said was posted with all the other employees' Health Department IDs at the bakery (Tr. 82-84). Mr. Azzeh said anyone in the kitchen had to have one of these "food cards," even his own relatives and people like Mr. Lucas who were just temporary volunteers (Tr. 548, 560-62).

According to Mr. Lucas, he was paid $550 for 66 hours of work for the first 135 weeks he worked at Jerusalem Cafe in 2007-2010, and then $500 per week for 60 hours of work for the final nine weeks, all always in cash by Mr. Alazzeh (Tr.

65-66, 68-69). He said he was refused raises and was never paid overtime (Tr. 69). He said he never took any vacations and was never ill (Tr. 105).

2. Gonzalo Leal

Mr. Leal said Mr. Azzeh hired him to work at Jerusalem Cafe beginning in November 2005 (Tr. 204-05). He said he first washed dishes at the restaurant, then in early 2006 was moved to the bakery and warehouse where he made pita bread (Tr. 205-06, 216, 221, 233-34). He identified what he said were photographs of him and Mr. Rodas working at the bakery (Tr. 215-16). He said he never had a Kansas City Health Department "food handler card" because it was not required for his job (Tr. 229-30, 234).

Mr. Leal said his hours were from 3:00 a.m. to 3:30 p.m., Monday through Friday, plus 1:00 a.m. to 4:30 p.m. on Saturday, for a total of 78 hours per week (Tr. 208-10). He said he was paid $420 per week from 2005-2008, then $500 per week from 2008 onward, always paid in cash with no paycheck or pay stub (Tr. 206, 225). He said Mr. Azzeh and Mr. Alazzeh together decided his rate of pay (Tr. 212). He said he never was paid overtime (Tr. 212).

3. Elmer Lucas

Elmer Lucas said he went to work at Jerusalem Cafe in 2004, though he said he once falsely had claimed to have started working there in 2001 (Tr. 239, 285).

He said that, from 2004-2007, he baked pita bread, after which he washed dishes at the Westport restaurant (Tr. 240-42).

Mr. Lucas identified what he said were photographs he had sent to his family in Guatemala of him and Mr. Villavicencio working at the Westport restaurant (Tr. 261-64). Mr. Azzeh, however, said the photographs did not depict them working, but rather he often had let Mr. Lucas and Mr. Villavicencio come to Jerusalem Cafe and eat for free through the years, and occasionally they volunteered to fill in for a sick worker (Tr. 544, 554-55, 557-58). He said these particular photographs appeared to be of Mr. Lucas posing for fun (Tr. 558).

Mr. Lucas identified a Kansas City Health Department food handler card from 2008 noting Jerusalem Cafe as his employer, as well as his application for it, which he said Mr. Azzeh and Mr. Alazzeh had asked him to get in order to work there (Tr. 264-66). He admitted he wrote all the information on the application himself, and that no one from Jerusalem Cafe had signed it (Tr. 320).

Mr. Lucas also identified what he said were two letters from Mr. Azzeh on Jerusalem Cafe letterhead certifying for Medicaid purposes that he was employed there, one of which, from 2008, was notarized and featured Mr. Alazzeh's name on a fax machine signature (Tr. 268-71). Mr. Alazzeh denied this, explaining he never had the phone number in the fax signature and also pointing out that, while his printed name was on the letter, his signature was not (Tr. 498-500, 501). Mr.

Azzeh denied signing any such letter and said his purported signatures on the letters were not his actual signature (Tr. 565-66, 589).

Mr. Lucas said the notary to whom he had brought the letters, Gilbert Valle, did not actually see Mr. Azzeh or Mr. Alazzeh sign the letters, but instead took his word for it (Tr. 294-95, 589). Mr. Valle, however, testified this could not possibly be (Tr. 366). He explained that, when notarizing documents, he always checked the signer's ID, the signer had to sign the document in front of him, and only then would he notarize it (Tr. 366). He testified he never had done this any other way during his 17 years as a notary (Tr. 366-67). Mr. Azzeh and Mr. Alazzeh said they never had seen Mr. Valle before (Tr. 501-02, 589).

Mr. Lucas identified what he said were other letters that also attested to his employment at Jerusalem Cafe, though they all were unsigned (Tr. 288). He admitted the letters misrepresented downward the amount of money he earlier had testified he had made per month, claiming he made only $1,000 (Tr. 297-98).

Mr. Lucas said that, between 2007 and March 2008, his hours were 2:00 a.m. to 4:30 p.m., Monday through Thursday, and then from 12:00 a.m. Friday to 6:30 p.m. on Saturday, for a total of 95 hours per week (Tr. 244-46). He said that, between March 2008 and March 2010, he worked 10:00 a.m. to 10:00 p.m., Monday through Thursday, and then from 10:00 a.m. on Friday to 12:45 a.m. on Saturday, plus 10:00 a.m. to 8:00 p.m. on Sunday, for a total of 77 hours per week

(Tr. 247-49). He said he was paid $360 per week between 2007 and March 2008 and $480 per week thereafter, always in cash by Mr. Alazzeh with no paycheck or pay stub (Tr. 243, 249-51).

4. Feliciano Macario

Mr. Macario said Mr. Azzeh hired him to work for Jerusalem Cafe beginning in January 2007 (Tr. 324). He said he worked at the Westport restaurant first as a dishwasher and then later as cook (Tr. 325). He identified what he said were photos and a video of himself, Mr. Villavicencio, and Esvin Lucas working at the restaurant in 2008 (Tr. 330-32, 334-37). Mr. Azzeh said that, though he briefly had employed Mr. Macario in January 2010, the 2008 photograph most likely showed Mr. Macario working once to return a favor (Tr. 556-57). Mr. Macario also identified what he said was a 2008 Kansas City Health Department food handler permit that he said Mr. Azzeh told him to obtain, as well as a handwritten application for it stating he worked at Jerusalem Cafe (Tr. 332-34).

Mr. Macario said his hours were 10:00 a.m. to 10:00 p.m., Monday through Saturday, plus 10:00 a.m. to 8:00 p.m. on Sunday, for a total of 82 hours per week (Tr. 327-28). He said he was paid $300 per week, always in cash by Mr. Alazzeh and with no paycheck or pay stub (Tr. 325, 328, 330).

5. Margarito Rodas

Mr. Rodas said Mr. Azzeh hired him to work at Jerusalem Cafe beginning in July 2005 (Tr. 368). He said he worked at the bakery making pita bread alongside Mr. Leal (Tr. 374, 380, 389). He identified what he said was a photo of him working there (Tr. 387). He said he never had a "food handler's license" because he did not need one (Tr. 409).

Mr. Rodas said his hours were 3:00 a.m. to 3:30 p.m., Monday through Friday, plus 1:00 a.m. to 4:00 p.m. on Saturday, for a total of 77 hours per week (Tr. 381-82). He said he was paid $420 per week from 2007 to September 2008 and $500 per week thereafter, always in cash by Mr. Alazzeh and with no paycheck or pay stub (Tr. 369, 382-83). He said he never was paid any overtime (Tr. 401).

6. Bernabe Villavicencio

Mr. Villavicencio said Mr. Azzeh hired him to work for Jerusalem Cafe in August 2002 (Tr. 412). He said he worked as a cook at the Westport restaurant, where he also gathered money in the evenings, which Mr. Alazzeh would collect on Sundays (Tr. 412, 414). He identified what he said was a 2007 Kansas City Health Department "food handler" ID card in his name noting he worked at Jerusalem Cafe (Tr. 425).

Mr. Villavicencio also identified what he said were photographs of him, Elmer Lucas, and Mr. Macario working together at the restaurant in 2008 (Tr. 423-24). He also identified himself and Mr. Macario working at Jerusalem Cafe on Esvin Lucas's video (Tr. 425-27, 565). Mr. Azzeh said they were not working, but rather were returning favors to him, "volunteering" because he had been busy remodeling for a Health Department inspection (Tr. 545). Mr. Azzeh said that, on occasion, the plaintiffs would volunteer in return for favors and also so he could teach them to cook (Tr. 554).

Mr. Villavicencio said his hours were 10:00 a.m. to 12:00 a.m., Monday through Thursday, 10:00 a.m. Friday to 5:00 a.m. Saturday, 10:00 a.m. to 5:00 p.m. on Saturday, plus 10:00 a.m. to 8:00 p.m. on Sunday, for a total of 104 hours per week (Tr. 415-16). He said they decreased to 90 hours per week beginning in July 2009 (Tr. 417-18, 419). He said he was paid $700 per week, always in cash by Mr. Alazzeh and without any paycheck or pay stub (Tr. 413, 415). He said he never was paid overtime (Tr. 421).

Unlike the others, Mr. Villavicencio claimed Mr. Azzeh forced him into labor against his will (Tr. 439). He claimed that, if he requested a day off, Mr. Azzeh would tell him, "[I]f you want a day off I'll take you off three, four days" (Tr. 439). Then, however, Mr. Villavicencio claimed it was actually Mr. Alazzeh who did this (Tr. 441).

7. Farid Azzeh's Response to the Allegations

Mr. Azzeh explained that, monetarily, these stories made no sense: Jerusalem Cafe's average gross annual income was only $445,000, and if he paid "$500 for each [of the plaintiffs], that comes to $3,000 a week … times four weeks, that's 120,000. 120,000 plus my payroll in 2007 that's another 102,000. How can I do that? 445,000, the sales, I have to pay 50 percent in labor," which was "impossible" (Tr. 592). While Jerusalem Cafe did "some cash" business, which Mr. Azzeh used "to buy inventory and buy goods for the restaurant," "85%" "of the business [was] … based on credit card" (Tr. 594).

Mr. Azzeh said Jerusalem Cafe never employed Esvin Lucas, Elmer Lucas, Mr. Villavicencio, Mr. Leal, or Mr. Rodas: they were never on the payroll and he never paid them in cash (Tr. 524, 539, 554). He knew they all were undocumented aliens and, as such, he could not hire them and did not "because I cannot hire illegals. I have to have documents to have on a payroll" (Tr. 592-93). He knew hiring undocumented aliens could result in civil and criminal penalties (Tr. 592-93).

8. Allegations About Adel Alazzeh's Role at Jerusalem Cafe

According to Esvin Lucas, Mr. Azzeh was the owner of Jerusalem Cafe, but Mr. Alazzeh "was the general supervisor," "resolved problems," and managed the work schedules (Tr. 67-68). He said Mr. Azzeh and Mr. Alazzeh "were always in

touch with each other" (Tr. 68). Then, however, he claimed there were up to four other managers and that Mr. Alazzeh operated his car dealership during the day, only coming to the restaurant at 5:00 p.m. "to see what was going on" (Tr. 125-26, 136, 141). Moreover, Esvin Lucas stated that, on one occasion, he represented in a letter that *he*, *himself*, was the manager of the Jerusalem Cafe (Tr. 145). Elmer Lucas claimed Mr. Azzeh had written the letter to help him obtain welfare benefits (Tr. 284, 286).

Mr. Leal said Mr. Azzeh was the owner of Jerusalem Cafe and Mr. Alazzeh was the manager (Tr. 207). But he also said another person was the manager of the bakery (Tr. 208). Elmer Lucas said Mr. Azzeh and Mr. Alazzeh both owned Jerusalem Cafe (Tr. 242). Then, however, he said Mr. Alazzeh was "the administrator" at the Westport restaurant and "the manager" or "general manager" of the other locations (Tr. 242-43). He also identified others as "managers" of the restaurant and bakery (Tr. 299). Mr. Macario said Mr. Azzeh was the owner of Jerusalem Cafe and Mr. Alazzeh was the manager (Tr. 326). He said both Mr. Azzeh and Mr. Alazzeh determined work schedules and calculated rates of pay (Tr. 330). Mr. Rodas said both Mr. Azzeh and Mr. Alazzeh owned the Jerusalem Cafe (Tr. 370). But then he said Mr. Alazzeh was the manager (Tr. 371, 374, 380). He stated, however, that Mr. Alazzeh was not actually the one who told workers what

time to show up (Tr. 396). He said another person was the actual manager at the bakery (Tr. 396).

Mr. Villavicencio said Mr. Azzeh was Jerusalem Cafe's owner and Mr. Alazzeh was the "general manager" (Tr. 413). He said this meant each Jerusalem Cafe location had an individual person in charge and Mr. Azzeh was their superior (Tr. 413-14). Then, however, he said Mr. Alazzeh only occasionally would come in to ask, "'Is everything okay? Everything is in order? Everything under control?,' and we would say 'Yes,' and then he would leave" (Tr. 433).

Mr. Azzeh said all the plaintiffs who testified Mr. Alazzeh had a role in "managing" Jerusalem Cafe were "not telling the truth" (Tr. 553-54).

E. Events Leading to the Proceedings Below

Elmer Lucas, Mr. Rodas, Mr. Villavicencio, and Mr. Macario said that, on January 23, 2010, a nephew of Mr. Azzeh and Mr. Alazzeh who worked at Jerusalem Cafe hit Mr. Macario, leading Mr. Macario to call the police, whereupon Mr. Azzeh and Mr. Alazzeh together fired Mr. Macario (Tr. 306, 325-26, 403, 429-30, 569). Elmer Lucas said Mr. Azzeh and Mr. Alazzeh "were worried that … the police would get involved and start investigating and wondering why they were just paying employees in cash and why there were so many of them" (Tr. 306). Mr. Rodas said this was because Mr. Azzeh "knew he would get in trouble" if the police found out he had "hired illegals like us" (Tr. 403).

Elmer Lucas said Mr. Azzeh also offered Mr. Macario $500 to drop the charges against their nephew and come back to work (Tr. 307). Mr. Azzeh said this was untrue; rather, he paid Mr. Macario cash – the only cash payment he ever made to any employee – because Mr. Macario wanted his money "quickly" after he had been fired (Tr. 520, 540). Elmer Lucas and Mr. Macario said that, after this, the plaintiffs and their families no longer got along with Mr. Azzeh, Mr. Alazzeh, and their families (Tr. 307, 345).

Mr. Azzeh said this story was untrue: rather, Mr. Macario became angry at his nephew, called the police, and made up a story about having been hit, which "shocked" Mr. Azzeh (Tr. 549-551, 569). He said he did not fire Mr. Macario, but rather told Mr. Macario to rest and come back to work when he was ready (Tr. 551). Mr. Azzeh said that, shortly thereafter, Esvin Lucas called him and said Mr. Macario demanded $2,000 to drop the case against the nephew, which Mr. Azzeh refused to pay (Tr. 551-52). He said the plaintiffs then no longer wanted to socialize with him or Mr. Alazzeh (Tr. 552). Mr. Azzeh said the matter ultimately "was resolved through the police and the court" (Tr. 551). Mr. Macario admitted the nephew was prosecuted and tried for the fight, and was found not guilty (Tr. 342).

The Lucases, Mr. Rodas, Mr. Leal, and Mr. Villavicencio claimed that, at this point, in March 2010, they were demanded "to sign a job application with a

recent date," as opposed to their purported earlier start dates with Jerusalem Cafe (Tr. 65-66, 206-07, 241, 306, 369-70, 403, 413). Esvin Lucas claimed Mr. Alazzeh had made the demand (Tr. 65-66, 68). Conversely, Mr. Leal and Mr. Villavicencio claimed Mr. Azzeh had made the demand (Tr. 206-07, 413). Esvin Lucas, Elmer Lucas, Mr. Leal, and Mr. Villavicencio claimed they were not paid for their final week of work (Tr. 72, 212, 242, 422). Esvin Lucas blamed this on Mr. Alazzeh (Tr. 72). Thereafter, the Lucases, Mr. Leal, Mr. Villavicencio, and Mr. Rodas said all the plaintiffs except Mr. Macario sought assistance from "community leaders," who got them "in touch with an attorney" and "in touch with the police" (Tr. 73, 212-13, 257, 383-84, 399, 421-22, 434-35).

Officer Matthew Tomasic of the Kansas City Police Department is stationed with the KCPD's "Community Action Network," which handles neighborhood crime prevention efforts including enforcement of Kansas City's "no pay law" or "theft of service" ordinance, rather than traditional law enforcement (Tr. 163-64). He recalled receiving a referral some years before the trial below that "a group of guys had worked and their employment was terminated;" "they had yet to receive their last week's wages," but it "was kind of gray" (Tr. 165, 182). He did not look beyond "their last week's wages" (Tr. 165).

Officer Tomasic said there were six complainants; he directed them to contact him, whereupon five eventually came by and spoke with Officer Octavio

Villalobos, a native Spanish speaker (Tr. 166-67, 180). Officers Tomasic and Villalobos did not know or remember the complainants' names, except that they were Hispanic and Officer Villalobos said they were from Guatemala (Tr. 172, 181-82, 187). Officer Tomasic never met them (Tr. 173). Officer Villalobos was not sure the complainants were the plaintiffs (Tr. 188).

The officers testified that, thereafter, they went to the Jerusalem Cafe bakery location and met with Mr. Azzeh (Appx. 38; Tr. 167, 173, 183, 258). They said Mr. Azzeh agreed he owed the complainants money but they had refused to sign the receipt he had wanted acknowledging he owed them no more money; the officers took no report, and the complainants later reported they were paid (Tr. 169-70, 183-84, 192). The officers said Mr. Azzeh did not deny the men on their list worked for him (Tr. 171, 186).

Mr. Azzeh recalled the meeting, but said Officer Villalobos did not read or give him a list of any complainants' names (Tr. 566, 589-90). He said he had fired six people in the past while for being late or for not doing their work, including Mr. Macario but not any of the other plaintiffs (Tr. 567, 591). Rather, he said the five others he had fired were "Hanan," "Abdul Karim," "Sari Hajmahmoud," "Nisreen Alazzeh," and "Elham Alazzeh" (Tr. 595-96).

The Lucases, Mr. Leal, Mr. Villavicencio, and Mr. Rodas said they met with Officer Villalobos (Tr. 75, 213, 257, 383-84, 421-22). Mr. Macario said all the

plaintiffs except him did so (Tr. 347). Elmer Lucas said they directed the police to Mr. Azzeh, not Mr. Alazzeh (Tr. 308-09). Esvin Lucas said the police took all the plaintiffs' names and spoke with Mr. Azzeh, who then agreed to pay them the money they were owed (Tr. 75).

The Lucases and Mr. Rodas said they then went back to the Jerusalem Cafe to pick up their money, whereupon Mr. Alazzeh requested them to sign a blank paper and, when they would not, still refused to pay them (Tr. 75, 258, 384). Mr. Leal and Mr. Villavicencio said the same, but testified the requester was Mr. Azzeh (Tr. 214, 422).

The Lucases, Mr. Leal, and Mr. Rodas said Mr. Azzeh later gave them a Spanish-language document saying Jerusalem Cafe did not owe them any more money and they were responsible for "all the taxes that [it] hadn't paid for" them, but they again refused to sign (Tr. 76, 214, 258, 384). The Lucases, Mr. Villavicencio, and Mr. Rodas said that, after the police went back to Mr. Azzeh again, all of them but Mr. Macario went to see Mr. Azzeh, who eventually gave them the final payment plus a carbon copy of a receipt (Tr. 77-78, 259, 307-08, 384-85, 422-23).

Esvin Lucas admitted, however, that he wrote his alleged receipt himself: it was unsigned and in Spanish (Tr. 144). Elmer Lucas identified his signature on one that said "for the last week of work" in Spanish (Tr. 260). Mr. Leal and Elmer

Lucas said Mr. Azzeh agreed to sign the receipt they had written and then paid them as requested (Tr. 214-15, 259-60). Mr. Leal claimed he had lost his alleged receipt (Tr. 230, 235). Mr. Rodas and Mr. Villavicencio identified receipts with their respective signatures on them (Tr. 385, 422-23). Mr. Macario said he went to Mr. Azzeh to pick up his money separately, with a friend (Tr. 347). Mr. Azzeh said he never issued or signed any such receipt (Tr. 566).

Mr. Leal said that, a few weeks later, Mr. Azzeh called him and asked him to come back to work, but he did not because he "was tired of working so much" and believed he "was being exploited" (Tr. 217).

On March 25, 2010, Mr. Azzeh received a letter from the plaintiffs' counsel below stating "certain employees" would be seeking compensation for their last week of work (Tr. 447, 552). On April 6, 2010, Mr. Alazzeh bought the Jerusalem Cafe from Mr. Azzeh for $25,000, though he said they had been discussing doing this for some time (Tr. 447-48, 476-47). Before that, Mr. Alazzeh had not owned any part of the company (Tr. 476-78).

F. Proceedings Below

On June 9, 2010, the plaintiffs filed a complaint against the defendants in the United States District Court for the Western District of Missouri (Appx. 2). They stated two claims under the FLSA: (1) unpaid overtime wages between 2007 and March 2010; and (2) nonpayment of minimum wage between 2007 and March

2010 (Appx. 15-17). The only relief they sought was recovery of those alleged unpaid wages, both actual and liquidated, plus attorney fees, expenses, and interest (Appx. 18).

Two months before trial, the plaintiffs moved for an order in limine prohibiting the introduction into evidence of "any mention of the[ir] immigration status," arguing this was "irrelevant" under the FLSA and its "prejudicial impact would substantially outweigh its probative value" (Appx. 25-26). The defendants opposed this, arguing the plaintiffs' immigration status was "relevant and probative" because "Defendants have testified adamantly under oath that the Plaintiffs were not employees of Jerusalem Café, LLC due to their illegal immigration status," which was "the sole reason Defendants could not and did not employ Plaintiffs at Jerusalem Café" (Appx. 30). They explained that suppressing this rendered them "defenseless against [the plaintiffs' FLSA claims] without the ability to explain why employment was not granted to Plaintiffs," as "Defendants have no other reason to deny Plaintiffs employment except this crucial fact" (Appx. 30-31). They sought to introduce the evidence "for the sole purpose of explaining why Defendants' [*sic*] refused to employ Plaintiffs" (Appx. 31).

The district court granted the plaintiffs' motion (Appx. 41; Addendum A12-13). It held "their immigration status is irrelevant," as "[i]llegal aliens have a right to recover unpaid wages under the FLSA" (Appx. 41; Add. A12). It held, "[E]ven

if Plaintiffs' immigration status were relevant, its prejudicial impact would substantially outweigh its probative value" (Appx. 41; Add. A12).

The case was tried before a jury over four days in November 2011 (Tr. 1, 149, 355, 601). During the third day of trial, at the end of the plaintiffs' case-in-chief, Mr. Rodas let slip that the plaintiffs all were "illegals" (Tr. 403). The defendants' attorney immediately sought a bench conference, explaining Mr. Rodas had "opened the door" to the previously excluded evidence (Tr. 403). The plaintiffs' counsel objected that Mr. Rodas's admission the plaintiffs were undocumented aliens was "prejudicial," "not probative," and "not relevant" (Tr. 403-04). The court proposed and issued a curative instruction, directing the jury to disregard Mr. Rodas's admission (Tr. 404-06).

Later that day, when the plaintiffs' counsel was cross-examining Mr. Azzeh about why Mr. Macario's hours were on Jerusalem Cafe's January 2010 time sheet but not its payroll record, the court called a recess on the defendants' request (Tr. 570). Defense counsel explained Mr. Azzeh's response had to be he could not "I-9" Mr. Macario because Mr. Macario "didn't have paper," so either the order in limine had to be broken or the plaintiffs could not inquire about that (Tr. 570-71).

The court stated, "You know, we may need to let this – let this illegal or legal thing out of the bag here," because "It kind of already is," and the plaintiffs agreed (Tr. 571). As such, the court proposed to allow the evidence in but instruct

the jury that the plaintiffs' immigration status did not bear on whether they were entitled to wages (Tr. 571-72). Defense counsel objected, explaining,

> I opposed their motion in limine because I wanted to through the trial to be able to use it because that explains a lot of reason why they weren't employees. And so at this point now I – I don't think it's appropriate because I wanted to let it out of the bag earlier. My defense would have been completely different. … [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).

The plaintiffs' counsel objected she was concerned "about making a record one way or another about the document and status of these individuals, having a formal public record about their documented status" (Tr. 573). The court admonished this, stating, "You-all brought this suit, and … this explains a lot, and it's consistent with [the plaintiffs'] theory of the case and consistent with [the defendants'] case," and directed the parties to decide what to do (Tr. 573). The plaintiffs agreed they would disregard the order in limine, they would ask Mr. Azzeh the question regarding Mr. Macario, and he could answer how he wished (Tr. 575). At this, defense counsel requested to dissolve the order in limine completely, and the court agreed, stating, "[W]e're going to bring this information about immigration status out" (Tr. 576).

The court then called the jury back in and retracted its earlier curative instruction:

> [E]arlier today there was a statement made by a witness about immigration status of the plaintiffs. And I directed you to disregard that. This Court has earlier made an order about whether or not that would be part of this case. But in order to give you a clearer picture of what's transpired here, I have changed that order. So the lawyers will now be able to ask questions, which may lead to answers related to the immigration status of the plaintiffs.

(Tr. 579).

After deliberating for about 2.5 hours, the jury found each plaintiff was employed by all three defendants, at least one defendant failed to pay each of the plaintiffs overtime, and all failure to pay was willful (Appx. 180-92; Tr. 653-63). It found the amounts of each of the plaintiffs' individual hours worked and the money previously paid to each plaintiff (Tr. 657-62). The court then directed the parties to submit briefing on the calculation of damages (Tr. 670).

Based on the jury's findings, the plaintiffs requested $141,864.04 in actual damages for back-due wages and overtime and another $141,864.04 in liquidated damages for the finding of willfulness, for a total of $283,728.08 (Appx. 197-203). The defendants did not contest the calculation of actual damages, but challenged any award of liquidated damages, arguing that, as the plaintiffs were undocumented aliens, paying them any wages would be unlawful, negating a failure to pay a "lawful wage" requiring liquidated damages (Appx. 211-14). The court granted the plaintiffs' requested damages, awarding a total of $283,728.08

(Appx. 222-25, 230; Add. A2, A5-10). It later awarded the plaintiffs' counsel $157,188.63 in attorney fees and expenses (Appx. 273; Add. A11).

The defendants timely moved for judgment as a matter of law or, alternatively, a new trial (Appx. 231). They argued the plaintiffs, as undocumented aliens prohibited by federal law from being paid any wages, lacked standing to sue as "employees" to collect back-due minimum wage and overtime under the FLSA (Appx. 231, 232-38). They also argued the order in limine was error, because evidence that the plaintiffs were undocumented aliens was relevant both to standing and to the defendants' desired defense, and the order prejudiced their ability to make their best defense (Appx. 231, 238-39).

On May 10, 2012, the district court denied the defendants' motion (Appx. 263). The defendants immediately appealed to this Court (Appx. 270).

Summary of the Argument

The district court erred in denying the defendants judgment as a matter of law because the plaintiffs, admitted undocumented aliens, lacked standing to claim allegedly back-due wages under the Fair Labor Standards Act ("FLSA"). In *Hoffman Plastic Compounds, Inc. v. Nat'l Labor Relations Bd.*, 535 U.S. 137 (2002), the Supreme Court held federal employment statutes may not be applied so as to "unduly trench upon explicit statutory prohibitions critical to federal immigration policy, as expressed in" the Immigration Reform and Control Act, which absolutely prohibits undocumented aliens from being employed in the United States or being paid any wages. As undocumented aliens, under *Hoffman* the plaintiffs in this case had no standing to claim allegedly back-due wages under the FLSA, because it would have been unlawful for them to have been paid those wages in the first place. This is an issue of first impression in this Court.

The district court also erred in denying a new trial, because it had erred in issuing an order in limine excluding any evidence of the plaintiffs' unlawful immigration status. Not only was this evidence relevant to the plaintiffs' legal ability to recover under the Fair Labor Standards Act, but it also denied the defendants the ability fully to put on their best defense: that they had not employed the plaintiffs because the plaintiffs were undocumented aliens. The district court's lifting of the order toward the very end of trial did not mitigate this prejudice.

Argument

I. The district court erred in denying the defendants judgment as a matter of law, because the plaintiffs, as admitted undocumented aliens to whom payment of any wages is prohibited by federal law, lacked standing to sue for back-due wages under the Fair Labor Standards Act. Employment statutes cannot be read in a manner that would trench upon explicit statutory prohibitions critical to federal immigration policy. As such, the FLSA cannot be read to allow undocumented aliens to claim back-due wages that would have been illegal for them to have been paid in the first place.

Standard of Review

This Court "reviews de novo a denial of a motion for judgment as a matter of law." *Weitz Co. v. MacKenzie House, LLC*, 665 F.3d 970, 974 (8th Cir. 2012), *cert. denied*, ___ S.Ct. ___ (2012). This Court also "review[s] *de novo* a district court's determination of whether a plaintiff has standing." *Hargis v. Access Capital Funding, LLC*, 674 F.3d 783, 790 (8th Cir. 2012).

* * *

To have standing to sue for relief under an act of Congress, a plaintiff's claim must fall within the "zone of interests" the act protects. The Supreme Court has directed that federal employment statutes may not be applied to trench upon explicit statutory prohibitions in federal immigration policy. The Immigration Reform and Control Act prohibits undocumented aliens from being employed or paid any wages. Do undocumented aliens who nonetheless broke this law and worked unlawfully have standing under the Fair Labor Standards Act to sue for allegedly back-due wages they could not legally have been paid in the first place?

In *Hoffman Plastic Compounds, Inc. v. Nat'l Labor Relations Bd.*, 535 U.S. 137, 151 (2002), the Supreme Court held federal employment statutes may not be read to apply in a manner that "would unduly trench upon explicit statutory prohibitions critical to federal immigration policy, as expressed in" the Immigration Reform and Control Act of 1986 ("IRCA"), 8 U.S.C. § 1324a. The Court reversed an award of allegedly back-due wages under the National Labor Relations Act of 1935 ("NLRA") to an "to an undocumented alien who has never been legally authorized to work in the United States," holding "such relief is foreclosed by federal immigration policy, as expressed by Congress in the" IRCA. *Hoffman*, 535 U.S. at 140.

In this case, the plaintiffs admitted during their case-in-chief that they are undocumented Guatemalan aliens who never lawfully entered into the United States or were authorized to work in this country; as they termed it, they were "illegals" (Transcript 403). They re-admitted this in post-judgment proceedings (Appendix 219, 243, 249). The law of the United States is that, as a result of this status, the plaintiffs cannot have suffered by reason of not having been paid a lawful wage under the Fair Labor Standards Act of 1938 ("FLSA"), 29 U.S.C. § 201, *et seq.*, because paying them *any* wages is manifestly *unlawful*. *Hoffman*, 535 U.S. at 140. As such, the FLSA cannot be read to confer standing on the plaintiffs to sue for recovery of such wages.

As explained below, *infra* 56-59, the defendants recognize that another federal appellate court 25 years ago (and a few district courts over the years) have held that, despite the IRCA's prohibitions, undocumented aliens qualify as "employees" under the FLSA so as to have standing to sue to recover allegedly back-due wages. In this Court, however, this is an issue of first impression.

Especially after the Supreme Court's clarification in *Hoffman*, these other decisions simply cannot be squared with the history, language, or intent of the IRCA. Rather, *Hoffman* binds this Court not to apply the FLSA in a manner that "would unduly trench upon explicit statutory prohibitions critical to federal immigration policy, as expressed in" the IRCA. 535 U.S. at 151. Heeding this mandate, the undocumented alien plaintiffs in this case did not have standing to claim back-due wages under the FLSA. The Court should reverse the judgment below and remand this case with instructions to dismiss the plaintiffs' complaint.

A. To have standing to sue under an act of Congress, a plaintiff's claim must fall within the "zone of interests" protectable under the act.

To establish standing to sue by invoking an act of Congress, a plaintiff must establish both of two levels of standing: (1) "minimum constitutional requirements" to make out a "case or controversy" under U.S. Const. art. III sufficient to open the courthouse doors; and (2) "the prudential standing requirement" that his alleged injury "fall[s] within the zone of interests protected or regulated by the statutory provision … invoked in the suit." *South Dakota v.*

U.S. Dep't of the Interior, 665 F.3d 986, 989-90 (8th Cir. 2012) (quoting *Bennett v. Spear*, 520 U.S. 154, 162 (1997)). If he fails either one of these two tests, the district court lacks subject matter jurisdiction. *Id.*

In order to "show Article III standing, a plaintiff has the burden of proving: (1) that he or she suffered an injury-in-fact, (2) a causal relationship between the injury and the challenged conduct, and (3) that the injury likely will be redressed by a favorable decision." *Id.* at 989. But "[e]ven if a plaintiff meets the[se] minimal constitutional requirements for standing, there are prudential limits on a court's exercise of jurisdiction" that he additionally must meet. *Ben Oehrleins & Sons & Daughter v. Hennepin Cnty.*, 115 F.3d 1372, 1378 (8th Cir. 1997).

One of these other required tests is that "plaintiffs alleging a violation of a … statutory right must demonstrate that they are within the 'zone of interests' of the particular provision invoked." *Id.* at 1379. "To satisfy this prudential requirement, a plaintiff must show that 'the interest sought to be protected by the complainant is arguably within the zone of interests to be protected or regulated by the statute … in question.'" *Id.* (quoting *Ass'n of Data Processing Serv. Orgs. v. Camp*, 397 U.S. 150, 153 (1970)). If not, he lacks standing. *Id.*

The application of this test "varies according to the provisions of law at issue," as prudential standing requirements can be "modified or abrogated by Congress …." *Bennett*, 520 U.S. at 162-63. That is, if it "cannot reasonably

assumed that Congress intended to permit the [plaintiff's] suit," he lacks standing. *Air Line Pilots Ass'n Int'l v. Trans States Airlines, LLC*, 638 F.3d 572, 577 (8th Cir. 2011) (quoting *Clarke v. Sec. Indus. Ass'n*, 479 U.S. 388, 399-400 (1987)).

As such, under this test, it is axiomatic that, if a statute says "X-classification has the right to sue Y-classification for Z-relief," and Congress did not intend a given plaintiff lawfully fits or qualifies for "X-classification" and/or can be entitled to "Z-relief", he lacks standing to sue under that statute. *See, e.g.*:

- *Pichler v. UNITE*, 542 F.3d 380, 390-92 (3d Cir. 2008) (where Driver's Privacy Protection Act gave "the individual" to whom car registration information pertains right to sue improper obtainer of material, person who was not registrant lacked standing to sue under the Act);
- *Holt v. JTM Indus., Inc.*, 89 F.3d 1224, 1225-27 (5th Cir. 1996) (where Age Discrimination in Employment Act gave employees who engaged in a protected activity right to sue employers who retaliated for it, employee who never engaged in a protected activity lacked standing to sue under the Act);
- *ICEE Distribs., Inc. v. J&J Snack Foods Corp.*, 325 F.3d 586, 597-99 (5th Cir. 2003) (where Trademark Dilution Act gave "owners" of trademark right to sue another's commercial use of mark, mere licensee of trademark lacked standing to sue under the Act);

- *San Pedro Hotel Co., Inc. v. City of Los Angeles*, 159 F.3d 470, 479 (9th Cir. 1998) (where Civil Rights Act gave people deprived of constitutional right to sue deprivers, person not deprived of constitutional right lacked standing to sue under the Act);
- *Warren v. Fox Family Worldwide, Inc.*, 328 F.3d 1136, 1140-45 (9th Cir. 2003) (where Copyright Act gave "legal or beneficial owners" of a copyright the right to sue infringers of it, creator of a work-for-hire lacked standing to sue under the Act);
- *Gordon v. Virtumundo, Inc.*, 575 F.3d 1040, 1049-57 (9th Cir. 2009) (where CAN-SPAM Act gave "internet access service" providers right to sue e-mail spammers, mere business receiving spam lacked standing to sue under the Act);

This rubric applies to the FLSA just as any other federal statute giving a specific class a right to sue for specific relief under its provisions – in this case, "employees" seeking unpaid wages. 29 U.S.C. § 203(e)(1). In *United Food & Commercial Workers Union v. Albertson's*, 207 F.3d 1193, 1198-1202 (10th Cir. 2000), for example, the Tenth Circuit held that, because "standing" under the FLSA "to pursue an action for liability is statutorily limited to employees only," and a labor union did not qualify as an "employee," while it "might or might not qualify" as to "Article III standing," it did not have standing to sue under the FLSA for violation of that law's specific provisions as to its members. *Id.* at 1201-02.

Similarly, an entire class of individuals uniformly has been held to lack standing to sue for wages under the FLSA: prisoners laboring in prison work activities. As there is no indication Congress intended the FLSA to encompass them, they cannot seek back-due wages under it. *See, e.g.*, *Miller v. Dukakis*, 961 F.2d 7, 8 (1st Cir. 1992); *Danneskjold v. Hausrath*, 82 F.3d 37, 39 (2nd Cir. 1996); *Tourscher v. McCullough*, 184 F.3d 236, 243 (3rd Cir. 1999); *Harker v. State Use Indus.*, 990 F.2d 131, 133-36 (4th Cir. 1993); *Reimoneng v. Foti*, 72 F.3d 472, 475 (5th Cir. 1996); *Sims v. Parke Davis & Co.*, 453 F.2d 1259, 1259 (6th Cir. 1971) (per curiam); *Vanskike v. Peters*, 974 F.2d 806, 807-08 (7th Cir. 1992); *McMaster v. Minnesota*, 30 F.3d 976, 980 (8th Cir. 1994); *Gilbreath v. Cutter Biological, Inc.*, 931 F.2d 1320, 1323-25 (9th Cir. 1991); *Franks v. Okla. State Indus.*, 7 F.3d 971, 973 (10th Cir. 1993); *Villarreal v. Woodham*, 113 F.3d 202, 207 (11th Cir. 1997); *Henthorn v. Dep't of the Navy*, 29 F.3d 682, 688 (D.C. Cir. 1994).

In this case, the plaintiffs are part of another class of individuals who Congress plainly did not intend to qualify as "employees" under the FLSA or other employment statutes so as to seek relief for allegedly unpaid wages: undocumented aliens whose employment or payment of *any* wages is prohibited by federal law. Given federal immigration law, the FLSA's conferral of a right to sue for wages on "employees" cannot reasonably be read to include persons, like the plaintiffs here, who invoke its protections based upon their blatant commission of a federal crime.

B. Due to the IRCA's explicit prohibitions on employing or paying wages to undocumented aliens, the FLSA cannot be read to include them as "employees" on whom it confers a right to sue for back-due wages.

The FLSA defines an "employee" as "any individual employed by an employer." 29 U.S.C. § 203(e)(1). While this definition, standing alone, feasibly could be read to include undocumented alien workers (or anyone else similarly committing a crime in exchange for regular payment), after passage of IRCA, *Hoffman* makes abundantly plain that federal immigration law's prohibitions on employing undocumented aliens preclude them from being "employees" for purposes of seeking allegedly back-due wages under federal employment laws.[1]

Even before *Hoffman*, the Supreme Court held federal employment statutes must be interpreted in conjunction with the immigration laws. *Sure-Tan, Inc. v. Nat'l Labor Relations Bd.*, 467 U.S. 883, 892-93 (1984). In *Sure-Tan*, decided two years before Congress enacted the IRCA, the Court held undocumented alien workers were "employees" covered by the NLRA's wage provisions because, "[c]ounterintuitive though it may be," the immigration laws as they then stood in 1984 (principally the Immigration and Naturalization Act of 1952, "INA") did not prohibit employment of undocumented aliens. *Id.* at 892.

[1] The definition of "employee" under the NLRA, which the Supreme Court held in *Hoffman* could not, by virtue of the IRCA, lawfully be extended to undocumented aliens for wage purposes, is even broader than that in FLSA: "any employee, and shall not be limited to the employees of a particular employer … and shall include any individual …." 29 U.S.C. § 152(3).

The Court stated:

> For whatever reason, Congress has not adopted provisions in the INA making it unlawful for an employer to hire an alien who is present or working in the United States without appropriate authorization. … Moreover, Congress has not made it a separate criminal offense for an alien to accept employment after entering this country illegally. *Since the employment relationship between an employer and an undocumented alien is hence not illegal under the INA, there is no reason to conclude that application of the NLRA to employment practices affecting such aliens would necessarily conflict with the terms of the INA.*

Id. at 892-93 (emphasis added).[2]

Thus, *Sure-Tan* applied a straightforward analytical framework to determine whether undocumented aliens were "employees": if federal law did not prohibit employment of undocumented aliens, then they could be "employees." Conversely, if federal law prohibited employment of undocumented aliens, as the IRCA does today, those workers could not be "employees."

Two year later, heeding *Sure-Tan*'s framework, Congress clarified its intent and enacted the IRCA. Unlike the previous INA, this landmark legislation

[2] In *Sure-Tan*, Justices Powell and Rehnquist dissented that, even without a statutory prohibition against employing undocumented aliens, it was "unlikely that Congress intended the term 'employee' to include – for purposes of being accorded the benefits of [the NLRA] – persons wanted by the United States for the violation of our criminal laws." 467 U.S. at 913. The majority reasoned, though, that an express prohibition on employment of undocumented aliens was necessary to conclude that undocumented alien workers did not have a right to wages. *Id.* at 892-93. As a result of the IRCA's enactment, however, this prohibition now exists, as Chief Justice Rehnquist explained in the Court's opinion in *Hoffman*.

"forcefully made combating the employment of illegal aliens central to the policy of immigration law." *Hoffman*, 535 U.S. at 147.

> It did so by establishing an extensive 'employment verification system' designed to deny employment to aliens who (a) are not lawfully present in the United States, or (b) are not lawfully authorized to work in the United States. This verification system is critical to the IRCA regime. To enforce it, IRCA mandates that employers verify the identity and eligibility of all new hires by examining specified documents before they begin work. If an alien applicant is unable to present the required documentation, *the unauthorized alien cannot be hired*.
>
> Similarly, if an employer unknowingly hires an unauthorized alien, or if the alien becomes unauthorized while employed, the employer is compelled to discharge the worker upon discovery of the worker's undocumented status. Employers who violate IRCA are punished by civil fines, and may be subject to criminal prosecution. IRCA also makes it a crime for an unauthorized alien to subvert the employer verification system by tendering fraudulent documents. It thus prohibits aliens from using or attempting to use "any forged, counterfeit, altered, or falsely made document" or "any document lawfully issued to or with respect to a person other than the possessor" for purposes of obtaining employment in the United States. Aliens who use or attempt to use such documents are subject to fines and criminal prosecution. …
>
> *Under the IRCA regime, it is impossible for an undocumented alien to obtain employment in the United States without some party directly contravening explicit congressional policies*. Either the undocumented alien tenders fraudulent identification, which subverts the cornerstone of IRCA's enforcement mechanism, or the employer knowingly hires the undocumented alien in direct contradiction of its IRCA obligations.

Id. at 147-48 (emphasis added).

Thus, the IRCA "significantly" changed the "legal landscape" that had existed in *Sure-Tan*. *Id.* at 147. Applying the straightforward *Sure-Tan* analysis post-IRCA, it is plain that that an undocumented alien worker cannot be an "employee" under the FLSA for purposes of seeking wages whose payment Congress now has made absolutely illegal.

And, indeed, this is what the Supreme Court held in *Hoffman*, under very similar "backpay" provisions of the NLRA to those in the FLSA at issue in this case. The Court could not "overlook" the IRCA and allow an award of back-due wages "to an illegal alien … for wages that could not lawfully have been earned, and for a job obtained in the first instance by a criminal fraud," because such an award obviously would run "counter to policies underlying IRCA." *Id.* at 148-49. Thus, the ability of an undocumented alien to claim allegedly back-due wages "is foreclosed by federal immigration policy, as expressed by Congress in the [IRCA]." *Id.* at 140. To hold otherwise would "encourage the successful evasion of apprehension by immigration authorities, condone prior violations of the immigration laws, and encourage future violations." *Id.* at 151.[3]

[3] Similarly, for these reasons, undocumented aliens have been held to lack standing to sue under Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e, *et seq.* *Egbuna v. Time-Life Libraries, Inc.*, 153 F.3d 184, 187-88 (4th Cir. 1998). "Given Congress' unequivocal declaration that it is illegal to hire unauthorized aliens and its mandate that employers immediately discharge unauthorized aliens upon discovering their undocumented status, we cannot … sanction the formation of a statutorily declared illegal relationship." *Id.*

The Supreme Court's reasoning obviously applies equally to the FLSA. The NLRA was invoked in *Hoffman*, rather than the FLSA, only because the undocumented alien plaintiff claimed to have been fired (and thus owed back-due wage both for work performed – "backpay" – and unperformed – "frontpay") for having participated in a union organizing activity, an unlawful labor practice specifically addressable under the NLRA by the National Labor Relations Board ("NLRB"), rather than a federal district court. 535 U.S. at 140-41.

The relief of seeking back-due wages under the NLRA, however, is indistinguishable from that under the FLSA. Given the IRCA's express prohibitions, Congress no more could have intended undocumented aliens be able to claim back-due wages under the FLSA than it did in the NLRA. Congress cannot reasonably have intended the FLSA, either, to provide remuneration for that class's unlawful activities. Application of the FLSA, too, plainly cannot "overlook" the IRCA and allow an award of statutory wages "to an illegal alien … *for wages that could not lawfully have been earned*, and for a job obtained in the first instance by a criminal fraud," as such an award plainly would run "counter to policies underlying IRCA." *Hoffman*, 535 U.S. at 148-49 (emphasis added).

In this case, given the plaintiffs' admitted status as undocumented aliens, the "employer-employee" relationship they allege they had with the defendants – and on which their FLSA claims rest – expressly violated the IRCA. *Hoffman*, 535

U.S. at 147-48. "In general, a contract entered in violation of federal statutory or regulatory law is unenforceable," because "one who has … participated in an illegal act cannot be permitted to assert in a court of justice any right founded upon or growing out of the illegal transaction." *Resolution Trust Corp. v. Home Sav. of Am.*, 946 F.2d 93, 96 (8th Cir. 1991) (quoting *Jackson Purchase Rural Elec. Coop. v. Local Union 816, Int'l Bhd. of Elec. Workers*, 646 F.2d 264, 267 (6th Cir. 1981)). This was precisely the Supreme Court's concern in *Hoffman*: to avoid construing federal employment statutes so as to "condone prior violations of the immigration laws, and encourage future violations." 535 U.S. at 151.

Thus, to hold undocumented aliens somehow can have standing as "employees" to seek allegedly back-due illegal wages from their alleged former illegal "employers" would run directly contrary to Congress's direction in the IRCA and the Supreme Court's in *Hoffman*.[4] Plainly, under the IRCA, illegal payments to undocumented aliens cannot be within the FLSA's zone of protectable interests. They lack standing to invoke its back-pay provisions to further their unlawful aims.

[4] Otherwise, what principle limits the ability of any other criminal to recover under the FLSA for illegal "employment" activities? Would a gang-"employed" drug dealer working late nights on a dark street corner have standing to sue his gang for unpaid overtime? Could a brothel worker who does not attract enough clients to make ends meet sue her madam to recover minimum wage?

C. Decisions holding undocumented aliens have standing to invoke the wage-paying protections of the FLSA erroneously run afoul of *Hoffman* and the IRCA.

While 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, another federal appellate court once did hold that such a plaintiff does have standing to bring such a claim. *See Patel v. Quality Inn S.*, 846 F.2d 700 (11th Cir. 1988).[5] Decided nearly 15 years before *Hoffman*, however, *Patel* wholly fails *Hoffman*'s command that federal employment statutes cannot be read to trench upon express prohibitions critical to the IRCA, reaching instead the exact opposite conclusion of *Hoffman*. Especially after *Hoffman*, *Patel*'s quaint, hopeful holding cannot be squared with the intent or effect of the IRCA.

The Eleventh Circuit premised its decision in *Patel* first on *Sure-Tan*'s pre-IRCA holding "that undocumented aliens are 'employees' within the meaning of the" NLRA, 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," both

[5] Several post-*Hoffman* appellate decisions have agreed with *Patel* in dicta in cases not directly concerning the FLSA, also citing district court decisions on this subject from throughout the past 25 years. *See Rivera v. NIBCO, Inc.*, 364 F.3d 1057, 1069 n.12 (9th Cir. 2004); *Madeira v. Affordable Hous. Found.*, 469 F.3d 219, 243 (2d Cir. 2006). *But see Rivera*, 364 F.3d at 822 (Bea, J., dissenting from denial of rhg. en banc). Also, in an unpublished opinion, the Eleventh Circuit recently declined to revisit *Patel*. *Galdames v. N & D Inv. Corp.*, 432 Fed.Appx. 801, 803-04 (11th Cir. 2011) (per curiam), *cert. denied*, 132 S.Ct. 1558 (2012).

"similarly define the term 'employee,' and courts frequently look to decisions under the NLRA when defining the FLSA's coverage."[6] 846 F.2d at 703.

Then, however, the Eleventh Circuit examined what it believed to be the effect on the IRCA's intentions of allowing undocumented aliens to have standing to sue as "employees" under the FLSA. *Id.* at 704-05. It held that, rather than frustrate the IRCA's objectives, "the FLSA's coverage of undocumented aliens goes hand in hand with the policies behind the IRCA." *Id.* at 704. It believed that, as "Congress enacted the IRCA to reduce illegal immigration by eliminating employers' economic incentive to hire undocumented aliens," "[t]he FLSA's coverage of undocumented workers has a similar effect in that it offsets what is perhaps the most attractive feature of such workers – their willingness to work for less than the minimum wage." *Id.* It suggested, "If the FLSA did not cover undocumented aliens, employers would have an incentive to hire them."[7] *Id.* At the same time, it "recognize[d] the seeming anomaly of discouraging illegal immigration by allowing undocumented aliens to recover in an action under the FLSA." *Id.*

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[6] *Hoffman* clarified that the NLRA no longer affords relief to undocumented aliens seeking allegedly unpaid wages. Under *Patel*'s reasoning that the NLRA and FLSA are similar, this would apply, too, to the FLSA.

[7] In his dissent in *Hoffman*, Justice Breyer approved of this analysis, citing, *inter alia*, *Patel*, and objected that the majority was undermining it. 535 U.S. at 155-56 (Breyer, J., dissenting). The majority, however, rejected his approach and, with it, *Patel*. *Id.* at 150 n.4.

The glaring flaw in this "seemingly anomalous" reasoning is that there *already* is a secondary labor market – the very market the plaintiffs allege they participated in – containing an underground economy in which undocumented aliens and illegal employers undercut the U.S. labor market. Allowing undocumented aliens standing to enforce this market merely would perpetuate it: as the Supreme Court warned against in *Hoffman*, "condon[ing] prior violations of the immigration laws, and encourage[ing] future violations." 535 U.S. at 151.

Under the *Patel* system, illegal employers "hiring" undocumented aliens would be bound by the FLSA to pay them statutory minimum wage and overtime. Of course, these payments would be in cash, under the table, and likely in a room where nobody, least of all federal labor and tax authorities, were watching.

Under that distasteful system, however, the "employers" still would be paying the aliens *less* than minimum wage. Since the entire operation would be illicit, the cash payments would be unrecorded,[8] there would be no recordkeeping or tax-planning costs, the "employers" neither would withhold nor pay a share of Social Security or Medicare taxes (usually 15.3% of the wages, half withheld from the wages and half paid additionally by the employer, 26 U.S.C. §§ 3101-02, 3111-12), and unemployment insurance tax would not be owed or paid.

[8] The lack of records itself is problematic. *Patel* opens the door for undocumented aliens with no records as to their alleged hours worked or wages paid, even if actually paid statutory minimum wage and overtime, easily to extort more money from their former illegal employers by threatening an FLSA suit.

As such, *Patel*'s purported right of undocumented aliens to "be paid" statutory wages under FLSA in this manner does nothing to "eliminate[e] employers' economic incentive to hire undocumented aliens …." 846 F.2d at 704. The aliens already would be "work[ing] for less than minimum wage." *Id.* Given the purpose and language of the IRCA, *Patel*'s strained and (self-admittedly) "seemingly anomalous" reading of the FLSA functionally makes no sense. The Court should reject *Patel*'s well-meaning but obviously flawed reasoning.

It is more discernibly *allowing* undocumented aliens to recover under our civil employment statutes for their criminal conduct that "not only trivializes the immigration laws," but also "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 150-51. As *Hoffman* makes plain, federal employment statutes, including the FLSA, cannot be read to legalize judicially a statutorily unlawful black market and confer on undocumented aliens such as the plaintiffs standing to sue for allegedly back-due wages, the payment of which in the first place would have been a federal crime.

The plaintiffs, undocumented aliens entirely prohibited by federal law from being employed or paid any wages, lacked standing to sue under the FLSA for back-due minimum wage and overtime. The Court should reverse the judgment below and remand this case with instructions to dismiss the plaintiffs' complaint.

II. The district court erred in denying a new trial, because its order in limine barring any mention of the plaintiffs' unlawful immigration status was prejudicial error. The plaintiffs' immigration status was relevant both to the defendants' ability to contest the plaintiffs' right to recover and to the defense the defendants desired to present: that they did not employ the plaintiffs because the plaintiffs were undocumented aliens.

Standard of Review

This Court "review[s] the district court's denial of [a] motion for a new trial for abuse of discretion …." *Rodrick v. Wal-Mart Stores E., L.P.*, 666 F.3d 1093, 1096 (8th Cir. 2012). "Encompassed within the district court's ultimate denial are its evidentiary rulings," and this Court "likewise afford[s] the district court broad discretion in its evidentiary rulings …." *Id.* (citation omitted). This Court "will reverse only if the district court's [evidentiary] ruling was based on 'an erroneous view of the law or a clearly erroneous assessment of the evidence' and affirmance would result in 'fundamental unfairness.'" *Id.* (citations omitted).

* * *

Relevant evidence – that which tends to make the existence of any material fact more or less probable than it would be otherwise – is admissible unless its probative value is outweighed by the danger of unfair prejudice. In this case, evidence of the plaintiffs' unlawful immigration status was relevant both to the defendants' ability to contest the plaintiffs' right to recover and to the defendants' desired defense that they did not employ the plaintiffs because of that status. Did the district court err in excluding any mention of the plaintiffs' status?

While, like any evidentiary ruling, a court has discretion to exclude evidence in limine, *United States v. Fincher*, 537 F.3d 868, 872 (8th Cir. 2008), it abuses this discretion if "evidence of a critical nature is excluded and there is 'no reasonable assurance that the jury would have reached the same conclusion had the evidence been admitted.'" *Elmahdi v. Marriott Hotel Servs., Inc.*, 339 F.3d 645, 653 (8th Cir. 2003) (quoting *Adams v. Fuqua Indus., Inc.*, 820 F.2d 271, 273 (8th Cir. 1987)).

It is well-established that "[o]rders in limine which exclude broad categories of evidence should rarely be employed. A better practice is to deal with questions of admissibility of evidence as they arise." *Sperberg v. Goodyear Tire & Rubber Co.*, 519 F.2d 708, 712 (6th Cir. 1975). If a sweeping, categorical order in limine effectively acts as a summary judgment preventing a party from putting on its case, the order is a prejudicial abuse of discretion and, thus, reversible. *Brobst v. Columbus Servs. Int'l*, 761 F.2d 148, 153-57 (3d Cir. 1985) (where plaintiff claimed change in job duties violated Equal Pay Act, order in limine precluding evidence of job duties before change erroneously "converted the in limine motion into one for summary judgment" and was reversed).

In this case, two months before trial, the district court issued an order in limine excluding "any mention of Plaintiffs' immigration status," reasoning: (1) "[e]ven if [the plaintiffs] were working in the United States illegally, their

immigration status is irrelevant" as "Illegal aliens have a right to recover unpaid wages under the FLSA;" and (2) "even if Plaintiffs' immigration status were relevant, its prejudicial impact would substantially outweigh its probative value" (Appendix 41; Addendum A12).

This was an abuse of discretion. The district court's first reason was "based on an erroneous view of the law," necessitating reversal. *Rodrick v. Wal-Mart Stores E., L.P.*, 666 F.3d 1093, 1096 (8th Cir. 2012). For, as explained in detail in Point I, above, the plaintiffs' unlawful immigration status plainly was relevant to their standing to recover allegedly back-due wages under the FLSA – and to the defendants' right to challenge it – as illegal aliens *do not* have a right to recover wages under the FLSA. *Supra* 43-59. This alone rendered the order in limine reversible error. *Rodrick*, 666 F.3d at 1096.

But both of the district court's reasons also excluded "evidence of a critical nature … and there is 'no reasonable assurance that the jury would have reached the same conclusion had the evidence been admitted." *Elmahdi*, 339 F.3d at 653. The evidence's supposed prejudicial nature is belied by the jury still finding in the plaintiffs' favor even after having found out through testimony at the tail end of trial that the plaintiffs were undocumented aliens. At the same time, however, it prevented the defendants from introducing *any* probative evidence in support of their desired defense: "that the Plaintiffs were not employees of Jerusalem Café,

LLC due to their illegal immigration status," "the sole reason Defendants could not and did not employ Plaintiffs at Jerusalem Café" (Appx. 30). They sought to introduce the evidence "for the sole purpose of explaining why Defendants' [*sic*] refused to employ Plaintiffs" (Appx. 31). The district court effectively (and erroneously) converted the in limine proceedings into summary judgment proceedings and precluded the defendants from putting on this defense.

Under Fed. R. Evid. 401, "Relevant evidence" is "evidence having *any tendency* to make the existence of *any fact that is of consequence to the determination of the action* more probable or less probable than it would be without the evidence." (Emphasis added). Under Fed. R. Evid. 402 and 403, relevant evidence "may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice …."

In this case, evidence of the plaintiffs' unlawful immigration status was demonstrably relevant and probative. Indeed, it was crucial to the defense the defendants sought to put on before the jury. Part of the plaintiffs' claim was that, under the FLSA, an employer has an "obligation … to maintain records of time worked and money paid to the employees," and the defendants kept no records of the plaintiffs (Transcript 625). This was reflected in the jury instructions:

> Employers are legally required to maintain accurate records of their employees' hours worked. If you find that the Defendant(s) are employers and failed to maintain records of the Plaintiffs' hours worked or that the records kept by the Defendant(s) are inaccurate,

> you must accept the Plaintiffs' estimate of hours worked, unless you find those estimates to be unreasonable.

(Appx. 173).

The defendants conceded "payroll records" were "central to [the defendants'] defense" (Tr. 12). In his opening statement, defense counsel stated, "There's no record of [the plaintiffs'] income. There's … no record of their existence as far as income goes. There's no bank accounts, there's no IRS returns, there's no pay stubs, there's no way that these people can prove the income that they have made or not made" (Tr. 60).

Due to the order in limine, however, the defendants were wholly precluded from bringing to the jury their explanation for *why* this was so: that the plaintiffs were undocumented aliens who could not lawfully be employed in the United States, and the defendants did not employ the plaintiffs specifically for this reason (Appx. 31). As defense counsel later told the district court,

> I opposed [the plaintiffs'] motion in limine because I wanted to through the trial to be able to use it because that explains a lot of reason why they weren't employees. … My defense would have been completely different. … [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).

The order in limine effectively granted the plaintiffs summary judgment on this defense by excluding a broad, sweeping category of obviously relevant,

probative evidence that the trial itself ultimately demonstrated was not prejudicial. This was a reversible abuse of discretion. *Brobst*, 761 F.2d at 153-57; *Elmahdi*, 339 F.3d at 653. It denied the defendants any ability to put on their best defense.

As well, that the district court ultimately dissolved the order in limine did nothing to mitigate the prejudice to the defendants. Its ruling came during the final day of testimony, in the middle of the defendants' cross-examination of their last witness, Farid Azzeh (Tr. 575-79). While "[e]videntiary rulings made by a trial court during motions in limine are preliminary and may change depending on what actually happens at trial," *Walzer v. St. Joseph State Hosp.*, 231 F.3d 1108, 1113 (8th Cir. 2000), the district court's abrupt sea-change in the final minutes of trial left the defendants with only the redirect examination of Mr. Azzeh to put on this "defense." This was utterly insufficient, as defense counsel explained (Tr. 572).

When evidence is erroneously excluded, that error only is harmless if, but for the exclusion, the jury positively would not have been swayed differently. *Hall v. Arthur*, 141 F.3d 844, 850 (8th Cir. 1998). "The centrality of the evidence, its prejudicial effect, whether it is cumulative, the use of the evidence by counsel, and the closeness of the case are all factors which bear on this determination." *Lewis v. Sheriffs Dep't for the City of St. Louis*, 817 F.2d 465, 467 (8th Cir. 1987).

Despite the defendants' ability to refer to the excluded evidence in this case at the tail end of trial, its erroneous exclusion until then was anything but harmless.

The Court issued its order in limine five weeks before trial (Appx. 6-7, 41-42; Add. A12). In the meantime, through the usual proposals, objections, and orders, the parties and the Court shaped their voir dire, the jury instructions, and the evidence that would be presented – all under the understanding that the plaintiffs' immigration status had to be excluded (Appx. 6-7). This continued through opening statements, the plaintiffs' case-in-chief, the defense's cross examination of the plaintiffs' witnesses, and the vast majority of the defendants' case-in-chief.

Obviously, all the trial preparation and almost all of its course would have been different if the central issue of Plaintiffs' immigration status had not, throughout this period, been excluded. When the defendants finally were able to discuss this issue before the jury, it was only on a perfunctory, surprise basis. They had no opportunity to cross-examine any of the plaintiffs as to it.

As such, it cannot be said fairly that the erroneous exclusion of this evidence was "harmless." It cannot be said that the jury positively would not have been swayed differently. *Hall*, 141 F.3d at 850. The centrality of the missing evidence, the prejudicial effect of the defense's unpreparedness, and counsel's inability adequately to use it all make its harm*ful*ness plain. *Lewis*, 817 F.2d at 467.

The district court erred in suppressing any evidence of the plaintiffs' immigration status. The Court should reverse the judgment below and remand this case for a new trial.

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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/s/Jonathan Sternberg
Attorney

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I hereby certify that on July 26, 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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