No. 12-1199

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

CHRISTIAN PALMA, ANTONIO GONZALEZ, FRANCISCO JAVIER JOYA, JOSE ANTONIO QUINTUÑA, JOSE ARMANDO SAX-GUTIERREZ

Petitioners

v.

NATIONAL LABOR RELATIONS BOARD

Respondent

ON PETITION FOR REVIEW
OF AN ORDER OF THE
NATIONAL LABOR RELATIONS BOARD

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD

USHA DHEENAN
Supervisory Attorney

MACKENZIE FILLOW
Attorney
National Labor Relations Board
1099 14th Street, N.W.
Washington, D.C. 20570
(202) 273-2948
(202) 273-3823

LAFE E. SOLOMON
Acting General Counsel
CELESTE J. MATTINA
Deputy General Counsel
JOHN H. FERGUSON
Associate General Counsel
LINDA DREEBEN
Deputy Associate General Counsel

National Labor Relations Board

TABLE OF CONTENTS

Headings **Page(s)**

TABLE OF AUTHORITIES

Cases: **Page(s)**

TABLE OF AUTHORITIES

Cases-Cont'd: **Page(s)**

TABLE OF AUTHORITIES

Cases-Cont'd: **Page(s)**

Statutes: **Page(s)**

Regulations:

Other:

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JURISDICTIONAL STATEMENT

This case is before the Court on the petition of Christian Palma, Antonio Gonzalez, Francisco Javier Joya, Jose Antonio Quintuña, and Jose Armando Sax-Gutierrez (collectively, the Employees) to review an order issued by the National Labor Relations Board on August 9, 2011 and reported at 357 NLRB No. 47.

(J.A.10-35.)[1] The Board found that Supreme Court precedent prevents it from awarding backpay to undocumented workers, including these Employees. (J.A. 10.) The Board's order is final with respect to all parties under Section 10(f) of the National Labor Relations Act, as amended.[2]

The Board had jurisdiction over the proceedings below pursuant to Section 10(a) of the Act,[3] which empowers the Board to prevent unfair labor practices. The Employees' petition for review, filed on March 27, 2012, was timely; the Act places no time limitations on such filings. This Court has jurisdiction over the petition for review pursuant to Section 10(f) because the unfair labor practices occurred in Brooklyn, New York.[4]

[1] Record references in this final brief are to the Joint Appendix ("J.A.") filed by the Employees and the Supplemental Appendix ("S.A.") filed by the Board. References before a semicolon are to the Board's findings; those following are to the supporting evidence. "Br." references are to the Employees' opening brief.

[2] 29 U.S.C. § 160(f).

[3] *Id.* § 160(a).

[4] *Id.* § 160(f).

ISSUE STATEMENT

In *Hoffman Plastic Compounds v. NLRB*,[5] the Supreme Court held that the Board lacked authority to award backpay to an employee unauthorized to work in the United States under federal immigration law. The employee in that case had presented fraudulent documents to obtain employment. In this case, the Board concluded that the broad language of *Hoffman* prevents it from awarding backpay to any undocumented worker, even those who never presented fraudulent documents. Did the Board correctly interpret the Supreme Court's *Hoffman* decision?

STATEMENT OF THE CASE AND FACTS

I. THE UNDERLYING UNFAIR LABOR PRACTICE CASE

The Employees worked for Mezonos Maven Bakery, Inc., a wholesale bakery in Brooklyn. (J.A. 19; 55.) In 2003, acting on charges filed by LatinoJustice PRLDEF (formerly the Puerto Rican Legal Defense and Education Fund), the Board's General Counsel issued a complaint alleging that Mezonos violated Section 8(a)(1) of the Act[6] by firing the Employees for joining together to complain about the behavior of a supervisor. (J.A. 10; 40-44.)

[5] 535 U.S. 137 (2002).

[6] 29 U.S.C. § 158(a)(1).

Mezonos and the General Counsel settled the case. The Board issued an unpublished consent order requiring Mezonos to offer "unconditional reinstatement" to the Employees and make them whole, "except that [Mezonos] may avail itself of a compliance proceeding and therein attempt to establish that one or more of [the Employees] is not entitled to an unconditional offer of reinstatement." (J.A. 10; 55-56.) The order also stated that the compliance proceeding would determine the amount of backpay, if any, Mezonos owed. (J.A. 10; 56.) On March 15, 2005, the Court enforced the Board's order (case number 05-0942). (J.A. 10; S.A. 1-5.)

II. THE COMPLIANCE PROCEEDING

The Board's Regional Director in Brooklyn subsequently instituted compliance proceedings, pursuant to the Board's Rules and Regulations,[7] to determine the exact amount Mezonos owed to the Employees under the Board's order. (J.A. 10; 60-74.) An administrative law judge held a hearing, at which Mezonos attempted to question the Employees about their immigration status. The Employees refused to answer, citing the Fifth Amendment. (J.A. 10; S.A. 18-34.) The parties agreed to proceed on the assumption that the Employees do not possess documents authorizing them to work in the United States. (J.A. 10; 79, S.A. 35.)

[7] 29 C.F.R. § 102.52 *et seq*.

The Employees testified that, when they were hired, Mezonos' management asked them for identification, and they presented passports from other countries. (J.A. 21-22.) No one from Mezonos ever asked the Employees to present the documents required by the Immigration Reform and Control Act (IRCA), as specified on the I-9 Employment Eligibility Verification form from the U.S. Citizenship and Immigration Services. (*Id*.) Accordingly, none of the Employees ever presented genuine or false versions of work authorization documents.

The Employees testified to the efforts they made to find work after Mezonos fired them, and they presented evidence as to interim earnings. All were able to find work and mitigate their damages. (J.A. 28-31.)

On November 1, 2006, the judge issued a decision and recommended order requiring Mezonos to pay a total of $106,651.26 to the Employees. (J.A. 18-35.) The judge concluded that such an order was not precluded by the Employees' work status because Mezonos, not the Employees, violated IRCA. (J.A. 25-27.) Although the Employees' brief claims otherwise (Br. 9, 27), the judge's recommended order did not mention reinstatement. (*See* J.A. 32.)

Mezonos appealed to the Board, filing exceptions to the judge's decision. The General Counsel and the charging party representing the Employees filed briefs in support of the judge's decision. On August 9, 2011, the Board granted Mezonos' exceptions and dismissed the compliance specification. (J.A. 10-13.)

The Board concluded that *Hoffman*'s broad language forecloses backpay for all undocumented workers, regardless of whether they presented fraudulent documents. (J.A. 10.)

On September 6, 2011, the charging party filed a motion for reconsideration, urging the Board to "grant its motion for reconsideration and affirm the Administrative Law Judge's decision awarding backpay to the discriminatees in this case." (S.A. 16.) The Board denied the motion on November 3, 2011. (J.A. 36-39.)

STANDARD OF REVIEW

The Board has great discretion in crafting a remedy that effectuates the policies of the Act, and its remedies are subject to limited judicial review.[8] However, when the Board's order "implicate[s] federal statutes or policies administered by other federal agencies," "the Board must be 'particularly careful in its choice of remedy.'"[9] More specifically, the Supreme Court has held that "the

[8] *See NLRB v. J.H. Rutter-Rex Mfg. Co.*, 396 U.S. 258, 262-63 (1969); *NLRB v. Consolidated Bus Transit, Inc.*, 577 F.3d 467, 476 (2d Cir. 2009).

[9] *Hoffman*, 535 U.S. at 146 (quoting *Burlington Truck Lines, Inc. v. United States*, 371 U.S. 156, 172 (1962)).

Board's selection of remedies" is "limited by federal immigration policy."[10] Courts review *de novo* the Board's interpretation of Supreme Court precedent.[11]

SUMMARY OF ARGUMENT

As part of its effort to reduce illegal immigration, Congress passed the Immigration Reform and Control Act (IRCA). As relevant here, IRCA may be violated in two ways: an undocumented worker may present fraudulent work authorization documents, or an employer may fail to request work authorization documents from such an individual. In either case, the employer has hired someone who is not authorized to work in the United States. The result is an unlawful employment relationship.

In *Hoffman*, the Supreme Court held that federal immigration policy as expressed in IRCA "foreclosed" the Board from "award[ing] backpay to an undocumented alien who has never been legally authorized to work in the United States."[12] In that case, the worker violated IRCA by submitting fraudulent documents. But the Court's holding is broadly worded. By its terms, it prevents the Board from ordering backpay for any undocumented worker, even those who have never violated IRCA by presenting fraudulent documents. Moreover, several

[10] *Hoffman*, 535 U.S. at 145.

[11] *Wolgast Corp. v. NLRB*, 349 F.3d 250, 253 (6th Cir. 2003).

[12] 535 U.S. at 140.

of the reasons given for the *Hoffman* decision – that backpay awards to undocumented workers encourage future IRCA violations and the evasion of immigration authorities – apply with equal force regardless of whether the IRCA violator is the employee or the employer. Because the Employees here are undocumented workers, the Board correctly determined that they are not entitled to a backpay remedy, even though they were fired in violation of Section 8(a)(1) of the Act.

This Court's decision in *Madeira v. Affordable Housing Foundation, Inc.*[13] does not compel a different conclusion. *Madeira* was a preemption case addressing the potential conflict between IRCA and a New York State workers compensation law. It did not involve the Board or the Act, and many of the Supreme Court's concerns in *Hoffman* were not present in *Madeira*. Indeed, *Madeira* expressly recognized that, where undocumented workers are involved, "an NLRB backpay award" "directly conflict[s] with IRCA."[14]

Finally, the Board did not commit material error by failing to order reinstatement, whether full or conditional. First, neither the General Counsel nor the Charging Party filed exceptions to the judge's failure to include conditional reinstatement in his recommended order. Moreover, the Charging Party's motion

[13] 469 F.3d 219 (2d Cir. 2006).

[14] *Madeira*, 469 F.3d at 236.

for reconsideration did not seek the Board's clarification or correction of the ambiguity or omission regarding conditional reinstatement the Employees now assert. Second, the parties here agreed to proceed on the assumption that the Employees are not legally authorized to work in the United States. The Employees have presented no evidence that an order of conditional reinstatement would alter the outcome of this case for them because they have never even asserted that they could meet the conditions for reinstatement. On the existing record, Mezonos would violate IRCA by reinstating them. Should the Court believe that reinstatement must be addressed, the Board requests a remand to do so.

ARGUMENT

The Board Correctly Interpreted the Supreme Court's Decision in *Hoffman* as Precluding Backpay for Any Undocumented Worker

A. In *Hoffman*, the Supreme Court Denied Enforcement of a Backpay Award to an Undocumented Worker Who Violated IRCA

In 1988, Jose Castro violated IRCA by presenting fraudulent documents to obtain employment at Hoffman Plastic Compounds.[15] A few months later, Castro began supporting a union organizing campaign. Without knowledge of Castro's work status, Hoffman fired Castro and a number of other employees. The Board

[15] *Hoffman Plastic Compounds, Inc.*, 326 NLRB 1060, 1060 (1998).

found that Hoffman violated Section 8(a)(3) of the Act[16] by firing Castro and others to deter union activity.[17] The Board ordered Hoffman to reinstate Castro and the others and make them whole.[18]

The Board then instituted compliance proceedings to determine exactly how much Hoffman owed to the unlawfully fired employees. During those proceedings, Castro revealed that he was not a U.S. citizen, was not authorized to work in the United States, and had submitted fraudulent documents to obtain employment.[19] The Board concluded that Castro's status did not preclude a backpay award.[20]

Hoffman filed a petition for review, which the D.C. Circuit denied.[21] That court found that the Board's "limited remedy" was "within the Board's discretion" and "further[ed] the purposes of both labor and immigration law."[22]

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[16] 29 U.S.C. § 158(a)(3).

[17] *Hoffman Plastic Compounds, Inc.*, 306 NLRB 100, 100 (1992), *enforced*, 208 F.3d 229 (D.C. Cir. 2000), *rev'd*, 535 U.S. 137 (2002).

[18] *Id*. at 100, 107-08.

[19] *Hoffman*, 326 NLRB at 1060.

[20] *Id*. at 1061-62.

[21] *Hoffman Plastic Compounds, Inc. v. NLRB*, 208 F.3d 229, 231 (D.C. Cir. 2000) (en banc), *rev'd*, 535 U.S. 137 (2002).

[22] *Id.*

On appeal, the Supreme Court disagreed, ruling that the Board did not have discretion to award backpay to Castro.[23] The *Hoffman* opinion opens by setting out the issue as follows:

> The National Labor Relations Board (Board) awarded backpay to an undocumented alien who has never been legally authorized to work in the United States. We hold that such relief is foreclosed by federal immigration policy, as expressed by Congress in the Immigration Reform and Control Act of 1986 (IRCA).[24]

The Court observed that it had "never deferred to the Board's remedial preferences where such preferences potentially trench upon federal statutes and policies unrelated to the NLRA."[25] In such cases, "the Board's remedy may be required to yield."[26]

The Court proceeded to discuss IRCA, which makes it "impossible for an undocumented alien to obtain employment in the United States without some party directly contravening explicit congressional policies."[27] Either a worker presents fraudulent documents, or an employer fails to verify that the employee is

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[23] *Hoffman Plastic Compounds, Inc. v. NLRB*, 535 U.S. 137 (2002).

[24] *Id.* at 140.

[25] *Id.* at 144.

[26] *Id*. at 146.

[27] *Id*. at 148.

authorized to work in the United States.[28] In the same paragraph that acknowledged either party can violate IRCA, the Court set out its "find[ing]" "that awarding backpay to illegal aliens runs counter to policies underlying IRCA, policies the Board has no authority to enforce or administer," and therefore "lies beyond the bounds of the Board's remedial discretion."[29]

The Court further noted that Castro could "qualif[y] for the Board's award only by remaining inside the United States illegally."[30] For that reason, the Board's backpay award "encourage[d] the successful evasion of apprehension by immigration authorities."[31]

Finally, the Court found that awarding backpay to undocumented workers "encourages future violations" of IRCA.[32] The Act requires unlawfully fired workers to mitigate their damages by seeking employment. But undocumented workers cannot do so "without triggering new IRCA violations, either by tendering false documents to employers or by finding employers willing to ignore IRCA and

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[28] *Id.*

[29] *Id.* at 149.

[30] *Id.* at 150.

[31] *Id.* at 151.

[32] *Id.* at 150.

hire illegal workers."[33] The Court "therefore conclude[d] that allowing the Board to award backpay to illegal aliens would unduly trench upon explicit statutory prohibitions critical to federal immigration policy, as expressed in IRCA."[34]

B. The Board Interpreted *Hoffman* To Preclude a Backpay Award to Any Undocumented Worker, Even Those Who Have Not Violated IRCA

In the compliance proceedings here, Mezonos argued that *Hoffman* prohibits the Board from awarding backpay to the Employees, even though they never submitted fraudulent documents and therefore did not themselves violate IRCA. The Employees sought to distinguish *Hoffman*, pointing out that here the employer, not the employees, violated IRCA. The Board concluded that, under *Hoffman*'s broad language, that distinction is irrelevant. Accordingly, the Board held that it does not have discretion to award backpay to undocumented workers, regardless of whether they, or their employer, violated IRCA's provisions. (J.A. 10.)

The Board pointed (J.A. 11) to the opening paragraph of *Hoffman*, noting that it is "categorically worded" and "suggests no distinction based on the identity of the IRCA violator." That paragraph states that the Board "is foreclosed by federal immigration policy, as expressed by Congress in [IRCA]" from awarding backpay "to an undocumented alien who has never been legally authorized to work

[33] *Id*. at 151.

[34] *Id.*.

in the United States."[35] Other language in the decision, the Board noted (J.A. 11), is equally clear: the Court "f[ou]nd" that "awarding backpay to illegal aliens runs counter to policies underlying IRCA."[36] And the Board determined that many of the policy reasons the Court cited "apply with equal force regardless of whether the IRCA violator is the employee, as in *Hoffman*, or the employer, as here." (J.A. 12 n.18.)

As the Employees note (Br. 25-26), *Hoffman* does cite Castro's misconduct as one of the reasons for its holding. But that misconduct was not limited to Castro's violation of IRCA. As the Court noted, undocumented workers also "remain[] inside the United States illegally" while "successfully evading apprehension by immigration authorities," rather than "obey[ing] the law and depart[ing] to" their home countries.[37] Furthermore, an undocumented worker who applies for employment, even without submitting fraudulent documents, is essentially asking the employer to violate IRCA. As the Board observed in comparing Castro's misconduct in *Hoffman* to this case, the Supreme Court made clear that "what matters is that IRCA has been violated, not which party to the employment relationship committed the violation." (J.A. 13.) Moreover, as the

[35] *Id*. at 140.

[36] *Id*. at 149.

[37] *Id.* at 149, 150.

Board properly recognized, a Supreme Court holding can extend beyond the specific facts of the particular case. (J.A. 13 n.25.) Indeed, the Supreme Court recently observed that, although IRCA does not impose criminal sanctions on workers like the Employees who do not submit fraudulent documents, "some civil penalties are imposed."[38] Such workers generally "are not eligible to have their status adjusted," and they "may be removed from the country."[39] Accordingly, the Board correctly concluded (J.A. 11) that the hiring of undocumented workers results in "an unlawful employment relationship" even when those workers do not submit fraudulent documents.

Furthermore, this case presents exactly the same problems regarding mitigation of damages that *Hoffman* feared. After Mezonos fired them, all the Employees mitigated their damages by finding work. (J.A. 28-31.) While Board law required them to do just that, in doing so they, like any undocumented job seeker, "trigger[ed] new IRCA violations, either by tendering false documents to employers or by finding employers willing to ignore IRCA."[40] The *Hoffman* Court

[38] *Arizona v. United States*, 567 U.S. __, 132 S. Ct. 2492, 2504 (2012).

[39] *Id.*

[40] *Hoffman*, 535 U.S. at 151.

expressly stated that a Board remedy under such circumstances "trivializes the immigration laws."[41]

The Employees claim (Br. 20-21) that Congress' deliberate choice not to impose criminal sanctions on undocumented workers who do not submit fraudulent documents supports their entitlement to backpay.[42] But the Court was aware that Congress made this choice when it decided *Hoffman* in 2002, and its decision accurately explains how Congress allocated criminal and civil penalties in IRCA.[43] Indeed, an amicus brief to the Court explicitly made the point that Congress "considered but explicitly rejected the suggestion that 'penalties must be imposed on those aliens who work illegally in the United States.'"[44] Despite its understanding of Congress' desire to avoid making criminals of undocumented workers who do not submit fraudulent documents, the Court issued a broadly-worded decision "hold[ing]" that an NLRB backpay award "to an undocumented

[41] *Id.* at 150.

[42] *Arizona*, 132 S. Ct. at 2504.

[43] *Hoffman*, 535 U.S. at 148.

[44] Brief for American Civil Liberties Union as Amicus Curiae Supporting Appellee, *Hoffman Plastic Compounds, Inc. v. NLRB*, (Dec. 10, 2001) (No. 00-1595), 2001 WL 1631648, at *11 n.10.

alien who has never been legally authorized to work in the United States" "is foreclosed by federal immigration policy."[45]

All of the policy arguments the Employees make here (Br. 22-27) were made to the Court in *Hoffman*. Indeed, they were highlighted by Justice Breyer's *Hoffman* dissent.[46] As the Board noted (J.A. 13), although the Court was "[r]eminded by the dissent of the possibility of distinguishing between IRCA-violating-alien and IRCA-violating-employer cases, the Court declined the invitation to limit its holding to the former and, to the contrary, repeatedly selected language that ignored the distinction." Instead, as the Board observed, the Court issued a decision that was "categorically worded." (J.A.11.) "[A]llowing the Board to award backpay to illegal aliens would unduly trench upon explicit statutory prohibitions critical to federal immigration policy, as expressed in IRCA."[47] The Board correctly concluded (J.A. 11-12) that *Hoffman* prevents it from awarding backpay to any undocumented worker, regardless of whether that worker violated IRCA by presenting fraudulent documents.[48]

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[45] *Hoffman*, 535 U.S. at 140.

[46] *Id.* at 155 (denying Board of backpay remedy "increases the employer's incentive to find and to hire illegal-alien employees") (Justice Breyer, dissenting).

[47] *Id*. at 151.

[48] *Id.* at 151; *see also NLRB v. Domsey Trading Corp*., 636 F.3d 33, 38 (2d Cir. 2011) ("After *Hoffman*, it is now clear that undocumented immigrants are ineligible for backpay under the NLRA.").

C. This Court's Decision in *Madeira v. Affordable Housing Foundation* Addressed a Different Issue, Applied a Different Standard, and Does Not Control This Case

The Employees wrongly suggest (Br. 18 & n.6) that this Court has already addressed the issue presented in this case. But *Madeira v. Affordable Housing Foundation*[49] did not involve either the Board or the Act. Rather, *Madeira* determined that IRCA did not preempt a New York State workers compensation law, a very different issue than the one decided by the Board here or by the Supreme Court in *Hoffman*. And this Court distinguished *Hoffman* in a variety of ways specific to the nature of the state law, the injury it redresses, and New York State's trial procedure.

Madeira, an undocumented worker, was injured at a construction site and sued his employer and the site owner for violating New York's Scaffold Law.[50] That law imposes absolute liability for personal injury on site owners and general contractors who provide inadequate safety equipment.[51] After receiving instructions that it could reduce the award based on Madeira's undocumented status, a jury awarded Madeira compensatory damages for lost earnings.[52] On

[49] 469 F.3d 219 (2d Cir. 2006).

[50] *Id*. at 223-24.

[51] *Id*. at 229.

[52] *Id*. at 222.

appeal, this Court rejected the site owner's argument that IRCA preempted state law allowing compensatory damages for lost earnings.[53] Noting that courts do not lightly infer that Congress has deprived the states of the power to act,[54] the *Madeira* Court concluded that the site owner failed to prove that Congress demonstrated "a clear and manifest intent" to preempt state law allowing damages for undocumented workers who sustain personal injuries.[55]

The key distinction between *Madeira* and the present case is the difference in standards governing how a federal court determines whether Congress intended to preempt a state law and how a court reconciles conflicting federal legislation. In the former, principles of federalism require, as *Madeira* explained, "[a] 'clear demonstration of conflict … before the mere existence of a federal law may be said to preempt state law operating in the same field.'"[56] As to the latter, *Madeira* recognized that, under *Hoffman*, the Board's remedy faces a steeper hurdle than the preemption question because "even a 'potential' conflict between two federal laws is enough to absolve federal courts of the duty to defer to an administering

[53] *Id*. at 223.

[54] *Id*. at 238

[55] *Id*. at 239.

[56] *Id*. at 238 (internal quotations omitted).

agency's remedial preferences."[57] Accordingly, unlike *Hoffman*, the *Madeira* Court "d[id] not simply reconcile two federal statutes; [it] consider[ed] federal preemption of established state law."[58]

Further, *Madeira* distinguished *Hoffman* in other ways that are not applicable here. First, the injury being remedied in *Madeira* (a disabling physical injury) is not authorized by either federal or state law, while the injury at issue here and in *Hoffman* (the firing of undocumented workers) is "required by IRCA."[59] Second, the *Hoffman* Court's concern about mitigation of damages was not present in *Madeira*. The Court noted that "'[m]itigation of damages is not implicated when a worker's injuries are so serious that the worker is physically unable to work.'"[60] Third, to accommodate federal law, the jury in *Madeira* was instructed to consider the plaintiff's undocumented work status, and the likelihood that he would be deported or return to his home country voluntarily, in determining its award.[61]

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[57] *Id.* at 238 n.20.

[58] *Madeira*, 469 F.3d at 241; *see also NLRB v. U.S. Truck Co.*, 124 F.2d 887, 888-89 (6th Cir. 1942) (denying enforcement of reinstatement order because it "violate[d] the spirit and provisions of the [federal] Motor Carrier Act").

[59] 469 F.3d at 236.

[60] *Id*. at 247 n.28 (quoting *Balbuena v. IDR Realty LLC*, 6 N.Y.3d 338, 361 (2006)).

[61] *Id.* at 225-26.

Ultimately the difference between *Madeira* and the present case comes down to this: New York expressly chose to protect undocumented workers from dangerous working conditions and provide a remedy for permanently disabling accidents that takes undocumented status into account,[62] and IRCA does not prevent it from doing so. But in harmonizing conflicting federal law, "[t]here is no reason to think Congress . . . 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, all the while successfully evading apprehension by immigration authorities."[63]

D. No Party Argued to the Board that the Judge Erroneously Failed to Order Conditional Reinstatement; the Employees Have Not Asserted That They Could Meet the Requirements of Conditional Reinstatement Even Had the Board Ordered It

The Employees claim they are entitled to some sort of reinstatement remedy despite their legal ineligibility to work in the United States. While it is unclear whether they seek traditional unconditional reinstatement or reinstatement conditioned upon showing documentation to work legally, their argument that the Board erred in failing to order that relief lacks merit.

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[62] *Id.* at 227-28 (stating the New York Court of Appeals has "observed that the state legislature intended the Scaffold law to protect 'all workers . . . regardless of immigration status.'") (quoting *Balbuena v. IDR Realty LLC*, 6 N.Y.3d 338, 358 (2006)).

[63] *Hoffman*, 535 U.S. at 149.

The Board customarily resolves unfair labor practice cases in two proceedings.[64] First, the Board determines whether an employer or a union violated the Act. That is the merits phase of the case. If a violation is found, the Board orders a general remedy in its merits decision. In a case involving an unlawful firing, the Board typically orders reinstatement and backpay.[65]

However, the remedy ordered in the merits proceeding is always subject to modification after the Board obtains additional information through a second proceeding known as compliance.[66] On occasion, facts are revealed during compliance that make reinstatement or full backpay inappropriate.[67] Here,

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[64] *NLRB v. J.H. Rutter-Rex Mfg. Co*., 396 U.S. 258, 260 (1969) (recognizing Board's practice is to litigate liability first "but l[eave] disputes over the details of reinstatement and back pay to the compliance stage of the proceedings").

[65] *See Kenmor Electric Co., Inc.*, 355 NLRB No. 173 (2010) ("The typical remedies provided by the Board include offers of reinstatement or employment to the discriminatees, and make-whole remedies."), *review pending* in case no. 10-60822 (5th Cir.); *Marine Welding & Repair Works, Inc. v. NLRB*, 439 F.2d 395, 399 (8th Cir. 1971) (noting typical remedy "requir[es] an offer of reinstatement and restitution of losses to the discharged employees").

[66] *NLRB v. Katz's Deli of Houston Street, Inc*., 80 F.3d 755, 771 (2d Cir. 1969) (likening compliance proceedings to the damages phase of a civil proceeding); *United Steelworkers of Am. v. NLRB*, 405 F.2d 1373, 1377 (D.C. Cir. 1968) (noting that an employee's "right to reinstatement and back pay, if any, can be determined in the compliance proceedings").

[67] *See, e.g., John Cuneo, Inc*., 298 NLRB 856, 856 (1990) (limiting backpay and eliminating reinstatement remedy where Board learned during compliance proceeding that employee had presented false information on application); *Am. Navigation Co*., 268 NLRB 426, 426-27 (1983) (limiting backpay for employee who failed to disclose all interim earnings).

although the Board ordered reinstatement of the Employees during the merits phase, during the compliance proceeding, the parties agreed that the Employees were unauthorized to work under federal immigration law. (J.A. 10 n.5.) Mezonos would violate IRCA by rehiring them. Therefore the Board did not err in failing to order full reinstatement because the record demonstrates that Mezonos could not legally employ these undocumented Employees.[68]

The Employees also claim the Board was required to order *conditional* reinstatement, which is reinstatement conditioned on the production of the required I-9 documents. But the Court need not consider that argument on this record. First, the administrative law judge discussed conditional reinstatement only to determine whether backpay, if owed, was tolled by Mezonos' purported reinstatement offer. (J.A. 22-23.) The judge did not direct conditional reinstatement of the Employees in his recommended order. (J.A. 32.) To the

[68] *See Sure-Tan, Inc. v. NLRB*, 467 U.S. 883, 902-03 (1984) (stating "remedies at the compliance proceedings must be conditioned upon the employees' legal readmittance to the United States"); *Flaum Appetizing Corp*., 357 NLRB No. 162, slip op. at *11 (2011) ("As the Supreme Court held in *Hoffman Plastics*, IRCA bars the Board from ordering the reinstatement of and awarding backpay to a discriminatee who was not authorized to work in the United States during the backpay period."); *see also Madeira*, 469 F.3d at 236 (recognizing that IRCA requires employer to fire undocumented workers); *NLRB v. Future Ambulette, Inc.*, 903 F.2d 140, 145 (2d Cir. 1990) ("We cannot condone an order which may encourage illegal hiring practices."); *De Jana Indus., Inc.*, 305 NLRB 845, 845 (1991) ("Respondent has no obligation to reinstate Barton as a driver until he demonstrates that he has an appropriate driver's license.").

extent that the Employees criticize the Board for failing to discuss or order conditional reinstatement, they overlook that no party advised the Board of this asserted error or ambiguity in the recommended remedy. Mezonos excepted to the judge's discussion (again in the context of its offers of reinstatement) of conditional reinstatement and argued that it was *not* an appropriate remedy after *Hoffman*. (S.A. 37.) While their answering briefs responded to Mezonos' arguments and did discuss conditional reinstatement, neither the General Counsel nor the Charging Party (the Employees' representative before the Board) specifically cross-excepted to the omission of conditional reinstatement in the judge's recommended order.[69] Moreover, the Charging Party filed a motion for reconsideration after the Board issued its decision dismissing the General Counsel's compliance specification yet that motion did not mention the omission of or seek conditional reinstatement as an alternate remedy, despite now claiming that the Board's order is unclear or inadequate. Accordingly, viewed in context, the Board's decision does not reflect reversible error. As the Supreme Court has

[69] *See Teddi of California*, 338 NLRB 1032, 1032 (2003) (judge found employer unlawfully threatened employees but failed to include that violation in his conclusions of law; employer failed to except to the judge's finding, but the General Counsel cross-excepted to the explicit omission of that finding from the conclusions of law; where employer "in its answering brief, belatedly contest[ed] the substance of this finding," Board found violation in "absence of a timely exception to this finding"); 29 C.F.R. § 102.46(d)(2) ("The answering brief to the exceptions shall be limited to the questions raised in the exceptions and in the brief in support thereof.").

held, "[s]imple fairness to those who are engaged in the tasks of administration, and to litigants, requires as a general rule that courts should not topple over administrative decisions unless the administrative body not only has erred but has erred against objection made at the time appropriate under its practice."[70]

Second, the Employees have never submitted or claimed to have any evidence to show that they have become eligible to work in the United States since the compliance proceeding, nor have they sought to reopen the record to present such evidence. And the fact that they have engaged in unauthorized work makes it unlikely that they will ever qualify for legal work. This is because, "[w]ith certain exceptions, aliens who accept unlawful employment are not eligible to have their status adjusted."[71]

In arguing that they are entitled to some sort of reinstatement remedy despite their legal ineligibility to work, the Employees cite (Br. 23-25, 28) a number of cases involving employees who could not lawfully perform their jobs.[72] Those

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[70] *United States v. L. A. Tucker Truck Lines, Inc.*, 344 U.S. 33, 37 (1952). *See also* 29 U.S.C. § 160(e) ("No objection that has not been urged before the Board, its member, agent, or agency, shall be considered by the court, unless the failure or neglect to urge such objection shall be excused because of extraordinary circumstances.").

[71] *See Arizona v. United States*, 132 S. Ct. 2492, 2504 (2012).

[72] *E.g., Consolidated Bus Transit, Inc.*, 350 NLRB 1064, 1066-67 (2007) (employee failed state driving test), *enforced*, 577 F.3d 467 (2d Cir. 2009); *Epic*

cases, however, involved potential conflicts between the Board's remedy and state law. As explained above on pages 19-20, such cases do not present the federal-federal conflict that concerned the *Hoffman* Court. In claiming that the state-federal distinction relied upon by the Board here is of no import and citing pre-*Hoffman* cases (Br. 25 n.8), the Employees ignore *Hoffman*'s language explicitly admonishing the Board to steer clear of remedies that implicate other federal statutes and agencies.[73] The Board properly heeded that direction here.

And the Employees mischaracterize (Br. 28) *Douglas Aircraft Co., Inc.*,[74] the only case they cite that does involve such a conflict with federal immigration law. That 1938 case involved an immigrant worker who, under the laws of the time, was not permitted to work on government aircraft construction projects.[75] The employer, however, performed work on both government and non-government projects. The Board ordered the employer to offer the worker "such available employment, for which as an alien he is eligible," *i.e.*, work on non-government

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Security Corp., 325 NLRB 772, 774 (1998) (employee lacked state gun license); *De Jana Indus*., 305 NLRB 845, 845 (1991) (employee lacked driver's license).

[73] *Hoffman*, 535 U.S. at 146 ("federal statutes or policies administered by other federal agencies [are] 'a most delicate area' in which the Board must be 'particularly careful in its choice of remedy.'").

[74] 10 NLRB 242, 282 (1938).

[75] *Id.* at 267, 282.

projects.[76] The difference between *Douglas Aircraft* and this case is plain. The employer there had work that the employee could legally perform. Mezonos has no work that the Employees can perform without some party violating IRCA.

The Board therefore did not commit a material error by failing to order reinstatement (conditional or otherwise).[77] Nonetheless, if the Court believes that the Board must address the appropriateness of reinstatement, the Board requests a remand to consider it in the first instance.

[76] *Id.* at 282.

[77] *See J.P. Stevens & Co., Inc. v. NLRB*, 612 F.2d 881, 883 (4th Cir. 1980) (Board's "failure to discuss its denial of litigation expenses is also harmless" and remand was unnecessary where it was "readily apparent" that remedy was ancillary to the "major questions presented" and not warranted under established standards); *accord E. Bay Chevrolet v. NLRB*, 659 F.2d 1006, 1011 (9th Cir. 1981) ("Omission of a discussion of ancillary issues does not warrant remand"); *see also NLRB v. Mangurian's, Inc*., 566 F.2d 463, 465 (5th Cir. 1978) (enforcing order where Board did not commit "material error").

CONCLUSION

Because the Board must comply with the Supreme Court's decision holding that the Board lacks the authority to award backpay to undocumented workers, the Board respectfully requests that the Court dismiss the petition for review.

s/Usha Dheenan (by MF)____
USHA DHEENAN
Supervisory Attorney

s/MacKenzie Fillow_____
MacKENZIE FILLOW
Attorney

National Labor Relations Board
1099 14th Street NW
Washington, DC 20570
202-273-2948
202-273-3823

LAFE E. SOLOMON
Acting General Counsel
CELESTE J. MATTINA
Deputy General Counsel
JOHN H. FERGUSON
Associate General Counsel
LINDA DREEBEN
Deputy Associate General Counsel

November 2012

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

CHRISTIAN PALMA, ANTONIO GONZALEZ, FRANCISCO JAVIER JOYA, JOSE ANTONIO QUINTUÑA, JOSE ARMANDO SAX-GUTIERREZ	*
Petitioners	* Nos. 12-1199
v.	*
NATIONAL LABOR RELATIONS BOARD	* Board Case No. 29-CA-25476
Respondent	*

CERTIFICATE OF COMPLIANCE

Pursuant to Federal Rule of Appellate Procedure 32(a)(7)(C), the Board certifies that its brief contains 5,672 words of proportionally-spaced, 14-point type, and the word processing system used was Microsoft Word 2007.

COMPLIANCE WITH CONTENT AND VIRUS SCAN REQUIREMENTS

Board counsel certifies that the contents of the accompanying CD-ROM, which contains a copy of the Board's brief, is identical to the hard copy of the Board's brief filed with the Court and served on the petitioners. Board counsel further certifies that the CD-ROM has been scanned for viruses.

s/Linda Dreeben (by MF)
Linda Dreeben
Deputy Associate General Counsel
National Labor Relations Board
1099 14th Street, NW
Washington, DC 20570
(202) 273-2960

Dated at Washington, DC
November 2, 2012

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CERTIFICATE OF SERVICE

I hereby certify that on November 2, 2012, I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Second Circuit by using the appellate CM/ECF system. All persons who have filed an appearance in the case are registered CM/ECF users, and service will be accomplished by the CM/ECF system

s/Linda Dreeben (by MF)
Linda Dreeben
Deputy Associate General Counsel
National Labor Relations Board
1099 14th Street, NW
Washington, DC 20570
(202) 273-2960

Dated at Washington, DC
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