No. _____

In The
Supreme Court of the United States

JERUSALEM CAFE, LLC, *et alia*,

Petitioners,

v.

ELMER LUCAS, *et alia*,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Eighth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether, despite this Court's decision in *Hoffman Plastic Compounds, Inc. v. NLRB*, 535 U.S. 137 (2002), that an unauthorized alien who is prohibited by the Immigration Reform and Control Act of 1986 from being employed in the United States is thereby precluded from recovering wages due from his former unlawful employer under the National Labor Relations Act of 1935, and in conflict with the Fourth Circuit's decision in *Egbuna v. Time-Life Libraries, Inc.*, 153 F.3d 184 (4th Cir. 1998) (en banc), that such an alien lacks standing to sue his former unlawful employer for wages due under Title VII of the Civil Rights Act of 1964, an admitted unauthorized alien nonetheless has standing to sue his former unlawful employer for wages due under the Fair Labor Standards Act of 1938.

2. Whether the 1986 enactment of the Immigration Reform and Control Act prohibiting unauthorized aliens from being employed in the United States precludes the applicability to such aliens of the wage recovery provisions of the prior 1938 Fair Labor Standards Act, just as the Fourth Circuit held in *Egbuna v. Time-Life Libraries, Inc.*, 153 F.3d 184 (4th Cir. 1998) (en banc), it did to the prior 1964 Civil Rights Act and this Court held in *Hoffman Plastic Compounds, Inc. v. NLRB*, 535 U.S. 137 (2002), it did to the wage recovery provisions of the even earlier 1935 National Labor Relations Act.

LIST OF PARTIES

Jerusalem Cafe, LLC, the petitioner identified in the caption, was a defendant in the District Court and was the appellant in the Eighth Circuit.

Two other petitioners in this Court are not identified in the caption. Farid Azzeh and Adel Alazzeh each were defendants in the District Court and appellants in the Eighth Circuit. They are represented by the same counsel as Jerusalem Cafe, LLC.

Elmer Lucas, the respondent identified in the caption, was a plaintiff in the District Court and was an appellee in the Eighth Circuit.

Five other respondents in this Court are not identified in the caption. Margarito Rodas, Gonzalo Leal, Feliciano Macario, Bernabe Villavicencio, and Esvin Lucas all were plaintiffs in the District Court and appellees in the Eighth Circuit. They are represented by the same counsel as Elmer Lucas.

RULE 29.6 STATEMENT

Jerusalem Cafe, LLC, was a Missouri limited liability company that had no parent corporation and was terminated in 2010. No publicly held company ever owned 10% or more of its stock.

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PETITION FOR WRIT OF CERTIORARI

Petitioners Jerusalem Cafe, LLC, Farid Azzeh, and Adel Alazzeh respectfully pray the Court to issue a writ of certiorari to review the judgment of the United States Court of Appeals for the Eighth Circuit in this case.

OPINIONS BELOW

The opinion of the Eighth Circuit (Appendix 1-27) is reported at 721 F.3d 927. The District Court's judgment memorandum (App. 28-38), judgment (App. 39-40), and order and memorandum concerning the questions presented in this petition (App. 41-50) all are unreported.

JURISDICTION

The panel of the Eighth Circuit entered its judgment on July 29, 2013 (App. 1). The petitioners' timely petition for rehearing and rehearing en banc was denied on September 6, 2013 (App. 51). The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Article III, § 2, of the Constitution of the United States provides:

> The judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority; – to all Cases affecting Ambassadors, other public Ministers and Consuls; – to all Cases of admiralty and maritime Jurisdiction; – to Controversies to which the United States shall be a Party; – to Controversies between two or more States; – between a State and Citizens of another State; – between Citizens of different States; – between Citizens of the same State claiming Lands under Grants of different States, and between a State, or the Citizens thereof, and foreign States, Citizens or Subjects.

The Immigration Reform and Control Act of 1986, 8 U.S.C. § 1324a, provides, in relevant part:

> **(a) Making employment of unauthorized aliens unlawful**
>
> **(1)** . . . It is unlawful for a person or other entity . . . to hire . . . for employment in the United States an alien knowing the alien is an unauthorized alien (as defined in subsection (h)(3) of this section) with respect to such employment. . . .

(2) . . . It is unlawful for a person or other entity, after hiring an alien for employment in accordance with paragraph (1), to continue to employ the alien in the United States knowing the alien is (or has become) an unauthorized alien with respect to such employment. . . .

[(h)](3) Definition of unauthorized alien

As used in this section, the term "unauthorized alien" means, with respect to the employment of an alien at a particular time, that the alien is not at that time either (A) an alien lawfully admitted for permanent residence, or (B) authorized to be so employed by this chapter or by the Attorney General.

The Fair Labor Standards Act of 1938, 29 U.S.C. §§ 201, *et seq.*, provides, in relevant part:

29 U.S.C. § 203 – Definitions

As used in this chapter – . . .

(d) "Employer" includes any person acting directly or indirectly in the interest of an employer in relation to an employee. . . .

(e) . . . (1) . . . [T]he term "employee" means any individual employed by an employer.

29 U.S.C. § 206 – Minimum Wage

(a) . . . Every employer shall pay to each of his employees . . . wages at . . . not less than . . . $7.25 an hour. . . .

29 U.S.C. § 207 – Maximum Hours

(a) . . . [N]o employer shall employ any of his employees . . . for a workweek longer than forty hours unless such employee receives compensation for his employment in excess of the hours above specified at a rate not less than one and one-half times the regular rate at which he is employed.

29 U.S.C. § 216 – Penalties

(b) Damages; right of action; attorney's fees and costs . . .

Any employer who violates the provisions of section 206 or section 207 of this title shall be liable to the employee or employees affected in the amount of their unpaid minimum wages, or their unpaid overtime compensation, as the case may be, and in an additional equal amount as liquidated damages. . . . An action to recover the liability prescribed in . . . the preceding sentenc[e] may be maintained against any employer . . . in any Federal or State court of competent jurisdiction by any one or more employees for and in behalf of himself or themselves and other employees similarly situated. . . . The court in such action shall, in addition to any judgment awarded to the plaintiff or plaintiffs, allow a reasonable attorney's fee to be paid by the defendant, and costs of the action.

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INTRODUCTION

In *Hoffman Plastic Compounds, Inc. v. NLRB*, 535 U.S. 137, 151 (2002), following the rubric it previously had announced in *Sure-Tan v. NLRB*, 467 U.S. 883 (1984), this Court held a New Deal-era federal employment statute – in that case the National Labor Relations Act of 1935 ("NLRA"), 29 U.S.C. §§ 151, *et seq.* – may not be applied in a manner that would "trench upon explicit statutory prohibitions critical to federal immigration policy, as expressed in" the later, Reagan-era Immigration Reform and Control Act of 1986 ("IRCA"), 8 U.S.C. § 1324a.

As the Court recognized, the IRCA "significantly" had changed the previous "legal landscape," by, for the first time, outright prohibiting the hiring, employment, and paying of any wages to unauthorized aliens, "forcefully ma[king] combating the employment of illegal aliens central to the policy of immigration law." *Hoffman*, 535 U.S. at 147. "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." *Id.* at 148. Given this, the Court in *Hoffman* broadly directed that the earlier enacted employment statute could not apply so as to "encourage the successful evasion of apprehension by immigration authorities, condone prior violations of the immigration laws, [or] encourage future violations." *Id.* at 151.

Accordingly, in *Hoffman*, faced with an unauthorized alien prohibited from being employed or paid any wages under the IRCA seeking (and being awarded) back wages under the NLRA, this Court rejected the Department of Labor's longstanding position to the contrary – and all previous NLRA decisions on point – and reversed the alien's previous award of back wages. *Id.* at 151. Under the IRCA, the wage-recovery provisions of the previously-enacted NLRA could not be invoked by "an unauthorized alien who has never been legally authorized to work in the United States," as "such wages could not lawfully have been earned" under the IRCA, and thus "such relief is foreclosed by federal immigration policy, as expressed by Congress in the" IRCA. *Hoffman*, 535 U.S. at 140.

Since the enactment of the IRCA's 1986 prohibition on employing unauthorized aliens and paying them any wages, the sweeping change it brought to preexisting employment statutes has not been limited to the NLRA in *Hoffman*. Rather, other courts have reached the same conclusion with other pre-IRCA employment statutes. *See*, *e.g.*, *Egbuna v. Time-Life Libraries, Inc.*, 153 F.3d 184, 187-88 (4th Cir. 1998) (en banc) (given the IRCA's express prohibitions, unauthorized aliens lack standing to sue for allegedly back-due wages for retaliation under Title VII of the Civil Rights Act of 1964 ("Title VII"), 42 U.S.C. §§ 2000e, *et seq.*). This is because, plainly, post-IRCA, preexisting employment statutes cannot be read in ignorance that, in many cases, applying their erstwhile protections to unauthorized aliens would, as

Hoffman forbade, "encourage the successful evasion of apprehension by immigration authorities, condone prior violations of the immigration laws, and encourage future violations." 535 U.S. at 151.

In this case, however, adopting a particularly narrow reading of *Hoffman* and the effect of the IRCA, the Eighth Circuit held the wage-recovery provisions of another pre-IRCA, New Deal-era employment statute, the Fair Labor Standards Act of 1938 ("FLSA"), 29 U.S.C. §§ 201, *et seq.*, must be weighed differently against the IRCA than either the NLRA or Title VII. Instead, unlike these other employment statutes – and relying on the Secretary of Labor's opinion that, as to the NLRA, this Court already expressly rejected in *Hoffman* – the Eighth Circuit held the FLSA *must* be applied so as to, at the very least, condone prior violations of the IRCA.

Conversely to *Hoffman*, the Eighth Circuit's decision affirmed an award under the FLSA of $141,864.04 in back wages (plus an additional, equal amount in liquidated damages, along with costs and attorney fees for a total of $440,916.71) to six Guatemalan nationals who *openly admit* they are unauthorized aliens present in the United States unlawfully and prohibited by the IRCA from being employed or paid any wages in this country. The Eighth Circuit held the aliens fell within the FLSA's "zone of interests" so as to have Article III and prudential standing to invoke the FLSA to sue their former, alleged unlawful employers for allegedly

unpaid minimum wage and overtime pay due to them.

The Eighth Circuit's decision conflicts with this Court's broad decision in *Hoffman* and with the IRCA. The plain language of the 1986 IRCA necessarily excised unauthorized aliens from the wage-paying provisions of the 1935 NLRA, per *Hoffman*, and 1964 Title VII, per *Egbuna*, so as to avoid condoning prior violations of the immigration laws. It plainly did so equally to the 1938 FLSA. The Eighth Circuit articulates no reliable rule to explain when condoning prior violations of the IRCA is disallowed and when it is allowable.

As a result, this Court's review is necessary to resolve the conflict between the Eighth Circuit's decision below, the Fourth Circuit's decision in *Egbuna*, and this Court's broad directions in *Hoffman*. The Court should review this case to announce a uniform, dependable rule that reconciles this country's later immigration laws with its earlier employment laws.

STATEMENT OF THE CASE

A. District Court Proceedings

All of the six respondents, Elmer Lucas, Margarito Rodas, Gonzalo Leal, Feliciano Macario, Bernabe Villavicencio, and Esvin Lucas, are Guatemalan nationals who openly admit they are unauthorized aliens unlawfully living in the United States

and are therefore prohibited by the IRCA, 8 U.S.C. § 1324a, from being employed in the United States or paid any wages. The aliens brought the action below in the United States District Court for the Western District of Missouri under the FLSA, 29 U.S.C. §§ 201, *et seq.*, alleging Petitioners Jerusalem Cafe, LLC, Farid Azzeh, and Adel Alazzeh employed them at the Jerusalem Cafe, a restaurant in Kansas City, Missouri, "for varying periods between June 2007 and March 2010" but wilfully did not pay them sufficient minimum wages or overtime pay as required by that statute (App. 2). During that period, Jerusalem Cafe, LLC, was the restaurant's operator (App. 2). The LLC's managing member, Mr. Azzeh, functioned as the restaurant's owner (App. 2). The aliens alleged, and the jury found, that Mr. Alazzeh was the restaurant's manager (App. 2).

Before trial, the District Court granted the aliens an order in limine precluding the defendants from mentioning the aliens' immigration status at trial (App. 6). The court found the aliens' status was "irrelevant" (App. 6). During the plaintiffs' case-in-chief at trial, however, Mr. Rodas testified that he and the other aliens all were "illegals" (App. 6). Then, after Mr. Azzeh sought to testify that he had no record of the aliens' payroll because they were unauthorized aliens, "the parties agreed to dissolve the order in limine" (App. 6-7). Thereafter, in all post-judgment proceedings, including in their brief before the Eighth Circuit, the aliens openly admitted they are unauthorized aliens who lack employment

authorization under the IRCA. The Eighth Circuit found so, too (App. 2).

At the four-day trial in November 2011, the aliens introduced evidence that they worked at the Jerusalem Cafe during the period alleged and the defendants paid them "in cash, at fixed weekly rates which did not vary based on overtime hours worked" (App. 3, 6-7). The jury found for the aliens and against the defendants (App. 6-7). The District Court's judgment and the Eighth Circuit's opinion each include charts of the jury's findings as to the individual aliens' hours worked and resultant wages and overtime due (App. 4-5, 33-38). Accordingly, the court entered judgment awarding the aliens "$141,864.04 in actual damages for unpaid FLSA wages, $141,864.04 in liquidated damages based on the jury's finding that the employers wilfully failed to pay FLSA wages, $150,627.00 in legal fees, and $6,561.63 in expenses," for a total of $440,916.71 (App. 7, 29, 33-39).

With new counsel, the defendants sought judgment as a matter of law, explaining that, as the aliens in this case were prohibited by the IRCA from being employed or paid any wages, they lacked prudential standing to seek wages under the FLSA that they could not lawfully have been paid in the first place (App. 7-8, 43-45). The defendants analogized this case to this Court's decision in *Hoffman Plastic Compounds, Inc. v. NLRB*, 535 U.S. 137 (2002), which held the IRCA bars unauthorized aliens from being awarded back wages under the NLRA, 29 U.S.C.

§§ 151, *et seq*. (App. 7-8, 43-45). The District Court denied the motion, holding the aliens had standing (App. 7-8, 43-45).

B. The Eighth Circuit's Decision

The central issue in the defendants' appeal to the Eighth Circuit also was whether an unauthorized alien who the IRCA prohibits from being employed or paid any wages nonetheless falls within the FLSA's zone of interests to have standing to seek such wages in court. The defendants argued that a claim by unauthorized aliens to allegedly back-due wages and overtime from previous "employment" cannot come within the zone of interests the FLSA seeks to protect, because the IRCA absolutely prohibits such wages and employment in the first place (App. 2). The Secretary of the United States Department of Labor participated as *amicus curiae* for the aliens both in briefing and at oral argument (App. 1).

The Eighth Circuit affirmed the District Court. While it cited to and quoted dicta from several non-FLSA and non-NLRA decisions from the Second and D.C. Circuits (App. 15), it acknowledged those decisions did not "address the question" in this case "directly" (App. 10). Instead, the court noted it was only the second circuit to address the applicability of the FLSA to unauthorized aliens (after the Eleventh Circuit in *Patel v. Quality Inn S.*, 846 F.2d 700 (11th Cir. 1988), later reaffirmed in *Lamonica v. Safe Hurricane Shutters, Inc.*, 711 F.3d 1299, 1306 (11th

Cir. 2013), which found unauthorized aliens do have such standing under the FLSA).

The Eighth Circuit "disagree[d]" that unauthorized aliens whose employment or payment of any wages is absolutely prohibited by the IRCA lack standing to seek such wages under the FLSA (App. 2). It held, "[E]mployers who unlawfully hire unauthorized aliens must otherwise comply with federal employment laws" as to those unauthorized aliens, including paying them the wages that the IRCA prohibits them to be paid (App. 10). It held "unauthorized aliens may sue under the FLSA . . . to recover statutory damages for work actually performed," because they are "workers" who qualify "as 'employees' under the FLSA," and thus "plainly fall within the zone of interests protected or regulated by" the FLSA (App. 20, 25). It analogized this answer to the requirement that "Al Capone" pay federal income taxes on his illicit income (App. 10-11).

As to this Court's decision in *Hoffman*, the Eighth Circuit held *Hoffman* was limited to the issue of "whether the NLRB's remedial power extended far enough to 'allow it to award backpay to an illegal alien for years of work *not* performed,'" as opposed to work the unauthorized alien did perform (App. 14) (quoting *Hoffman*, 535 U.S. at 149 (emphasis added by the Eighth Circuit)). It concluded "the *Hoffman* court – after considering Congress's intervening enactment of the IRCA – reaffirmed its earlier holding in *Sure-Tan*, *Inc. v. NLRB*, 467 U.S. 883 (1984)

that the NLRA applies to the actual employment of unauthorized aliens" (App. 14-15).

Finally, the Eighth Circuit also relied on the "Department of Labor's position" on this issue (App. 16). It observed the Secretary had argued "applying the FLSA to unauthorized aliens 'is essential to achieving the purposes of the FLSA to protect workers from substandard working conditions, to reduce unfair competition for law-abiding employers, and to spread work and thereby reduce unemployment by requiring employers to pay overtime compensation'" (App. 17). The Secretary's opinion was that the FLSA and IRCA "work in tandem to discourage employers from hiring unauthorized workers by 'assur[ing] that the wages and employment of lawful residents are not adversely affected by the competition of illegal alien employees who are not subject to the standard terms of employment'" (App. 16) (quoting *Sure-Tan*, 467 U.S. at 893). The court concluded, "Given the Department's decades-long consistency and the Secretary's 'specialized experience and broader investigations and information' in these matters," its "position is persuasive and merits *Skidmore* deference" (App. 17-18). The Panel also "agree[d] with the [Department's] position, independent of any deference" (App. 18).

For all the reasons below, the Eighth Circuit's decision was erroneous and consideration by this Court is necessary.

REASONS FOR GRANTING THE WRIT

This Court's review is required to avoid a direct conflict with the plain language of its decision in *Hoffman Plastic Compounds, Inc. v. NLRB*, 535 U.S. 137 (2002), which the Eighth Circuit misstated and misinterpreted, as well as with the plain language and intent of the IRCA, 8 U.S.C. § 1324a, which the Eighth Circuit misinterpreted in conflict with both *Hoffman* and with the Fourth Circuit in *Egbuna v. Time-Life Libraries, Inc.*, 153 F.3d 184 (4th Cir. 1998) (en banc). The later-enacted IRCA, which makes paying any wages to any unauthorized alien unlawful, precludes an unauthorized alien from having standing to seek such wages under the earlier-enacted FLSA, 29 U.S.C. §§ 201, *et seq*.

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

In *Hoffman*, this Court held the NLRA, 29 U.S.C. §§ 151, *et seq.*, 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 IRCA, 8 U.S.C. § 1324a. 535 U.S. at 151. The Court reversed an award of back wages for an unauthorized alien that otherwise would have been due under the NLRA to an authorized worker, because the unauthorized alien was never "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.

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

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

The National Labor Relations Board ("NLRB") affirmed the denial of reinstatement, but reversed the denial of back-due wages up until the moment Mr. Castro's immigration status became apparent. *Id.* Hoffman Plastics filed a petition for review to the

D.C. Circuit, arguing "that both *Sure-Tan, Inc. v. NLRB*, 467 U.S. 883 . . . (1984), and the [IRCA], bar awards of any backpay to undocumented discriminatees." *Id.* at 640. The D.C. Circuit disagreed. It held, "*Sure-Tan* supports backpay awards to undocumented discriminatees so long as the awards reflect the discriminatees' actual losses." *Id.* It upheld the post-IRCA "tweak" in the award as "fall[ing] within the [NLRB's] broad remedial discretion." *Id.*

This Court reversed. After reviewing the history and intent of the IRCA, it held allowing Mr. Castro to claim *any* wages was simply impermissible. For, previously, in *Sure-Tan*, 467 U.S. at 892-93, decided two years before Congress enacted the IRCA, this Court had held federal employment statutes must be applied in conjunction with the immigration laws. In *Sure-Tan*, 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 the employment of unauthorized aliens. *Id.* at 892.

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).[1]

Thus, *Sure-Tan* applied a straightforward framework to determine whether unauthorized aliens qualified for wage-paying protections of federal employment laws: if federal law did not prohibit their employment, they could qualify. Conversely, if federal law did prohibit their employment, as the IRCA does today, they could not qualify.

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[1] Justices Powell and Rehnquist dissented from *Sure-Tan*, stating 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*.

Two years later, heeding *Sure-Tan*'s framework, Congress clarified its intent and enacted the IRCA. Unlike the previous INA, this landmark legislation "significantly" changed the "legal landscape" that had existed at the time *Sure-Tan* was decided and, instead, "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).

Accordingly, unlike for authorized workers, given the later passage of the IRCA this Court held in *Hoffman* that NLRA could not be applied to allow Mr. Castro to claim or be awarded any back wages. 535 U.S. at 151-52. For, the IRCA "not only speaks directly to matters of employment but expressly criminalizes the only employment relationship at issue in this case." *Id.* at 151 n.5. Therefore, to allow "an undocumented alien who has never been legally authorized to work in the United States" to claim "wages that could not lawfully have been earned" would "trench upon explicit statutory prohibitions critical to federal immigration policy, as expressed in IRCA. It would encourage the successful evasion of apprehension by

immigration authorities, condone prior violations of the immigration laws, and encourage future violations." *Hoffman*, 535 U.S. at 151-52.

Hoffman's holding updating the application of the *Sure-Tan* rule to the law post-IRCA could not be plainer. Given the IRCA's express prohibitions, a federal employment law may not be applied in a manner that "would encourage the successful evasion of apprehension by immigration authorities, condone prior violations of the immigration laws, [or] encourage future violations." *Id.* at 151.

Moreover, *Hoffman*'s result – foreclosing unauthorized aliens from invoking the wage-recovery provisions of a federal employment statute, as such wages cannot lawfully be paid under the IRCA – has not been limited to the NLRA. A few years *before Hoffman*, but anticipating its result, the Fourth Circuit held that, under the IRCA, unauthorized aliens lack standing to sue for allegedly back-due wages for retaliation under Title VII of the Civil Rights Act of 1964 ("Title VII"), 42 U.S.C. §§ 2000e, *et seq*. *Egbuna v. Time-Life Libraries, Inc.*, 153 F.3d 184, 187-88 (4th Cir. 1998) (en banc).[2]

[2] The petitioners discussed *Egbuna* at length before the Eighth Circuit in both their opening brief (p. 53 n.3) and their reply brief (pp. 9-10), but neither the respondents nor the Secretary of Labor mentioned it in their briefs, nor did the Eighth Circuit in its decision.

Unlike *Hoffman*, which due to the procedural nature of an NLRA case spoke in terms of the NLRB's authority to issue an award, *Egbuna* spoke in terms of standing to sue. Faced with an unauthorized alien's lawsuit for back wages for retaliation under Title VII, the Fourth Circuit held the alien's status under the IRCA deprived him of standing to invoke Title VII so as to maintain such a cause of action. *Id.* This was because the "IRCA," which "effected a monumental change in our country's immigration policy by criminalizing the hiring of unauthorized aliens," "declares it unlawful for employers to employ, recruit, or refer for a fee all unauthorized aliens" and "thus statutorily disqualifies any undocumented alien from being employed as a matter of law." *Id.* Thus, "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," the court could not "sanction the formation of a statutorily declared illegal relationship" by allowing an unauthorized alien a cause of action under Title VII. *Id.* at 188. "To rule" otherwise "would nullify IRCA. . . ." *Id.*

II. Affording an unauthorized alien standing to seek wages under a preexisting act of Congress that the later-enacted IRCA prohibited him from being paid in the first place would condone past, present, and future violations of the IRCA.

As the Fourth Circuit saw in *Egbuna*, it is plain that allowing an unauthorized alien standing under a preexisting act of Congress to sue in court for (and thereby recover) wages that he could not lawfully have been paid in the first place under the later-enacted IRCA would, as this Court expressly forbade in *Hoffman*, "encourage the successful evasion of apprehension by immigration authorities, condone prior violations of the immigration laws, and encourage future violations." 535 U.S. at 151. It would judicially legalize that which Congress legislatively has prohibited.

To establish standing to sue by invoking an act of Congress, a plaintiff must establish both of two levels of standing: (1) the "irreducible constitutional minimum" sufficient to open the courthouse doors under U.S. Const. art. III, § 2, of "demonstrating" an "injury in fact" that is "fairly traceable" to the defendants that can "be redressed by a favorable decision;" and (2) "prudential principles that bear on the question of standing," including that the plaintiff's claim must "fall within the zone of interests protected or regulated by the statutory provision . . . invoked in the suit. . . ." *Bennett v. Spear*, 520 U.S. 154, 162 (1997). If he fails either one of those two tests, the district

court lacks subject matter jurisdiction of his statutory claim. *Id.*

Thus, even if a plaintiff suing under an act of Congress meets the minimal constitutional requirements for standing, he additionally must meet the "zone of interests" test. *Id*. The breadth of a law's "zone of interests varies according to the provisions of law at issue," as "Congress legislates against the background of our prudential standing doctrine," and prudential standing requirements therefore can be "modified or abrogated by Congress. . . ." *Id.* at 162-63. As such, if it "cannot reasonably be assumed that Congress intended to permit the [plaintiff's] suit," the plaintiff lacks standing. *Clarke v. Sec. Indus. Ass'n*, 479 U.S. 388, 399 (1987).

In this case, the respondents, all six of whom are admitted "aliens . . . without employment authorization," invoked the FLSA to sue the petitioners, the aliens' alleged former employers, for "minimum and overtime wages" the aliens alleged (and the jury found) the petitioners wilfully had failed to pay (App. 2, 6). As the Eighth Circuit's opinion recounts, the FLSA mandates that "[e]very employer shall pay to each of his employees who in any workweek is engaged in commerce or in the production of goods for commerce, or is employed in an enterprise engaged in commerce or in the production of goods for commerce, wages at the [minimum wage rate]" (App. 11) (quoting 29 U.S.C. § 206(a)) (emphasis removed). It mandates additional overtime pay of at least "one and one-half the regular [hourly] rate" for "a workweek longer

than forty hours" (App. 11-12) (quoting 29 U.S.C. § 207(a)(1)).

At the same time, the IRCA absolutely prohibits employing or paying any wages to unauthorized aliens such as the respondents. 8 U.S.C. § 1324a. Titled "Unlawful Employment of Aliens," this section of the IRCA makes it "unlawful for a person or entity . . . to hire, or to recruit or refer for a fee, for employment in the United States an . . . unauthorized alien," that is, an alien who is not "lawfully admitted for permanent residence" or otherwise "authorized to be so employed by" federal law "or by the Attorney General." *Id.* at (a)(1)(A) and (h)(3). It prohibits employing unauthorized aliens both at the outset, in hiring, as well as any such "continuing employment." *Id.* at (a)(2).

Thus, as this Court has held,

> 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.

Hoffman, 535 U.S. at 148 (2002). Accordingly, the "IRCA . . . not only speaks directly to matters of employment but expressly criminalizes the only

employment relationship at issue in this case." *Id.* at 151 n.5.

For this reason, both before the District Court and on appeal, the petitioners explained that, as in *Egbuna*, a claim by unauthorized aliens to allegedly unpaid wages and overtime from previous "employment" cannot come within the zone of interests the FLSA seeks to protect, because the IRCA absolutely prohibits such employment or the payment of such wages in the first place (App. 2, 7-8).

The "zone of interest" standing requirement applies equally to the FLSA just as to any other act of Congress: that is, if a person's unpaid wage claim does not fall within the zone of interests Congress seeks to protect in the FLSA (under the present state of federal law), he or she lacks standing to invoke its provisions. 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 come within the FLSA's zone-of-interests so as to afford it standing to sue under the FLSA on behalf of its members. And every circuit has held that prisoners laboring in

prison work activities do not fall within the FLSA's zone of interests.[3]

In the decision below, the Eighth Circuit "disagree[d]" that unauthorized aliens whom the IRCA prohibits employing or paying any wages lack standing to bypass the IRCA and seek such wages under the FLSA (App. 2). Instead, it held "employers who unlawfully hire unauthorized aliens must otherwise comply with federal employment laws" as to those aliens, including paying them the wages that the IRCA prohibits them from being paid (App. 10). It held "unauthorized aliens may sue under the FLSA . . . to recover statutory damages for work actually performed," as opposed to work unperformed, because they are "workers" who qualify "as 'employees' under the FLSA," and thus "plainly fall within the zone of interests protected or regulated by" the FLSA (App. 20, 25).

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[3] *See Miller v. Dukakis*, 961 F.2d 7, 8 (1st Cir. 1992); *Danneskjold v. Hausrath*, 82 F.3d 37, 39 (2d Cir. 1996); *Tourscher v. McCullough*, 184 F.3d 236, 243 (3d 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); *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).

That conclusion conflicts with both this Court's decision in *Hoffman* and the Fourth Circuit's decision in *Egbuna*. Indeed, it equally conflicts with the accepted manner in which the zone-of-interests test applies to present claims under statutes. It is common that the terms of a later act of Congress necessarily must excise the ability of some class of litigants to have standing to sue or take some other action under an earlier act of Congress. *See*, *e.g.*, *United States v. Fausto*, 484 U.S. 439, 443-45 (1988) (under Civil Service Reform Act of 1978, civil servant lacked standing under Tucker Act of 1887 and Back Pay Act of 1967 to seek review of agency suspension and backpay decision); *Argentine Republic v. Amerada Hess Shipping Corp.*, 488 U.S. 428, 433-37 (1989) (under Foreign Sovereign Immunities Act of 1976, Liberian corporation lacked standing under 1789 Alien Tort Statute to sue Argentine government for damage to tanker by Argentine military forces); *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 137 (2000) (under later tobacco statutes, FDA lacked ability to enforce its own tobacco regulations against tobacco companies under the Food, Drug, and Cosmetic Act of 1938); *cf. United States v. Novak*, 476 F.3d 1041, 1043 (9th Cir. 2007) (despite anti-alienation provision of Employee Retirement Income Security Act of 1974, Mandatory Victims Restitution Act of 1996 authorized Government to enforce restitution orders against convicted criminal defendant's retirement plan).

This is because,

> At the time a statute is enacted, it may have a range of plausible meanings. Over time, however, subsequent acts can shape or focus those meanings. The "classic judicial task of reconciling many laws enacted over time, and getting them to 'make sense' in combination, necessarily assumes that the implications of a statute may be altered by the implications of a later statute." This is particularly so where the scope of the earlier statute is broad but the subsequent statutes more specifically address the topic at hand. . . . "[A] specific policy embodied in a later federal statute should control our construction of the [earlier] statute, even though it ha[s] not been expressly amended."

FDA, 529 U.S. at 143 (internal citations omitted).

In *Hoffman*, this Court applied this same analysis to the effect of the IRCA on an earlier employment statute, the NLRA, and held the IRCA's prohibition on paying wages to unauthorized aliens precluded such an alien from recovering under the earlier act. 535 U.S. at 151-52. In *Egbuna*, the Fourth Circuit did the same to the effect of the IRCA on Title VII, and held the IRCA's prohibition similarly precluded such an alien from having standing to sue.

Although the Eighth Circuit's decision below does not address *Egbuna*, it seeks to distinguish *Hoffman* by holding *Hoffman* was limited to the issue of whether the NLRB could "'award backpay to an

illegal alien for years of work *not* performed,'" as opposed to work the unauthorized alien did perform (App. 14) (quoting *Hoffman*, 535 U.S. at 149 (emphasis added by the Eighth Circuit)). It concluded that "the *Hoffman* court – after considering Congress's intervening enactment of the IRCA – reaffirmed its earlier holding in [*Sure-Tan*, *supra*] that the NLRA applies to the actual employment of unauthorized aliens" (App. 14-15).

The Eighth Circuit's suggestion that *Hoffman* somehow held unauthorized aliens are not entitled to "backpay . . . for . . . work not performed" but nonetheless have standing to seek unpaid wages for "actual employment" is simply incorrect. It is unsupported by any language in *Hoffman*, nor does the decision below quote any to support this notion.

Rather, *nothing* in *Hoffman* remotely suggests its holding is limited to wages due (but unlawful to be paid) for "work not performed," as opposed to wages due (but unlawful to have been paid) for work performed (App. 14). Notably, the Eighth Circuit's placement of a period after "work not performed" in its emphasized quotation from *Hoffman* (App. 14) is in error: the actual sentence reads that this Court would preclude backpay not merely for "work not performed," but also "*for wages that could not lawfully have been earned*, and for a job obtained in the first instance by a criminal fraud." 535 U.S. at 149 (emphasis added).

As well, the Court's broad language in *Hoffman* expressly (and logically) holds the opposite of the Eighth Circuit's conclusion: that unauthorized aliens are unentitled to claim *any* wages, as employing and paying them is absolutely prohibited by the IRCA in the first place. For, "allowing" an unauthorized alien to seek such wages "would unduly trench upon *explicit statutory prohibitions critical to federal immigration policy*, as expressed in IRCA. It would encourage the successful evasion of apprehension by immigration authorities, *condone prior violations of the immigration laws*, and encourage future violations." *Hoffman*, 535 U.S. at 151-52 (emphasis added). *Hoffman* holds the effect of the IRCA is that unauthorized aliens cannot use the judicial processes of the United States under preexisting employment statutes to recover "wages that could not lawfully have been earned. . . ." *Id.* at 149.

Allowing the respondents in this case to use the courts to recover wages that the IRCA prohibited them from being paid in the first place plainly "would . . . condone prior violations of the immigration laws" and "encourage the successful evasion of apprehension by immigration authorities. . . ." *Id.* at 151-52. The wages "could not lawfully have been earned. . . ." *Id.* at 149. *Hoffman* enjoins applying any federal employment statute as to allow any of these things. It

expresses no limitation on this principle. The Eighth Circuit's opinion was wrong to conclude otherwise.[4]

As *Hoffman*, *Egbuna*, and *Sure-Tan* explain, and as in other cases in which a later law more specifically foreclosed some previous, broad activity allowed under an earlier law, given the explicit statutory prohibitions critical to the IRCA, unauthorized aliens cannot fall under the "zone of interests" the FLSA seeks to protect in its grant of standing to sue for unpaid wages. As to unauthorized aliens, the IRCA prohibits those wages from being paid in the first place. It matters not whether the claim for wages was brought under the NLRA, FLSA, Title VII, or any other federal employment statute.

The application of the IRCA to the preexisting employment statutes in *Hoffman* and *Egbuna* boils down to one clear and simple rule: by foreclosing paying any wages of any kind to any unauthorized aliens, the IRCA equally forecloses the applicability to unauthorized aliens of the wage-recovery provisions of preexisting employment statutes. The Eighth Circuit's opinion, however, is devoid of any clear

[4] Similarly, the Panel's analogy of this case to the requirement that Al Capone pay federal income taxes on his illicit income (App. 10) is inapposite. Since its inception, and echoing U.S. Const. amend. XVI, the Internal Revenue Code has required income taxes to be paid broadly on "all income from whatever source derived," 26 U.S.C. § 61(a), unless another provision of the Code specifically excludes the income. Unlike the IRCA in this case, no later-enacted part of the Code exempts illicit income from taxation.

delineation of when an unauthorized alien may not invoke a preexisting employment statute, as in *Hoffman* and *Egbuna*, or when he may. This Court should grant its writ of certiorari to review this case so as to provide needed harmony between the application of federal wage-recovering employment statutes and the immigration laws. The most logical conclusion would be to extend to the FLSA the broad holding of *Hoffman* and its similar application in *Egbuna*.

III. The Department of Labor's position on which the Eighth Circuit relied – that affording unauthorized aliens standing to sue for unpaid wages under the FLSA actually supports the IRCA's prohibition on employing unauthorized aliens – is illogical and already was rejected by this Court in *Hoffman*.

Beyond its misreading and misapplication of *Hoffman* and the IRCA, the Eighth Circuit also rested its decision as to the interplay of the IRCA and FLSA on the "Department of Labor's position" (App. 16-18). As the Secretary of Labor argued to the Eighth Circuit, the Department believes "applying the FLSA to unauthorized aliens 'is essential to achieving the purposes of the FLSA to protect workers from substandard working conditions, to reduce unfair competition for law-abiding employers, and to spread work and thereby reduce unemployment by requiring employers to pay overtime compensation'"

(App. 17). It said it believed the FLSA and IRCA "work in tandem to discourage employers from hiring unauthorized workers by 'assur[ing] that the wages and employment of lawful residents are not adversely affected by the competition of illegal alien employees who are not subject to the standard terms of employment'" (App. 16) (quoting *Sure-Tan*, 467 U.S. at 893).

The Eighth Circuit, however, fails to note that the Department of Labor's position in this case (as to the FLSA) is identical to its position in *Hoffman* (as to the NLRA). There, it argued:

> Congress did not bar undocumented aliens from receiving back pay as a remedy for violations of federal labor laws, and indeed in IRCA it authorized increased enforcement of labor laws by the Department of Labor, in recognition of the fact that such enforcement (including the possibility of back pay awards for undocumented aliens) would deter employment of undocumented aliens and would therefore deter illegal immigration.

Br. of the Respondent in *Hoffman*, 535 U.S. at 137 (No. 00-1595), 2001 WL 1597748 at *15. This Court expressly rejected this position. *Hoffman*, 535 U.S. at 148-51.

For, in his dissent in *Hoffman*, Justice Breyer, even citing *Patel v. Quality Inn S.*, 846 F.2d 700 (11th Cir. 1988), the 1988 Eleventh Circuit decision holding unauthorized aliens had standing to sue under the FLSA despite the IRCA, advanced the same position as the Department in this case, criticizing

the *Hoffman* majority for "rest[ing] its conclusion upon the immigration laws' purposes" and reasoning that "the general purpose of the [IRCA]'s employment prohibition is to diminish the attractive force of employment," and "[t]o permit . . . backpay [to unauthorized aliens] could not significantly increase the strength of this magnetic force. . . ." 535 U.S. at 155 (Breyer, J., dissenting). The majority disagreed. *Id.* at 149.

And rightly so: ultimately, the position makes no sense. Requiring unauthorized aliens to be paid statutory minimum wage demonstrably would do nothing to lessen "the competition of illegal alien employees who are not subject to the standard terms of employment" (App. 16) (quoting *Sure-Tan*, 467 U.S. at 893). For, the unlawful "employers" still would be paying *less* than for a lawful worker, as the illicit payments would be unrecorded and in cash, there would be no recordkeeping or tax-planning costs, and the "employers" neither would withhold nor pay a share of FICA, Medicare, or state or federal income or unemployment taxes. Hiring and paying unauthorized aliens – now with judicial sanction of the otherwise black market – *still* would be far more lucrative than hiring a lawful worker. And, at the same time, it would necessitate the unpalatable result of the federal courts permitting (and enforcing) judicially that which Congress expressly has prohibited.

In *Hoffman* and *Egbuna*, this Court and the Fourth Circuit, respectively, saw this, too, and rejected calls to legalize this black market judicially in

order to grant unauthorized aliens under the NLRA and Title VII a way around the IRCA's prohibition on employing them. The Court should issue its writ of certiorari to clarify whether the FLSA's relationship with the IRCA should be different and, if so, how and why.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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United States Court of Appeals
For the Eighth Circuit

No. 12-2170

Elmer Lucas; Margarito Rodas; Gonzalo Leal; Feliciano Macario; Bernabe Villavicencio; Esvin Lucas,

Plaintiffs-Appellees

v.

Jerusalem Cafe, LLC; Farid Azzeh, Individually; Adel Alazzeh, Individually and as successor in interest to Jerusalem Cafe LLC, doing business as Jerusalem Cafe, LLC,

Defendants-Appellants.

Secretary of Labor

Amicus on Behalf of Appellee

Appeal from United States District Court
for the Western District of Missouri – Kansas City

Submitted: February 14, 2013
Filed: July 29, 2013.

Before RILEY, Chief Judge, LOKEN and SHEPHERD, Circuit Judges.

RILEY, Chief Judge.

For varying periods between June 2007 and March 2010, Elmer Lucas and five other aliens (collectively, workers), without employment authorization, toiled in the Jerusalem Cafe (Cafe), some for less than minimum wage and all without receiving overtime wages. The workers sued the Cafe, and its then-owner Farid Azzeh and manager Adel Alazzeh (collectively, employers), for willfully violating the Fair Labor Standards Act of 1938 (FLSA), 29 U.S.C. § 201, *et seq*. After a jury decided in the workers' favor, the district court[1] awarded the workers minimum and overtime wages, statutory liquidated damages, and legal fees. The district court denied the employers' motion for judgment as a matter of law, rejecting the argument that the workers, as aliens without work authorization, lacked standing to sue. The employers appeal, contending the FLSA does not apply to employers who illegally hire unauthorized aliens. We disagree. The FLSA does not allow employers to exploit any employee's immigration status or to profit from hiring unauthorized aliens in violation of federal law. Exercising our jurisdiction under 28 U.S.C. § 1291, we affirm.

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[1] The Honorable David Gregory Kays, United States District Judge for the Western District of Missouri.

I. BACKGROUND

A. Facts[2]

This case concerns the employers' failure to pay minimum and overtime wages between June 2007 and March 2010. During this period, Azzeh, the owner of the Jerusalem Cafe, and Alazzeh, who held a managerial role in the Cafe, paid the workers, in cash, at fixed weekly rates which did not vary based on overtime hours worked.

1. Workers

The six individuals who brought this suit are (1) Feliciano Macario, (2) Gonzalo Leal, (3) Elmer Lucas (Lucas), (4) Esvin Lucas (Esvin), (5) Margarito Rodas, and (6) Bernabe Villavicencio. Table 1 lists the jury's findings as to the workers' weekly hours, wages, and effective hourly wages during the period at issue in this case.

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[2] The appellants' statement of facts evinces a desire to retry some facts, but a jury has decided the disputed questions of fact. As usual in such cases, we recount "the facts in the light most favorable to the jury verdict." *Newhouse v. McCormick & Co.*, 110 F.3d 635, 637 (8th Cir. 1997).

Table 1

	Weekly Hours	Weekly Wage	Effective Hourly Wage
Feliciano Macario			
January 2008 to January 2010	77	$300	$3.90
Gonzalo Leal			
June 2007 to September 2008	77	$420	$5.45
September 2008 to March 2010	77	$500	$6.49
Elmer Lucas			
June 2007 to March 2008	77	$360	$4.68
March 2008 to September 2008	77	$480	$6.23
September 2008 to September 2009	77	$640	$8.31
September 2009 to March 2010	77	$560	$7.27
Esvin Lucas			
June 2007 to January 2010	66	$550	$8.33
January 2010 to March 2010	60	$500	$8.33
Margarito Rodas			
June 2007 to September 2008	77	$420	$5.45
September 2008 to March 2010	77	$500	$6.49

Bernabe Villavicencio			
June 2007 to July 2009	77	$800	$10.39
July 2009 to March 2010	77	$700	$9.09

On January 23, 2010, Macario called the police after Azzeh's and Alazzeh's nephew allegedly struck him. Fearing the police would discover Azzeh employed illegal aliens, Azzeh offered Macario $500 to drop the charges and return to work. Macario refused. The employers terminated Macario in January 2010, and also terminated the other workers' employment in March 2010 after the other workers refused to falsify an employment application to make it appear they had not been working for the Cafe before March 2010.

2. Employers' Account

In the face of overwhelming evidence to the contrary, Azzeh claimed photos and videos of the workers performing tasks in the restaurant showed the workers "volunteering" and "posing for picture[s]." Azzeh also claimed the workers' food handler cards, issued by the Kansas City, Missouri, Health Department, *see* Kan. City, Mo., Food Code § 8-304.11(I)(2), and listing the Cafe as the workplace, were obtained in order to allow the workers to "volunteer" in the restaurant. Having observed the trial, the district court called the employers' account a "fantastic story."

B. Procedural History

The workers filed an amended complaint in the Western District of Missouri on July 30, 2010, alleging the employers willfully failed to pay minimum and overtime wages in violation of the FLSA, 29 U.S.C. §§ 206(a), 207(a). On September 27, 2011, the district court granted the workers' motion in limine to preclude mention at trial of the workers' immigration status. The district court found the workers' immigration status "irrelevant" because they were seeking FLSA wages for previous work – not prospective relief, which would be unlawful under the Immigration Reform and Control Act of 1986 (IRCA), 8 U.S.C. § 1324a.

1. Trial

The district court held a four-day jury trial in November 2011. On the third day, Rodas testified during cross-examination that Azzeh "knew that he would get in trouble if he would have hired *illegals like us.*" (Emphasis added.) After discussion with counsel, the district court instructed the jury to "disregard the last statement made by this witness in its entirety." Later on the third day, during his cross-examination, Azzeh wished to answer the question why he kept no record of the workers' payments by testifying that he could not "I-9"[3] the workers. After

[3] The United States Citizenship and Immigration Services requires all employers to verify employment eligibility by

(Continued on following page)

discussion among counsel, the parties agreed to dissolve the order in limine, and the district court instructed the jury that the order had changed "in order to give . . . a clearer picture of what[ ] transpired here." Azzeh then testified he had never employed the workers – with the exception of Macario, whom he admitted hiring – because he "never hired illegals."

The jury found in the workers' favor. In accordance with the jury's verdict, the district court awarded $141,864.04 in actual damages for unpaid FLSA wages, $141,864.04 in liquidated damages based on the jury's finding that the employers willfully failed to pay FLSA wages, $150,627.00 in legal fees, and $6,561.63 in expenses.

2. Post-Trial Motions

The employers moved for judgment as a matter of law or a new trial, arguing the workers "as undocumented aliens" were "prohibited by law from receiving any wages . . . [and] lacked standing to sue for backpay under the [FLSA]." The district court rejected both arguments. First, denying the employers' motion for judgment as a matter of law, the district court found the standing argument was "a belated attempt by [the employers] to bring an affirmative defense" that the workers were not employed within

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properly completing a Form I-9, Employment Eligibility Verification Form, for each employee. *See* 8 C.F.R. § 274a.2.

the meaning of the FLSA, 29 U.S.C. § 203(e)(1). The employers waived that IRCA argument by failing to raise it until after trial, concluded the district court. On the question of Article III standing, which cannot be waived, the district court found the workers had standing to sue the employers because they (1) "suffered an injury in fact," (2) "this injury was the direct result of [the employers'] failure to pay the lawful wage," and (3) "the court's judgment will redress the [workers'] injuries."

Second, the district court denied the employers' motion for a new trial, finding no error in the order precluding any reference to the workers' immigration status. The district court observed that "virtually all of the courts that have considered th[e] issue" concluded immigration status "was irrelevant . . . because illegal aliens are not precluded from recovering unpaid wages under the FLSA." Even if its order were erroneous, the district court found the error would be harmless because the employers ultimately were able to discuss the workers' immigration status in the employer's case and argue they would not have hired unauthorized workers. Rejecting the employers' contention that they were prejudiced by their inability to discuss the workers' immigration status from the beginning, the district court explained the employers'

> testimony that they never employed the [workers], and that [the workers] simply occasionally "*volunteered*" to work at the restaurant without pay was contradicted by a

> mountain of more credible evidence, including a video of [the workers] working in the restaurant's kitchen and the testimony of two disinterested police officers who, in attempting to defuse a dispute, discussed with one of the [employers] how [the workers] would be paid for their last days at work. Thus, even had [the employers] been allowed to reference [the workers'] immigration status, the weight of the evidence *overwhelmingly established* that [the workers] were employees of the [employers], not volunteers.

(Second emphasis added). The employers filed a timely notice of appeal.

II. DISCUSSION

"We review *de novo* a denial of a motion for judgment as a matter of law," *Marez v. Saint-Gobain Containers, Inc.*, 688 F.3d 958, 962 (8th Cir. 2012), and a decision that a plaintiff has standing, *see Hargis v. Access Capital Funding, LLC*, 674 F.3d 783, 790 (8th Cir. 2012). We give "high deference" to a district court's denial of a motion for a new trial, reviewing it for an abuse of discretion. *PFS Distrib. Co. v. Raduechel*, 574 F.3d 580, 592 (8th Cir. 2009). We also "defer[ ] to a district court's familiarity with the details of the case and its greater experience in evidentiary matters," *Sprint/United Mgmt. Co. v. Mendelsohn*, 552 U.S. 379, 384 (2008), reversing a district court's evidentiary ruling "only if the . . . 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," *Rodrick v. Wal-Mart Stores E., L.P.*, 666 F.3d 1093, 1096 (8th Cir. 2012) (internal quotation marks omitted) (quoting *Wegener v. Johnson*, 527 F.3d 687, 690 (8th Cir. 2008)).

A. FLSA Applicability to Unauthorized Aliens

The only circuit court to address the question directly, *see Patel v. Quality Inn S.*, 846 F.2d 700 (11th Cir. 1988); numerous district courts, including the one in this case;[4] and the Secretary of Labor (Secretary) all agree: employers who unlawfully hire unauthorized aliens must otherwise comply with federal employment laws. The employers' argument to the contrary rests on a legal theory as flawed today as it was in 1931 when jurors convicted Al Capone of failing to pay taxes on illicit income.[5] As Justice

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[4] *See*, *e.g.*, *Chellen v. John Pickle Co.*, 446 F. Supp. 2d 1247, 1279-81, 1286 (N.D. Okla. 2006); *Zavala v. Wal-Mart Stores, Inc.*, 393 F. Supp. 2d 295, 321-25 (D.N.J. 2005); *Galaviz-Zamora v. Brady Farms, Inc.*, 230 F.R.D. 499, 501-03 (W.D. Mich. 2005); *Flores v. Amigon*, 233 F. Supp. 2d 462, 463-64 (E.D.N.Y. 2002); *Singh v. Jutla & C.D. & R's Oil, Inc.*, 214 F. Supp. 2d 1056, 1060-62 (N.D. Cal. 2002); *Liu v. Donna Karan Int'l, Inc.*, 207 F. Supp. 2d 191, 192 (S.D.N.Y. 2002).

[5] *See* Meyer Berger, *Capone Convicted of Dodging Taxes; May Get 17 Years*, N.Y. Times, October 17, 1931, available at http://www.nytimes.com/learning/general/onthisday/big/1017.html#article.

Oliver Wendell Holmes explained in *United States v. Sullivan*, 274 U.S. 259, 263 (1927), there is no "reason why the fact that a business is unlawful should exempt it from paying the taxes that if lawful it would have to pay." Here, too, there is no "reason why the fact that" the employers unlawfully hired the workers "should exempt" them "from paying the" wages "that if lawful" they "would have to pay." *Id.* "Certainly there is no reason for treating" the employers "more leniently." *Rutkin v. United States*, 343 U.S. 130, 137 (1952). Like the Eleventh Circuit, we hold that aliens, authorized to work or not, may recover unpaid and underpaid wages under the FLSA. *See Patel*, 846 F.2d at 706 ("[U]ndocumented workers are 'employees' within the meaning of the FLSA and . . . such workers can bring an action under the act for unpaid wages and liquidated damages.").

1. Plain Text of the FLSA

Because this case is one of statutory interpretation, our "starting point . . . is the existing statutory text." *Lamie v. U.S. Tr.*, 540 U.S. 526, 534 (2004). As to minimum wages, the text of the FLSA states "[e]very *employer* shall pay to each of his *employees* who in any workweek is engaged in commerce or in the production of goods for commerce, or is employed in an enterprise engaged in commerce or in the production of goods for commerce, wages at the [minimum wage rate]." 29 U.S.C. § 206(a) (emphasis added). The FLSA's overtime wage scheme is more complex, but the crux is simple: "[n]o employer shall

employ any of his employees . . . for a workweek longer than forty hours unless such employee receives compensation for his employment in excess of the hours above specified at a rate not less than one and one-half times the regular rate at which he is employed." *Id.* § 207(a)(1).

The FLSA's sweeping definitions of "employer" and "employee" unambiguously encompass unauthorized aliens:

> (d) "Employer" includes any person acting directly or indirectly in the interest of an employer in relation to an employee and includes a public agency, but does not include any labor organization (other than when acting as an employer) or anyone acting in the capacity of officer or agent of such labor organization.
>
> (e)(1) [With certain statutorily defined exceptions], the term "employee" means *any* individual *employed* by an employer.
>
> . . . .
>
> (g) "Employ" includes to suffer or permit to work.

29 U.S.C. § 203(d), (e)(1), (g) (emphasis added). During debate over the FLSA, then-Senator Hugo Black (who, shortly before his elevation to the Supreme Court, sponsored the bill that ultimately became the FLSA) called the FLSA's "definition of employee . . . the broadest definition that has ever been included in any one act." 81 Cong. Rec. 7656-57 (1937).

Importantly, Congress showed elsewhere in the statute that it "knows how to" limit this broad definition "when it means to," *City of Milwaukee v. Illinois & Michigan*, 451 U.S. 304, 329 n.22 (1981), and it did not do so with respect to unauthorized aliens. *See* 29 U.S.C. § 203(e). The FLSA contains detailed limitations for certain governmental employees, *see id.* § 203(e)(2); family members engaged in agricultural work, *see id.* § 203(e)(3); state, local, and interstate governmental volunteers, *see id.* § 203(e)(4); and "individuals who volunteer their services solely for humanitarian purposes to private non-profit food banks and who receive from the food banks groceries," *id.* § 203(e)(5). Nowhere in this list do we see any indication Congress meant to exclude unauthorized aliens from the FLSA's broad application to "any individual" whom an employer "suffer[s] or permit[s] to work." *Id.* § 203(e)(1), (g).

As the Supreme Court has long emphasized, "where, as here, the statute's language is plain, 'the sole function of the courts is to enforce it according to its terms.'" *United States v. Ron Pair Enters., Inc.*, 489 U.S. 235, 241 (1989) (quoting *Caminetti v. United States*, 242 U.S. 470, 485 (1917)). Because the FLSA by its plain terms protects aliens working without authorization, the employers' argument must fail unless the employers can point to a different statutory basis for limiting "the broadest definition that has ever been included in any one act," 81 Cong. Rec. at 7657.

2. IRCA

The employers point to the Supreme Court's decision in *Hoffman Plastic Compounds, Inc. v. NLRB*, 535 U.S. 137 (2002), for the proposition that the IRCA implicitly amended the FLSA to exclude unauthorized aliens. The employers misread *Hoffman*, ignore the relevant agency's reasonable interpretations of the FLSA and the IRCA, and "ascribe to Congress an intent at variance with the purpose[s] of th[e] statute[s]," *Wyandotte Transp. Co. v. United States*, 389 U.S. 191, 200 (1967).

a. *Hoffman*

In *Hoffman*, the Supreme Court held that unauthorized aliens may not receive backpay after being terminated for engaging in union activities protected by the National Labor Relations Act (NLRA), 29 U.S.C. §§ 151-169. *See Hoffman*, 535 U.S. at 151-52. The issue in *Hoffman* was not, as the employers seem to think, whether the NLRA's broad definitions of "employer" and "employee," *see* 29 U.S.C. § 152, excluded unauthorized aliens from all protection by the National Labor Relations Board (NLRB). *See Hoffman*, 535 U.S. at 142-43. Rather, the question in *Hoffman* was whether the NLRB's remedial power extended far enough to "allow it to award backpay to an illegal alien for years of work *not* performed." *Id.* at 149 (emphasis added). Far from concluding the NLRA did not protect unauthorized aliens for work *actually* performed, the *Hoffman* court – after

considering Congress's intervening enactment of the IRCA – reaffirmed its earlier holding in *Sure-Tan, Inc. v. NLRB*, 467 U.S. 883 (1984), that the NLRA applies to the *actual* employment of unauthorized aliens. *See Hoffman*, 535 U.S. at 151-52; *Sure-Tan*, 467 U.S. at 893-94.

Not only is our reading of *Hoffman* consistent with the overwhelming majority of post-*Hoffman* decisions by courts at every level, but "[n]o circuit court has reached a contrary conclusion," *Agri Processor Co. v. NLRB*, 514 F.3d 1, 5-6 (D.C. Cir. 2008). In *Madeira v. Affordable Hous. Found., Inc.*, 469 F.3d 219 (2d Cir. 2006), the Second Circuit explained:

> [A]n order requiring an employer to pay his undocumented workers the minimum wages prescribed by the [FLSA] for labor actually and already performed. . . . does not . . . condone that violation or continue it. It merely ensures that the employer does not take advantage of the violation by availing himself of the benefit of undocumented workers' past labor without paying for it in accordance with minimum FLSA standards.

Id. at 243. Interpreting an analogous definition of "employee" in *Agri Processor*, the D.C. Circuit found "absolutely no evidence that in passing IRCA Congress intended to repeal the NLRA to the extent its definition of 'employee' include[d] undocumented aliens." *Agri Processor*, 514 F.3d at 5.

Shortly after our court heard argument in this case, the Eleventh Circuit reaffirmed its decision in

Patel "that undocumented aliens may recover their unpaid wages under the FLSA." *Lamonica v. Safe Hurricane Shutters, Inc.*, 711 F.3d 1299, 1306 (11th Cir. 2013). Rejecting arguments similar to those advanced by the employers here, the Eleventh Circuit concluded "the IRCA does not express Congress's clear and manifest intent to exclude undocumented aliens from the protection of the FLSA." *Id.* at 1308.

b. Agency Interpretation

As the Secretary explains, there is no conflict between the FLSA and the IRCA. Both statutes work in tandem to discourage employers from hiring unauthorized workers by "assur[ing] that the wages and employment of lawful residents are not adversely affected by the competition of illegal alien employees who are not subject to the standard terms of employment," *Sure-Tan*, 467 U.S. at 893.

The Department of Labor's position that the FLSA applies to aliens without employment authorization is longstanding and consistent. In 1942, just four years after the FLSA's passage, the Department of Labor's "Wage and Hour Administrator opined that alien prisoners of war were covered by the [FLSA] and therefore were entitled to be paid the minimum wage." *Patel*, 846 F.2d at 703. Since then, in case after

case, the Department of Labor has taken the same position it takes here.[6]

In the Secretary's amicus brief filed in this case, the Secretary explains that applying the FLSA to unauthorized aliens "is essential to achieving the purposes of the FLSA to protect workers from substandard working conditions, to reduce unfair competition for law-abiding employers, and to spread work and thereby reduce unemployment by requiring employers to pay overtime compensation." Given the Department's decades-long consistency and the Secretary's "specialized experience and broader investigations and information" in these matters, we think the Secretary's position is persuasive and

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[6] *See*, *e.g.*, *Patel*, 846 F.2d at 703 ("The Department of Labor . . . supports Patel's position"); *Donovan v. Burgett Greenhouses, Inc.*, 759 F.2d 1483, 1485 (10th Cir. 1985) (involving a suit by the Secretary of Labor in his official capacity to enforce the FLSA rights of "illegal aliens who were paid less than a dollar per hour and were not paid overtime compensation"); *Brennan v. El San Trading Corp.*, 73 Lab. Cas. 33,032, 1973 WL 991, at *1 (W.D. Tex. Dec.26, 1973) (addressing a suit by the Secretary in his official capacity); Dep't of Labor's Br., *Josendis v. Wall to Wall Residence Repairs, Inc.*, No. 09-12266 (11th Cir. dated Aug. 26, 2010), *available at* http://www.dol.gov/sol/media/briefs/josendis(A)-8-26-2010.pdf; *see also* U.S. Dep't of Labor, Wage and Hour Div., "Fact Sheet # 48: Application of U.S. Labor Laws to Immigrant Workers: Effect of Hoffman Plastics decision on laws enforced by the Wage and Hour Division" (rev. July 2008), *available at* https://www.dol.gov/whd/regs/compliance/whdfs48.pdf ("The Department's Wage and Hour Division will continue to enforce the FLSA . . . without regard to whether an employee is documented or undocumented.").

merits *Skidmore* deference – to the extent there is any statutory ambiguity. *Skidmore v. Swift & Co.*, 323 U.S. 134, 139 (1944); *see also Godinez-Arroyo v. Mukasey*, 540 F.3d 848, 850 (8th Cir. 2008).

c. Congressional Purpose

We agree with the Secretary's position, independent of any deference to the Department of Labor's expertise, because Congress's purposes in enacting the FLSA and the IRCA are in harmony. The IRCA unambiguously prohibits hiring unauthorized aliens, and the FLSA unambiguously requires that any unauthorized aliens – hired in violation of federal immigration law – be paid minimum and overtime wages. The IRCA and FLSA together promote dignified employment conditions for those working in this country, regardless of immigration status, while firmly discouraging the employment of individuals who lack work authorization. "If an employer realizes that there will be no advantage under the" FLSA "in preferring [unauthorized] aliens to legal resident workers, any incentive to hire such . . . aliens is correspondingly lessened." *Sure-Tan*, 467 U.S. at 893. Exempting unauthorized aliens from the FLSA would frustrate the purposes of the IRCA, for unauthorized workers' "acceptance . . . of jobs on substandard terms as to wages and working conditions can seriously depress wage scales and working conditions of citizens and legally admitted aliens." *De Canas v. Bica*, 424 U.S. 351, 356-57 (1976).

Holding employers who violate federal immigration law and federal employment law liable for both violations advances the purpose of federal immigration policy by "offset[ting] what is perhaps the most attractive feature of [unauthorized] workers – their willingness to work for less than the minimum wage." *Patel*, 846 F.2d at 704. For this reason, prohibiting employers from hiring unauthorized aliens is in harmony with requiring employers – including those who break immigration laws by hiring unauthorized workers – to provide fair working conditions and wages. Both (1) the legislative history of the IRCA, which we reference "for those who find legislative history useful," *United States v. Tinklenberg*, 563 U.S. ___, ___, 131 S. Ct. 2007, 2015 (2011), and (2) "our steadfast canons of statutory construction," *United States v. Johnson*, 703 F.3d 464, 468 (8th Cir. 2013), confirm this point.

First, the House Committee on Education and Labor's report on the IRCA explained Congress did

> *not* intend that any provision of [the IRCA] would limit the powers of State or Federal labor standards agencies such as . . . *the Wage and Hour Division of the Department of Labor* . . . to remedy unfair practices committed against undocumented employees for exercising their rights before such agencies or for engaging in activities protected by these agencies. To do otherwise would be *counterproductive* of our intent to limit the hiring of undocumented employees and the depressing

> effect on working conditions caused by their employment.

H.R. Rep. No. 99-682(II), at 1 (1986), *reprinted in* 1986 U.S.C.C.A.N. 5757, 5758 (emphasis added). When Congress passed the IRCA, at least the authors of this report expected the FLSA would continue to protect unauthorized aliens from substandard working conditions and wages.

Second, § 111(d) of the IRCA "authorized to be appropriated, . . . *such sums as may be necessary* to the Department of Labor for enforcement activities of the *Wage and Hour Division* . . . in order to deter the employment of unauthorized aliens and *remove the economic incentive for employers to exploit and use such aliens.*" Pub.L. No. 99-603, § 111(d), 100 Stat. 3359, 3381 (1986). Presuming, as the employers do, that the IRCA impliedly exempts unauthorized aliens from the protections of the FLSA would render this section "mere surplusage," *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 174 (1803). No "sums" would "be necessary" to enforce the FLSA as to unauthorized aliens if the FLSA did not apply to their employment. § 111(d), 100 Stat. at 3381. A reading that turns an entire subsection into a meaningless aside "is inadmissible, unless the words require it." *Marbury*, 5 U.S. (1 Cranch) at 174. The IRCA's words do not require it, so "the presumption against surplusage [is] decisive." *Johnson*, 703 F.3d at 468.

For these reasons, we hold that unauthorized aliens may sue under the FLSA, 29 U.S.C. §§ 206(a),

207(a), 216(b), to recover statutory damages for work actually performed.

B. Standing

Because the FLSA gives the workers a right to sue the employers and obtain a real remedy for a statutory wrong, the workers have both Article III and prudential standing to recover damages from the employers.

1. Article III Standing

The employers violated the FLSA by paying the workers substandard wages, which means the workers' suit to recover damages is a justiciable "Case [ ]" or "Controvers[y]" under Article III. U.S. Const. art. III, § 2; *see Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560-61 (1992). First, the underpayment for *actual* work was "an 'injury in fact.'" *Id.* at 560. Second, that underpayment "fairly can be traced to the challenged action of the defendant[s]." *Simon v. E. Ky. Welfare Rights Org.*, 426 U.S. 26, 41 (1976). Third, the district court's judgment, awarding actual and liquidated damages for the employers' FLSA violations, was a "favorable decision" providing "redress[ ]" in the form of financial damages. *Id.* at 38.

2. Prudential Standing

The employers did not raise their prudential standing argument until after the jury reached its verdict and the district court entered judgment in the workers' favor, so if a challenge alleging a lack of prudential standing is waivable, the employers resoundingly waived it. *See*, *e.g.*, *Ensley v. Cody Res., Inc.*, 171 F.3d 315, 320 (5th Cir. 1999) (holding a defendant waived a challenge to prudential standing by objecting "too late," after the plaintiff's case-in-chief). But our court has never directly decided whether prudential standing is a waivable exercise in judicial self-restraint or a jurisdictional bar "'determining the power of the court to entertain the suit.'" *Urban Contractors Alliance of St. Louis v. Bi-State Dev. Agency*, 531 F.2d 877, 881 (8th Cir. 1976) (quoting *Warth v. Seldin*, 422 U.S. 490, 498 (1975)).

Some of our cases have referred to prudential standing in jurisdictional terms. *See*, *e.g.*, *Delorme v. United States*, 354 F.3d 810, 815 (8th Cir. 2004) ("A party invoking federal jurisdiction must establish that he has met the requirements of both constitutional and prudential standing."); *Starr v. Mandanici*, 152 F.3d 741, 750 (8th Cir. 1998) ("Assuming, *arguendo*, that the Article III requirements of standing were fulfilled, this court still lacks jurisdiction

because [the plaintiff] cannot satisfy the judicially-imposed prudential standing principles.").[7] Other cases have more carefully distinguished between jurisdictional power and self-imposed judicial restraint. *See*, *e.g.*, *Miller v. Redwood Toxicology Lab., Inc.*, 688 F.3d 928, 934 (8th Cir. 2012) ("'Constitutional and prudential standing are about, respectively, the constitutional power of a federal court to resolve a dispute and the wisdom of so doing.'") (quoting *Graden v. Conexant Sys., Inc.*, 496 F.3d 291, 295 (3d Cir. 2007)); *Cent. S. Dakota Coop. Grazing Dist. v. Sec'y of the USDA*, 266 F.3d 889, 895 (8th Cir. 2001) ("The issue of standing implicates constitutional limitations on federal court jurisdiction and prudential limitations on the exercise thereof."); *cf. Henderson ex rel. Henderson v. Shinseki*, 562 U.S. ___, ___, 131 S.Ct. 1197, 1202-03 (2011) ("We have urged that a rule should not be referred to as jurisdictional unless it governs a court's *adjudicatory capacity*, that is, its subject-matter or personal jurisdiction." (emphasis added)).

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[7] We do not read these case references to "jurisdiction" to have decided the question whether prudential standing governs our adjudicatory capacity. *See*, *e.g.*, *Delorme*, 354 F.3d at 817 (relying solely on an absence of "constitutional standing" to affirm dismissal). To the extent these cases turned on missing prudential standing, its absence gave us a reason to decline to *exercise* jurisdiction. *See*, *e.g.*, *Starr*, 152 F.3d at 750 ("[S]tanding 'involves both constitutional limitations on federal-court jurisdiction and *prudential* limitations on its *exercise*.'" (emphasis added) (quoting *Warth*, 422 U.S. at 498)).

We are reluctant – without the benefit of dedicated briefing, which the parties have not provided – to venture into the "deep and important circuit split on this important issue." *Grocery Mfrs. Ass'n v. EPA*, 693 F.3d 169, 185 (D.C. Cir. 2012) (Kavanaugh, J., dissenting). *Compare id.* at 172, 179-80 (majority opinion) (dismissing for "lack of jurisdiction" because of a failure "to demonstrate prudential standing"), *with, e.g.*, *Bd. of Miss. Levee Comm'rs v. EPA*, 674 F.3d 409, 417 (5th Cir. 2012) ("Unlike constitutional standing, prudential standing arguments may be waived."); *Rawoof v. Texor Petroleum Co.*, 521 F.3d 750, 756 (7th Cir. 2008) ("Prudential-standing doctrine is not jurisdictional in the sense that Article III standing is." (internal quotation omitted)); *Finstuen v. Crutcher*, 496 F.3d 1139, 1147 (10th Cir. 2007) (same); *Gilda Indus., Inc. v. United States*, 446 F.3d 1271, 1280 (Fed. Cir. 2006) (holding the government defendant waived any challenge to the plaintiff's lack of prudential standing by failing to raise the issue in its brief). Though the prudential standing question lies near the heart of this case, we need not resolve the issue in order to resolve this appeal.

Regardless of any waiver by the employers, the workers have prudential standing. A plaintiff has prudential standing to bring a claim if "the constitutional or statutory provision on which the claim rests properly can be understood as granting persons in the plaintiff's position a right to judicial relief." *Warth*, 422 U.S. at 500. Here, Congress has spoken unambiguously: "[a]ny employer who violates the [minimum

and overtime wage] provisions of [the FLSA] *shall* be liable to the employee or employees affected in the amount of their unpaid minimum wages, or their unpaid overtime compensation, as the case may be, and in an additional equal amount as liquidated damages." 29 U.S.C. § 216(b) (emphasis added). Because the workers here are "employees" under the FLSA, *see* 29 U.S.C. § 203(e), they plainly fall within the "zone of interests protected or regulated by" § 216(b). *Bennett v. Spear*, 520 U.S. 154, 162 (1997).

C. Suppression of Evidence

Having decided the FLSA protects unauthorized aliens and the workers have standing to sue the employers for violating the FLSA, we swiftly reject the employers' challenge to the district court's decision to suppress evidence related to the workers' immigration status.

Our review of the district court's evidentiary rulings is highly deferential, "particularly . . . with respect to [Federal Rule of Evidence] 403" because the district court is better positioned than we are to weigh the probative value of a piece of evidence, in context, against its prejudicial effect. *Sprint/United*, 552 U.S. at 384. Because the workers were seeking redress only for work actually performed, the district court reasonably concluded any reference to the workers' immigration status would be substantially more prejudicial than probative under Rule 403.

Even if the district court's exercise of discretion were ill-advised, "affirmance would [not] result in 'fundamental unfairness,'" *Rodrick*, 666 F.3d at 1096 (quoting *Wegener*, 527 F.3d at 690), because, as the district court reasoned, the "mountain of more credible evidence" supporting the workers' case towers over any potential harm. Furthermore, the order in limine was eventually dissolved, leaving the employers free to testify regarding the workers' lack of employment authorization, and the employers argued the Cafe never employed the workers because the employers "never hired illegals."

The employers have fallen well short of the threshold required for us to reverse the district court's evidentiary ruling.

III. CONCLUSION

Consistent with the principle that breaking one law does not give license to ignore other generally applicable laws, we affirm.

LOKEN, Circuit Judge, concurring.

I join Chief Judge Riley's thorough opinion for the court with the exception of Part II.A.2.c.

I also note that, as in *Lamonica v. Safe Hurricane Shutters, Inc.*, 711 F.3d 1299 (11th Cir. 2013), appellants have not challenged on appeal the award of liquidated damages under the Fair Labor Standards

Act. We therefore do not consider that issue. But in my view, the question whether the Supreme Court's decision in *Hoffman Plastic Compounds, Inc. v. NLRB*, 535 U.S. 137 (2002), may require a modified analysis of the liquidated damages issue, at least in some cases, is not free from doubt. *See Madeira v. Affordable Housing Found., Inc.*, 469 F.3d 219, 255 (2d Cir. 2006) (Walker, J., concurring); *Rivera v. NIBCO, Inc.*, 384 F.3d 822, 833-35 (9th Cir. 2004) (Bea, J., dissenting from the denial of rehearing en banc).

IN THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF MISSOURI WESTERN DIVISION

ELMER LUCAS, et. al., Plaintiffs, v. JERUSALEM CAFÉ, LLC, et. al., Defendants.	))))))))	Case No. 4: 10-CV-00582-DGK

JUDGMENT AND ORDER REGARDING DAMAGES

Plaintiffs brought this case under the Fair Labor Standards Act ("FLSA") alleging Defendants failed to pay them the applicable minimum wage and/or all the overtime wages they were due. After a four day trial the jury returned a verdict in the Plaintiffs' favor. The verdict form contained a series of questions, the answers to which form the basis for the damages calculations in this case.

Now before the Court is Plaintiffs' Damages Brief (doc. 80), Defendants' Response (doc. 82), and Plaintiffs' Reply (doc. 83). Plaintiffs calculate that the total amount of unpaid minimum wages and unpaid overtime in this case is $141,864.04, and ask the Court to award an equal amount in liquidated damages, for a

total award of $283,728.08.[1] Defendants do not contest Plaintiffs' calculations, but argue that the Court should not award liquidated damages.

Finding Plaintiffs' calculations are correct and that liquidated damages are appropriate, the Court awards Plaintiffs the following damages against Defendants jointly and severally: Gonzalo Leal – $42,998.64; Elmer Lucas – $44,527.40; Esvin Lucas – $30,752.46; Feliciano Macario – $68,680.30; Margarito Rodas – $42,998.64; Bernabe Villavicencio – $53,770.64.

Discussion

A. Plaintiffs' calculations of damages are correct.

Plaintiffs have submitted a detailed calculation of damages for unpaid minimum wages and overtime. Defendants do not contest these calculations. The Court has independently reviewed these calculations and finds they are accurate.[2] Accordingly, the Court

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[1] The FLSA also provides for a statutory award of attorneys' fees and costs which will be determined after subsequent briefing.

[2] The Court did find a typographical error in Feliciano Macario's calculations. Under the "July 2009 to January 2010" heading, the weekly hours worked is listed as 82. This is a typographical error. The jury found Mr. Macario worked 77 hours a week. His rate of pay calculation, however, was made using the correct number of hours, 77, so the damages calculation is correct.

adopts these calculations. They are attached as Appendix A to this order.

B. Plaintiffs are entitled to liquidated damages.

The FLSA provides that, in addition to unpaid minimum wage and overtime, a defendant is liable for liquidated damages in an amount equal to the amount of actual damages. 29 U.S.C. § 216(b). Liquidated damages are compensatory, not punitive, because they "account for the fact that actual damages, such as costs to the employee arising from the delay in receiving wages, may be difficult to calculate and prove." *Fenton v. Farmers Ins. Exch.*, 663 F. Supp. 2d 718, 728 (8th Cir. 2009).

Under 29 U.S.C. § 260 the Court has discretion whether to award liquidated damages. However, an award "is mandatory unless the employer can show good faith and reasonable grounds for believing that it was not in violation of the FLSA." *Jarrett v. ERC Prop., Inc.*, 211 F.3d 1078, 1083 (8th Cir. 2000). This "'burden is a difficult one, with double damages being the norm and single damages the exception.'" *Chao v. Barbeque Ventures, LLC*, 547 F.3d 938, 941-42 (8th Cir. 2008), quoting *Herman v. RSR Sec. Servs. Ltd.*, 172 F.3d 132, 142 (2nd Cir. 1999). "To demonstrate good faith, employers must show an honest effort to discover and follow the FLSA's requirements." *Fenton*, 663 F. Supp. 2d at 728. Where – as here – the jury has found that an employer has violated the FLSA willfully, "it is hard

to mount a serious argument" that the employer "has nonetheless acted in good faith." *Jarrett*, 211 F.3d at 1084.

In the present case, Defendants do not even attempt to argue that they had good faith and reasonable grounds for believing that they were in compliance with the FLSA. Nor could they. There is no evidence on the record that Defendants intended to comply with the FLSA with respect to Plaintiffs. On the contrary, the evidence shows Defendants intentionally and systematically evaded federal law, paying Plaintiffs under the table and concocting a fantastic story that Plaintiffs volunteered to work for them without pay. To avoid liquidated damages, Defendants instead argue that under the Immigration Reform and Control Act of 1986 ("IRCA"), 8 U.S.C. § 1324a, which makes it unlawful to hire an unauthorized alien,[3] Plaintiffs "receipt of *any* wages is patently *unlawful*." Resp. at 2 (emphasis in original).

Assuming that Defendants can even raise this argument for the first time in a post-trial motion, the Court finds there is no merit to it. In *Patel v. Quality Inn South* the Eleventh Circuit Court of Appeals considered this specific argument and rejected it. 846 F.2d 700 (11th Cir. 1988). It held, "[N]othing in the

[3] By "unauthorized alien" the Court means a non-citizen who is not an alien lawfully admitted for permanent residence, or authorized to be employed by the law or the Attorney General. *See* 8 U.S.C. § 1324a(h)(3).

IRCA or its legislative history suggests that Congress intended to limit the rights of undocumented aliens under the FLSA. To the contrary, the FLSA's coverage of undocumented aliens is fully consistent with the IRCA and the policies behind it." *Id.* at 704. The Eleventh Circuit also noted that in "section 111(d) [of the IRCA] Congress specifically authorized the appropriation of additional funds for increased FLSA enforcement on behalf of undocumented aliens." *Id.* "This provision would make little sense if Congress had intended the IRCA to repeal the FLSA's coverage of undocumented aliens." *Id.*

The law here is clear. While the IRCA forbids employers from hiring unauthorized alien and forbids unauthorized aliens from working in the United States, if an employer decides to break the law and hire an unauthorized alien, that employer must pay wages at a rate that complies with the FLSA. Consequently, as this Court previously held in its September 27, 2011 Order, "[Plaintiffs'] immigration status is irrelevant. Illegal aliens have a right to recover unpaid wages under the FLSA. *Jin-Ming Lin v. Chinatown Restaurant Corp.*, 771 F. Supp. 2d 185, 190 (D. Mass. 2011)."

Because Defendants have not carried their burden to show good faith compliance with the FLSA, an award of liquidated damages is appropriate.

Conclusion

The Court awards Plaintiffs the following damages, which include liquidated damages, against Defendants jointly and severally: Gonzalo Leal – $42,998.64; Elmer Lucas – $44,527.40; Esvin Lucas – $30,752.46; Feliciano Macario – $68,680.30; Margarito Rodas – $42,998.64; Bernabe Villavicencio – $53,770.64.

IT IS SO ORDERED.

DATE: December 12, 2011

/s/ Greg Kays
GREG KAYS, JUDGE
UNITED STATES
DISTRICT COURT

EXHIBIT A

Calculation of Unpaid Overtime and Unpaid Minimum Wage

Gonzalo Leal

June 2007 to July 2007	
$420/week, 77 hours/week, $5.15 minimum wage, regular hourly rate of pay =	$5.45
OT: $2.725/hour x 37 hours x 6 weeks =	$604.95
July 2007 to July 2008	
$420/week, 77 hours/week, $5.85 minimum wage, regular rate of pay =	$5.45
MW: $0.40/hour x 77 hours/week x 52 weeks =	$1,601.60
OT: $2.925/hour x 37 hours x 52 weeks =	$5,627.70

July 2008 to September 2008	
$420/week, 77 hours/week, $6.55	
minimum wage, regular rate of pay =	$5.45
MW: $1.10/hour x 77 hours/week x 8 weeks =	$677.60
OT: $3.275/hour x 37 hours x 8 weeks =	$969.40
September 2008 to July 2009	
$500/week, 77 hours/week, $6.55	
minimum wage, regular rate of pay =	$6.49
MW: $0.06/hour x 77 hours/week x 45 weeks =	$207.90
OT: $3.275/hour x 37 hours x 45 weeks =	$5,452.88
July 2009 to March 2010	
$500/week, 77 hours/week, $7.25	
minimum wage, regular rate of pay =	$6.49
MW: $0.76/hour x 77 hours/week x 33 weeks =	$1,931.16
OT: $3.625/hour x 37 hours x 33 weeks =	$4,426.13
Minimum wage underpayment:	**$4,418.26**
Unpaid overtime:	**$17,081.06**
Total, before liquidated damages:	**$21,499.32**

Elmer Lucas

June 2007 to July 2007	
$360/week, 77 hours/week, $5.15 minimum	
wage, regular hourly rate of pay =	$4.68
MW: $0.47/hour x 77 hours/week x 6 weeks =	$217.14
OT: $2.575/hour x 37 hours x 6 weeks =	$571.65
July 2007 to March 2008	
$360/week, 77 hours/week, $5.58 minimum	
wage, regular hourly rate of pay =	$4.68
MW: $1.17/hour x 77 hours/week x 34 weeks =	$3,063.06
OT: $2.925/hour x 37 hours x 34 weeks =	$3,679.65

March 2008 to July 2008 $480/week, 77 hours/week, $5.85 minimum wage, regular hourly rate of pay =	$6.23
OT: $3.115/hour x 37 hours x 18 weeks =	$2,07.59
July 2008 to September 2008 $480/week, 77 hours/week, $6.55 minimum wage, regular hourly rate of pay =	$6.23
MW: $0.32/hour x 77 hours/week x 8 weeks =	$197.12
OT: $3.275/hour x 37 hours x 8 weeks =	$969.40
September 2008 to September 2009 $640/week, 77 hours/week, regular hourly rate of pay =	$8.31
OT: $4.115/hour x 37 hours x 52 weeks =	$7,994.22
September 2009 to March 2010 $560/week, 77 hours/week, $7.25 minimum wage, regular hourly rate of pay =	$7.27
OT: $3.635/hour x 37 hours x 26 weeks =	$3,496.87
Minimum wage underpayment:	**$3,477.32**
Unpaid overtime:	**$18,785.38**
Total unpaid wages, before liquidated damages:	**$22,263.70**

Esvin Lucas

June 2007 to January 2010 $550/week, 66 hours/week, regular hourly rate of pay =	$8.33
OT: $4.167/hour x 26 hours x 135 weeks =	$14,626.17

January 2010 to March 2010	
$500/week, 60 hours/week, regular hourly rate of pay =	$8.33
OT: $4.167/hour x 20 hours x 9 weeks =	$750.06
Unpaid overtime:	**$15,376.23**
Total, before liquidated damages:	**$15,376.23**

Feliciano Macario

January 2008 to July 2008	
$300/week, 77 hours/week, $5.85 minimum wage, regular hourly rate of pay =	$3.90
MW: $1.95/hour x 77 hours x 28 weeks =	$4,204.20
OT: $2.925/hour x 37 hours x 28 weeks =	$3,030.30
July 2008 to July 2009	
$300/week, 77 hours/week, $6.55 minimum wage, regular hourly rate of pay =	$3.90
MW: $2.65/hour x 77 hours/week x 52 weeks =	$10,610.60
OT: $3.275/hour x 37 hours x 52 weeks =	$6,301.10
July 2009 to January 2010	
$300/week, 82 hours/week, $7.25 minimum wage, regular hourly rate of pay =	$3.90
MW: $3.35/hour x 77 hours/week x 26 weeks =	$6,706.70
OT: $3.625/hour x 37 hours x 26 weeks =	$3,487.25
Minimum wage underpayment:	**$21,521.50**
Unpaid overtime:	**$12,818.65**
Total, before liquidated damages:	**$34,340.15**

Margarito Rodas

June 2007 to July 2007	
$420/week, 77 hours/week, $5.15 minimum wage, regular hourly rate of pay =	$5.45
OT: $2.725/hour x 37 hours x 6 weeks =	$604.95
July 2007 to July 2008	
$420/week, 77 hours/week, $5.85 minimum wage, regular hourly rate of pay =	$5.45
MW: $0.40/hour x 77 hours/week x 52 weeks =	$1,601.60
OT: $2.925/hour x 37 hours x 52 weeks =	$5,627.70
July 2008 to September 2008	
$420/week, 77 hours/week, $6.55 minimum wage, regular hourly rate of pay =	$5.45
MW: $1.10/hour x 77 hours/week x 8 weeks =	$677.60
OT: $3.275/hour x 37 hours x 8 weeks =	$969.40
September 2008 to July 2009	
$500/week, 77 hours/week, $6.55 minimum wage, regular hourly rate of pay =	$6.49
MW: $0.06/hour x 77 hours/week x 45 weeks =	$207.90
OT: $3.275/hour x 37 hours x 45 weeks =	$5,452.88
July 2009 to March 2010	
$500/week, 77 hours/week, $7.25 minimum wage, regular hourly rate of pay =	$6.49
MW: $0.76/hour x 77 hours/week x 33 weeks =	$1,931.16
OT: $3.625/hour x 37 hours x 33 weeks =	$4,426.13
Minimum wage underpayment:	**$4,418.26**
Unpaid overtime:	**$17,081.06**
Total, before liquidated damages:	**$21,499.32**

Bernabe Villavicencio

June 2007 to July 2009 $800/week, 77 hours/week, regular hourly rate of pay =	$10.39
OT: $5.195/hour x 37 hours x 111 weeks =	$21,335.87
July 2009 to March 2010 $700/week, 77 hours/week, $7.25 minimum wage, regular hourly rate of pay	$9.09
OT: $4.545/hour x 37 hours x 33 weeks =	$5,549.45
Unpaid overtime:	**$26,885.32**
Total unpaid wages, before liquidated damages:	**$26,885.32**

IN THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF MISSOURI WESTERN DIVISION

ELMER LUCAS, et al., Plaintiffs, v. JERUSALEM CAFÉ, LLC, et al., Defendants.	)	Case No. 10-00582-CV-W-DGK

JUDGMENT IN A CIVIL ACTION

___ **Jury Verdict.** This action came before the Court for a trial by jury. The issues have been tried and the jury has rendered its verdict.

_X_ **Decision by Court.** The issues have been considered and a decision has been rendered by the Court.

IT IS ORDERED AND ADJUDGED that

Jury verdicts returned in favor of Plaintiffs. (Verdict Forms, Doc. 77)

The Court awards Plaintiffs the following damages, which include liquidated damages, against Defendants jointly and severally: Gonzalo Leal – $42,998.64; Elmer Lucas – $44,527.40; Esvin Lucas – $30,752.46; Feliciano Macario – $68,680.30; Margarito Rodas – $42,998.64; Bernabe Villavicencio – $53,770.64. (Order, Doc. 84)

December 12, 2011	Ann Thompson
Dated	Clerk of Court
December 12, 2011	/s/ Alex Francis
Entered	(by) Deputy Clerk

IN THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF MISSOURI WESTERN DIVISION

ELMER LUCAS, et al.,	)	
Plaintiffs,	)	
	)	Case No. 4:10-CV-
v.	)	00582-DGK
JERUSALEM CAFÉ, LLC, et al.,	)	
Defendants.	)	

ORDER DENYING MOTION FOR JUDGMENT AS A MATTER OF LAW OR, ALTERNATIVELY, A NEW TRIAL

Plaintiffs brought this case under the Fair Labor Standards Act ("FLSA") alleging Defendants failed to pay them the applicable minimum wage and/or overtime wages they were due. After a four day trial, the jury returned a verdict in Plaintiffs' favor on all counts.

Now before the Court is Defendants' Motion for Judgment as a Matter of Law or, Alternatively, a New Trial (doc. 86). Defendants contend the Plaintiffs, who entered this country illegally, lack standing to sue for back pay under the FLSA and the Court should enter judgment in their favor as a matter of law. Alternatively, Defendants contend a new trial is warranted because the Court erred in (1) granting Plaintiffs' motion in limine suppressing any evidence of Plaintiffs' immigration status, and (2) erred in refusing to

issue separate element instructions for each Plaintiff and each Defendant.

Finding no merit to these arguments, Defendants' motion is DENIED.

Standard

Judgment as a matter of law is appropriate where "a party has been fully heard on an issue during a jury trial and the court finds that a reasonable jury would not have a legally sufficient evidentiary basis to find for the party on that issue." Fed. R. Civ. P. 50(a)(1). In order for the court to grant the motion, the evidence must be such that, "without weighing the credibility of the witnesses, there can be but one reasonable conclusion as to the verdict." *McGreevy v. Daktronics, Inc.*, 156 F.3d 837, 840 (8th Cir. 1998) (quotation omitted).

A Rule 59 motion for a new trial invokes the Court's discretion "by asserting that the verdict was against the weight of the evidence or that for other reasons of law the trial was manifestly unjust." *Cal. & Hawaiian Sugar Co. v. Kansas City Terminal Warehouse Co.*, 602 F. Supp. 183, 186 (W.D. Mo. 1985). It is not appropriate to use a Rule 59 motion "to repeat arguments or to raise new arguments that could have been made before judgment." *In re Gen. Motors Corp. Anti-Lock Brake Prods. Liab. Litig.*, 174 F.R.D. 444, 446 (E.D. Mo. 1997) (citations omitted); *Lowry ex. rel. Crow v. Watson Chapel Sch. Dist.*, 540 F.3d 752, 761 (8th Cir. 2008).

Discussion

A. Plaintiffs have standing to sue Defendants for back pay under the FLSA.

Defendants assert that Plaintiffs, who entered the United States unlawfully and were not authorized to work here, lacked standing to sue Defendants for back pay under the FLSA because the Immigration Reform and Control Act of 1986 ("IRCA"), 8 U.S.C. § 1324a, implicitly amended the FLSA to prohibit undocumented aliens from lawfully receiving any wages or suing under the FLSA.

The question of standing concerns "whether the litigant is entitled to have the court decide the merits of the dispute or of particular issues." *Warth v. Seldin*, 422 U.S. 490, 498 (1975). The Supreme Court has articulated several requirements for standing, some of which are constitutional – derived from the Court's interpretation of Article III – and some of which are prudential – derived from the need for prudent judicial administration. Erwin Chemerinsky, *Federal Jurisdiction*, §2.3.1 at 59-60 (3rd ed. 1999). The constitutional limitations require a plaintiff to show (1) that the plaintiff personally has suffered an actual or threatened injury as a result of the defendant's conduct ("injury in fact"); (2) that plaintiff's injuries are traceable to the action challenged ("causation"); and (3) that the court can redress that injury by the relief requested ("redressibility"). *In re Malone v. City of Fenton, Mo.*, 592 F. Supp. 1135, 1153-54 (E.D. Mo. 1984); *see also Neighborhood Enters. Inc. v.*

City of St. Louis, 644 F.3d 728, 735 (8th Cir. 2011). The prudential limits on standing are: (1) a party may, as a rule, assert only its own rights; (2) the plaintiff must have suffered an individualized injury, not a "generalized grievance;" and (3) the injury must fall within the zone of interest protected by the law in question. *In re Malone*, 592 F. Supp. at 1154; Chemerinsky, *supra*, at 60. In their motion, Defendants challenge whether the constitutional requirements are met. *See* doc. 86 at 7.

As a threshold matter, the Court holds this is not an argument concerning standing, but a belated attempt by Defendants to bring an affirmative defense by arguing it as a standing question.[1] Defendants appear to be casting this as a standing question because an affirmative defense must be raised before the case is submitted, while standing may be raised at any time, including for the first time in a post-trial motion. *Midwest Commc'ns., Inc. v. Minn. Twins, Inc.*, 779 F.2d 444, 449 (8th Cir. 1985). But Defendants waived any argument that the IRCA precludes

[1] The elements of an FLSA claim are: 1) plaintiff was *employed* by defendant during the relevant period; 2) plaintiff was engaged in commerce or employed by an enterprise engaged in commerce or the production of goods for commerce that had annual gross sales of at least $500,000; and 3) the defendant failed to pay plaintiff minimum wage and/or overtime pay. 29 U.S.C. § 201, et. seq.; 8th Cir. Model Civ. Jury Instr. § 10.01 (2011) (emphasis added). The Court finds Defendants are asserting the affirmative defense that if a plaintiff is an undocumented worker then she is not "employed" under the FLSA. *See* doc. 88 at 5.

Plaintiffs from recovering by failing to assert this argument earlier, for example, by raising it in a motion to dismiss for failure to state a claim or on a motion for summary judgment.[2]

That said, the Court holds Plaintiffs do have standing to sue Defendants. Plaintiffs suffered an injury in fact, because they were not paid the proper wages for work they performed; this injury was the direct result of Defendants' failure to pay the lawful wage; and the court's judgment will redress Plaintiffs' injuries. Plaintiffs have standing to bring this lawsuit, and this portion of the motion is denied.[3]

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[2] Furthermore, given that every court that has ever considered this argument has rejected it, trial counsel's decision not to raise this defense was a sound one.

[3] In their reply brief, Defendants argue for the first time that Plaintiffs also fail to meet one of the prudential tests for standing, namely that Plaintiffs cannot demonstrate that they are within the zone of interests the statute aims to protect. The Court does not consider this argument because it is raised for the first time in a reply brief. Even if this argument were properly raised, however, it would be meritless because the FLSA was designed to protect illegal aliens as well as properly documented workers. *Jin-Ming Lin v. Chinatown Rest. Corp.*, 771 F. Supp. 2d 185, 190 (D. Mass. 2011). As the Eleventh Circuit Court of Appeals has noted, nothing in the IRCA limits "the rights of undocumented aliens under the FLSA. To the contrary, the FLSA's coverage of undocumented aliens is fully consistent with the IRCA and the policies behind it." *Patel v. Quality Inn South*, 846 F.2d 700, 704 (11th Cir. 1988).

B. The Court did not err in granting Plaintiff's motion in limine.

Next, Defendants argue the Court should order a new trial because the Court erred in granting Plaintiffs' motion in limine precluding Defendants from mentioning Plaintiffs' immigration status. In its ruling, the Court reasoned that Plaintiffs' immigration status was irrelevant to the issues in the case because illegal aliens are not precluded from recovering unpaid wages under the FLSA. Defendants contend this ruling was incorrect and prejudiced them by preventing them from presenting their strongest defense to the jury.

The Court finds no merit to this argument. Evidentiary rulings at trial are reversible when 1) the evidence was wrongly excluded, and 2) the wrongly excluded evidence was so critical "that there is no reasonable assurance that the jury would have reached the same conclusion had the evidence been admitted." *Cavataio v. City of Bella Villa*, 570 F.3d 1015, 1021 (8th Cir. 2009). With respect to the first prong, the Court holds there was no error here. The Court's ruling was correct and consistent with virtually all of the courts that have considered this issue. *See*, *e.g.*, *Jin-Ming Lin v. Chinatown Rest. Corp.*, 771 F. Supp. 2d 185, 190 (D. Mass. 2011).

Furthermore, any error arising from this ruling was harmless because the ruling was undone when one of the Plaintiffs' inadvertently testified that all of the Plaintiffs were undocumented workers, and

Defendants were subsequently allowed to freely mention this during their case-in-chief. Defendants argue, that at that point they were limited to only a "perfunctory, inadequate presentation" of this defense, and had they been able to discuss Plaintiffs' immigration status from the beginning, the jury might have reached a different verdict. This argument is without merit.

Defendants argue that had they been allowed to reference Plaintiffs illegal status, this would have supported their defense that they did not employ Plaintiffs because they were undocumented aliens. However, Defendants' testimony that they never employed the Plaintiffs, and that Plaintiffs simply occasionally "*volunteered*" to work at the restaurant without pay was contradicted by a mountain of more credible evidence, including a video of Plaintiffs working in the restaurant's kitchen and the testimony of two disinterested police officers who, in attempting to defuse a dispute, discussed with one of the Defendants how Plaintiffs' would be paid for their last days at work. Thus, even had Defendants been allowed to reference Plaintiffs' immigration status, the weight of the evidence overwhelmingly established that Plaintiffs were employees of the Defendants, not volunteers.

The Court holds there was no error here, and if there was any error, it was harmless. This portion of the motion is denied.

C. The Court did not err in refusing to give separate elements instructions for every Plaintiff and every Defendant.

Finally, Defendants contend the Court erred by submitting one verdict form for each Plaintiff, with each form asking separate questions whether each Defendant employed that Plaintiff. For example, the first verdict form, for Plaintiff Esvin Lucas, separately asked whether Lucas was employed by Defendant Jerusalem Café, whether Lucas was employed by Defendant Farid Azzeh, and whether Lucas was employed by Defendant Adel Alazzeh. Thus, the jury could have decided that zero, one, two, or three of the Defendants employed Lucas.

Defendant contends this was "grossly unfair error" which "conflated the Plaintiffs' separate claims into one and the Defendants into one entity." Defendants argue the Court should have submitted the 18 liability questions in 18 separate verdict forms, and that the Court's failure to do so "substantially affected Defendants' right and denied them a fair trial.

There is no merit to this argument. First, Defendants never actually objected to the verdict forms as they were ultimately given. Although there was discussion of whether 18 separate forms should be given, defense counsel ultimately approved the instruction, stating he had no objection to the way it was written.

Second, even if Defendants had objected, there was no error. The question here is "whether the instructions, taken as a whole and viewed in the light of the evidence and applicable law, fairly and adequately submitted the issues in the case to the jury." *Wheeling Pittsburgh Steel Corp. v. Beelman River Terminals, Inc.*, 254 F.3d 706, 711 (8th Cir. 2001). They did. The six verdict forms were a simple and efficient way of fairly and adequately submitting the issues to the jury. Submitting these same questions in 18 different forms, as Defendant suggests, would have been a more cumbersome way of asking the same questions. It would not have clarified anything or altered the jury's verdict in any way. It would not have changed the overwhelming evidence on which the jury's verdict was based, which is what clearly drove the jury's decision.

This portion of the motion is denied.

Conclusion

The Court holds Plaintiffs had standing to sue Defendants under the FLSA, thus Defendants are not entitled to judgment as a matter of law. The Court also holds that there was no error in granting Plaintiff's motion in limine or refusing to submit 18 different verdict forms to the jury, much less any error warranting a new trial. Defendants' Motion for

Judgment as a Matter of Law or, Alternatively, a New Trial (doc. 86) is DENIED.

IT IS SO ORDERED.

DATE: May 10, 2012

/s/ Greg Kays
GREG KAYS, JUDGE
UNITED STATES
DISTRICT COURT

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No: 12-2170

Elmer Lucas, et al.

Appellees

v.

Jerusalem Cafe, LLC, et al.

Appellants

Secretary of Labor

Amicus on Behalf of Appellee(s)

Appeal from U.S. District Court for the
Western District of Missouri – Kansas City
(4:10-cv-00582-DGK)

ORDER

The petition for rehearing en banc is denied. The petition for rehearing by the panel is also denied.

September 06, 2013

Order Entered at the Direction of the Court:
Clerk, U.S. Court of Appeals, Eighth Circuit.

/s/ Michael E. Gans