No. S196568
(Court of Appeal No. C064627)
(Superior Court of California – San Joaquin County No. CV033425)

IN THE SUPREME COURT
OF THE STATE OF CALIFORNIA

VICENTE SALAS

Petitioner and Appellant,

v.

SIERRA CHEMICAL COMPANY

Defendant and Respondent.

APPLICATION FOR LEAVE TO FILE *AMICI CURIAE* BRIEF AND *AMICI CURIAE* BRIEF OF IMPACT FUND, NATIONAL EMPLOYMENT LAW PROJECT, NATIONAL IMMIGRATION LAW CENTER AND 12 ADDITIONAL PUBLIC INTEREST ORGANIZATIONS IN SUPPORT OF PETITIONER AND APPELLANT VICENTE SALAS

Linton Joaquin (73547)
Karen C. Tumlin (234691)
Josh Stehlik (220241)
NATIONAL IMMIGRATION LAW CENTER
3435 Wilshire Boulevard,
Ste. 2850
Los Angeles, CA 90010
T: 213.639.3900
joaquin@nilc.org
tumlin@nilc.org
stehlik@nilc.org

Della Barnett (88649)
Michael Caesar (280548)
IMPACT FUND
125 University Avenue, Ste. 102
Berkeley, CA 94710
T: 510.845.3473
dbarnett@impactfund.org
mcaesar@impactfund.org

Eunice Hyunhye Cho (266417)
NATIONAL EMPLOYMENT LAW PROJECT
405 14th Street, Ste. 1400
Oakland, CA 94612
T: 510.663.5707
echo@nelp.org

Counsel for Amici Curiae

TO THE HONORABLE TANI G. CANTIL-SAKAUYE, CHIEF JUSTICE OF THE SUPREME COURT OF CALIFORNIA:

Pursuant to California Rule of Court 8.520 (f), non-profit organizations Bet Tzedek, Community Legal Services in East Palo Alto, Coalition for Humane Immigrant Rights of Los Angeles, Disability Rights Education & Defense Fund, Disability Rights Legal Center, Dolores Street Community Services, Immigrant Legal Resource Center, Immigration Center for Women and Children, Impact Fund, Lawyers' Committee for Civil Rights of the San Francisco Bay Area, National Employment Law Project, National Immigration Law Center, Public Advocates, Inc., Public Counsel, and Public Law Center (collectively, "*Amici*") respectfully request leave to file the attached *amicus* brief in support of Petitioner and Appellant Vicente Salas. This brief is timely, as it is filed within 30 days after the last reply brief was filed.

STATEMENT OF INTEREST

Amici are comprised of an array of non-profit organizations which assist thousands of low-wage, immigrant workers with employment-related legal problems each year, including claims of employment discrimination based on disability and other protected characteristics. The issues presented in this appeal have a direct impact on the low-income, immigrant

workers for whom Amici provide services and the ability of these workers to obtain legal redress for unlawful employment discrimination.

A brief description of the work and mission of Amici, explaining their interest in the case, is as follows:

Amicus Bet Tzedek was established in 1974 and provides free legal services to seniors, the indigent, and disabled persons in Los Angeles County in the areas of housing, benefits, consumer fraud, and employment. Bet Tzedek's Employment Rights Project assists low-wage and immigrant workers through a combination of litigation, legislative and administrative advocacy, and community education. Bet Tzedek clients work in industries marked by low pay and frequent violations of minimum labor standards, and include day laborers, domestic workers, and employees in the garment, construction, car wash, restaurant, and janitorial industries.

Amicus Community Legal Services in East Palo Alto (CLSEPA) is a non-profit organization that provides legal assistance to low-income immigrants in and around East Palo Alto, California, where two-thirds of the population is Latino or Pacific Islander. CLSEPA's practice areas include housing, anti-predatory lending, immigration, and a voluntary attorney program which assists clients in various civil matters. The immigration team provides consultations to and represents local residents as they navigate the federal government's complicated immigration

processes. For individual clients, CLSEPA provides pro bono and low cost legal assistance to immigrants applying for affirmative immigration benefits and to those in removal proceedings in immigration court.

Amicus Coalition for Humane Immigrant Rights of Los Angeles (CHIRLA) is a non-profit immigrant rights organization with a mission to advance the human and civil rights of immigrants and refugees, promote harmonious multi-ethnic and multi-racial human relations, and empower immigrants and their allies to build a more just and humane society. CHIRLA was founded in 1986 in response to the Immigration Reform and Control Act (IRCA) of 1986. For over 25 years, CHIRLA's innovative programming in community organizing, civic engagement and community education has served the immigrant communities of the Los Angeles region, reaching over 25,000 people annually.

Amicus Disability Rights Education & Defense Fund (DREDF), based in Berkeley, California, is a national non-profit law and policy center dedicated to protecting and advancing the civil rights of people with disabilities. Founded in 1979 by people with disabilities and parents of children with disabilities, DREDF pursues its mission through education, advocacy and law reform efforts. For over two decades, DREDF has received funding from the California Legal Services Trust Fund (IOLTA) Program as a Support Center providing consultation, information, training

and representation services to legal services offices throughout the state as to disability civil rights law issues. DREDF is nationally recognized for its expertise in the interpretation of federal and California disability civil rights laws, including the California Fair Employment and Housing Act (FEHA).

Amicus Disability Rights Legal Center (DRLC) is a non-profit legal organization that was founded in 1975 to represent and serve people with disabilities. The DRLC assists people with disabilities in attaining the benefits, protections and equal opportunities guaranteed to them under the Rehabilitation Act of 1973, the Americans with Disabilities Act, Individual with Disabilities Education Improvement Act and other federal and state laws. Its mission is to champion the rights of people with disabilities through education, advocacy and litigation. The DRLC is a recognized expert in the field of disability rights, and regularly files amicus briefs in state and federal courts, and is involved in policy-making activities on behalf of persons with disabilities both statewide and nationally. For example, DRLC filed an amicus brief on the merits at the United States Supreme Court in the cases of *Cullen v. Pinholster*, 131 S.Ct. 1388 U.S. (2011), addressing the impact of disability on the death penalty phase of a criminal matter, and *Graham v. Florida*, 130 S.Ct. 2011 (2010), on the issue of whether disability should be considered in charging and sentencing of minor youths charged as adults. DRLC also filed an amicus brief on the

merits at the United States Supreme Court in *Forest Grove Sch. Dist. v. T. A.*, 129 S. Ct. 2484 (2009), on the issue of whether the Individuals with Disabilities Education Act allows reimbursement for private school placement without prior receipt of special education service, and in *Goodman v. Georgia*, 126 S. Ct. 877 (2005), a case addressing the issue of whether Congress properly abrogated state sovereign immunity when enacting Title II of the Americans with Disabilities Act.

Amicus Dolores Street Community Services (DSCS) provides community outreach services and pro bono deportation defense to low-income immigrants, many of whom work in low paying jobs who are vulnerable to exploitation because of their immigration status. DSCS is the fiscal sponsor and member of the San Francisco Immigrant Legal and Education Network ("SFILEN"), a collaboration of thirteen San Francisco based nonprofit organizations which supports immigrants seeking to adjust their immigration status. DSCS regularly disseminates information to the public through trainings and workshops, and publishes educational and informational material designed to assist immigrants who have suffered adverse consequences as a result of their real or perceived immigration status. A decision in favor of the Petitioner in this case will directly enhance DSCS's goal of protecting and advocating for low-wage immigrant workers.

Amicus Immigrant Legal Resource Center (ILRC) is a national non-profit that provides legal trainings, educational materials, and advocacy to advance immigrant rights. ILRC's mission is to work with and educate immigrants, community organizations, and the legal sector to continue to build a democratic society that values diversity and the rights of all people. As part of its mission, the ILRC assists immigrant groups in understanding immigration law and the democratic process in the United States, enabling them to advocate for better policies in immigration law, health care, community safety, and other issues that affect their communities. The ILRC also conducts "know your rights" training events with immigrant-based organizations to inform immigrants about their rights under the immigration laws and the United States Constitution.

Amicus Immigration Center for Women and Children (ICWC) is a non-profit legal organization providing affordable immigration services to underrepresented women and children in Los Angeles, San Francisco, and San Diego, California. ICWC strives to provide security and stability for children who are abused, abandoned or neglected and for women and children who are victims of domestic violence, sexual assault and other violent crimes. The ICWC staff includes nationally-recognized experts on the U visa, which grants legal status to immigrant victims of crime. In their work with this specialized population, the staff understand the immense

fear that undocumented immigrants have of law enforcement. Only nuanced policy making and legislation will allow these immigrants to come out of the shadows and report crime. Alternately, if an immigrant's status is in jeopardy when the immigrant reports labor abuses, immigrants will surely choose to remain quiet and continue suffering the abuses rather than risk deportation. ICWC's clients certainly are only reporting crimes, such as domestic violence, rape, and assaults with firearms, because they can trust their law enforcement to value their safety and that of their community over investigating their immigration status.

Amicus Impact Fund is a non-profit foundation that provides funding, training, and co-counsel to public interest litigators across the country, assisting in employment discrimination and other cases. It offers training programs, advice and counseling, and amicus representation to nonprofit organizations regarding class actions and related issues. It is also a California State Bar Legal Services Trust Fund Support Center, and provides services to legal services projects across the state. The Impact Fund argued two leading class action and labor rights cases before the California Supreme Court, *Sav-On Drug Stores v. Superior Court* (2004) 34 Cal.4th 319, and *Cortez v. Purolator* (2000) 23 Cal.4th 163, among others, and recently participated as Amicus in *Brinker v. Superior Ct.* (2012) 53 Cal.4th 1004.

Amicus Lawyers' Committee for Civil Rights of the San Francisco Bay Area (Lawyers' Committee) is a civil rights and legal services organization that advances, protects and promotes the rights of communities of color, immigrants and refugees, with a specific focus on low-income communities and a long-standing commitment to African Americans. Lawyers' Committee, with the assistance of hundreds of pro bono attorneys, provides free legal assistance and representation to individuals in the areas of racial justice, immigrant justice, and voting rights.

In 1981, the Lawyers' Committee initiated its Immigrant and Refugee Rights Project which has become one of the leading immigrant and refugee advocacy organizations in the country. Through this project, the Lawyers' Committee has litigated scores of major class actions implicating the rights of immigrants and refugees. The Lawyers' Committee has a profound interest in protecting immigrant workers who are the targets of workplace abuses and in encouraging these workers to report abuses. The Lawyers' Committee is also dedicated to ensuring access to the judicial system, particularly for the most vulnerable individuals and groups in society.

Amicus National Employment Law Project (NELP) is a nationwide advocacy organization that has worked for over forty years to defend and

expand the labor rights of low wage and immigrant workers. Through training, policy advocacy, education, and strategic intervention in court cases, NELP works to uphold the labor and employment protections of all workers, regardless of their immigration status, so that labor standards are followed for and by all. NELP has participated as amicus curiae in cases around the country addressing the issue of labor rights of immigrant workers, including in the U.S. Supreme Court's decision in *Hoffman Plastic Compounds, Inc., v. NLRB*, 535 U.S. 137 (2002), and *Rivera v. NIBCO, Inc*., 364 F.3d 1057 (9th Cir. 2004). This Court's decision will directly enhance NELP's, its clients', and its constituents' goals of securing safe workplaces and ensuring coverage under labor and employment laws for all workers.

Amicus National Immigration Law Center (NILC) is a national legal advocacy organization based in Los Angeles whose mission is to defend and promote the rights and opportunities of low-income immigrants and their family members. NILC has earned a national leadership reputation for its expertise in the legal rights of immigrants in a wide variety of areas, including immigration law, employment, and access to public benefits and educational opportunities. Since 1979, NILC has litigated key cases regarding immigrants' rights, written basic legal reference materials relied on by the field, trained countless advocates and attorneys, and provided

technical assistance on a wide range of legal issues affecting low-wage immigrants. NILC's interest in the outcome of this case arises out of a concern that immigrant workers have judicial recourse for violations of their rights.

Amicus Public Advocates, Inc., is one of the oldest non-profit public interest law firms in the nation. Throughout its history, the firm's mission has been to challenge the persistent, underlying causes and effects of poverty and discrimination and to work for the empowerment of the poor and people of color, including immigrants. Public Advocates uses diverse litigation and non-litigation strategies. Its current efforts focus on educational equity, transit equity, affordable housing, community economic development and employment.

Amicus Public Counsel is the largest non-profit law firm of its kind in the nation. It is the public interest arm of the Los Angeles County and Beverly Hills Bar Associations and is also the Southern California affiliate of the Lawyers' Committee for Civil Rights Under Law. Established in 1970, Public Counsel is dedicated to advancing equal justice under law by delivering free legal and social services to indigent and underrepresented children, adults and families throughout Los Angeles County. Last year, its staff of fifty-one attorneys and forty-six support staff (including three social workers), together with more than 5,000 volunteer lawyers, law students

and legal professionals, assisted over 32,000 low-income children, youth, adults and families, as well as eligible community organizations. The value of the free legal services that Public Counsel provided during 2011 is conservatively estimated at more than $88 million. The Immigrants' Rights Project at Public Counsel represents thousands of immigrants each year before the immigration and federal courts. A significant number of these clients have issues regarding their ability to work in this country and their ability to pursue labor-related claims when they lack lawful immigration status in the United States.

Amicus Public Law Center (PLC) is a non-profit legal services organization committed to providing access to justice for low income residents of Orange County, California. PLC provides free civil legal services through private attorney volunteers and staff. In 2011, PLC’s immigration unit assisted over 300 low-income immigrants in obtaining legal status. These immigrants included asylum seekers and victims of domestic violence, human trafficking, and other serious crimes. PLC provides direct representation and pro bono placement cases where undocumented immigrants' rights have been violated by their employer. These low-income clients will be negatively affected by the decision that is the subject of this amicus.

Amici's proposed brief presents arguments that materially add to and complement the initial brief following appeal from the Court of Appeal of Petitioner and Appellant Vicente Salas, without repeating those arguments. Amici have significant experience representing low-wage immigrant workers in pursuing employment-related legal claims, including claims for unlawful employment discrimination.

The brief of Amici will provide critical, focused assistance to the Court in understanding: (1) the unique and specific vulnerabilities experienced by undocumented workers in the workplace; (2) how application of equitable defenses based on undocumented status is inconsistent with due process and the right of free access to the courts; (3) how equitable defenses cannot bar workers from bringing civil rights and other statutory claims; and (4) how state judicial officers run the risk of making erroneous determinations of immigration and work authorization status and chilling immigrant workers from enforcing their legal rights. Amici's insight, experience, and expertise will assist the Court in understanding the full reach and impact of the Court of Appeal's decision on immigrant workers throughout California.

For all of the foregoing reasons, Amici respectfully request that the Court grant Amici's application and accept the enclosed brief for filing and consideration.

No party or counsel for any party, other than counsel for Amici, have authored the proposed brief in whole or in part or funded the preparation of the brief.

Dated: September 12, 2012

Respectfully submitted,

By: ____________________

Josh Stehlik
NATIONAL IMMIGRATION LAW CENTER
3435 Wilshire Boulevard, Suite 2850
Los Angeles, CA 90010
T: 213.639.3900
F: 213.639.3911

Della Barnett
Michael Caesar
IMPACT FUND
125 University Avenue, Suite 102
Berkeley, CA 94710
T: 510.845.0740
F: 510.845.3654

Eunice Hyunhye Cho
NATIONAL EMPLOYMENT LAW PROJECT
405 14th Street, Suite 1400
Oakland, CA 94612
T: 510.663.5707
F: 510.663.2028

Attorneys for *Amicus Curiae*

No. S196568
(Court of Appeal No. C064627)
(Superior Court of California – San Joaquin County No. CV033425)

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

VICENTE SALAS

Petitioner and Appellant,

v.

SIERRA CHEMICAL COMPANY

Defendant and Respondent.

BRIEF OF AMICUS CURIAE IMPACT FUND, NATIONAL EMPLOYMENT LAW PROJECT, NATIONAL IMMIGRATION LAW CENTER AND 12 ADDITIONAL PUBLIC INTEREST ORGANIZATIONS IN SUPPORT OF PETITIONER AND APPELLANT VICENTE SALAS

Linton Joaquin (73547)
Karen C. Tumlin (234691)
Josh Stehlik (220241)
NATIONAL IMMIGRATION LAW CENTER
3435 Wilshire Boulevard,
Ste. 2850
Los Angeles, CA 90010
T: 213.639.3900
joaquin@nilc.org
tumlin@nilc.org
stehlik@nilc.org

Della Barnett (88649)
Michael Caesar (280548)
IMPACT FUND
125 University Avenue, Ste. 102
Berkeley, CA 94710
T: 510.845.3473
dbarnett@impactfund.org
mcaesar@impactfund.org

Eunice Hyunhye Cho (266417)
NATIONAL EMPLOYMENT LAW PROJECT
405 14th Street, Ste. 1400
Oakland, CA 94612
T: 510.663.5707
echo@nelp.org

Counsel for Amicus Curiae

TABLE OF CONTENTS

Page No(s)

TABLE OF AUTHORITIES iii

INTRODUCTION 1

RELEVANT BACKGROUND 6

ARGUMENT 10

A. APPLICATION OF EQUITABLE DEFENSES BASED ON UNDOCUMENTED STATUS IS INCONSISTENT WITH DUE PROCESS AND THE RIGHT OF FREE ACCESS TO THE COURTS. 10

B. EQUITABLE DEFENSES CANNOT BAR WORKERS FROM BRINGING CIVIL RIGHTS AND OTHER STATUTORY CLAIMS. 16

1. While certain prospective remedies may be limited in some circumstances, courts must make a liability determination on claims seeking to vindicate a plaintiff's civil rights. 17

2. Courts are prohibited from using equitable defenses to extinguish other kinds of statutory rights designed for a plaintiff's protection. 19

3. The Court of Appeal's Decision Was Based on a Misunderstanding of *Murillo* and *Camp* 22

C. STATE JUDICIAL OFFICERS, WHO ARE NOT EQUIPPED TO MAKE DETERMINATIONS OF IMMIGRATION AND WORK AUTHORIZATION STATUS, RUN THE RISK OF ERRONEOUS DETERMINATIONS AND CHILLING IMMIGRANT WORKERS FROM CHALLENGING WORKPLACE ABUSES. 24

1. State judicial officers are ill-suited to determine immigration and work authorization status. 24

2. State judicial officers run the risk of erroneous determinations that could conflict with federal law. 27

3. The *Salas* court's erroneous inference of lack of work authorization status from an alleged social security number discrepancy exemplifies the risk of state judicial determinations. 28

4. Application of the unclean hands doctrine by state judicial officers will chill immigrant workers from challenging workplace abuses 30

CONCLUSION 31

CERTIFICATE OF WORD COUNT 31

TABLE OF AUTHORITIES

Page No(s)

CASES

Agri Processor Co., Inc. v. NLRB,
514 F.3d 1 (D.C. Cir. 2008) 13

Aguilar v. Avis Rent A Car Sys., Inc.,
21 Cal. 4th 121 (1999) 19

Alexander v. Gardner-Denver Co.,
415 U.S. 36 (1974) 18

Angelucci v. Century Supper Club,
41 Cal. 4th 160 (2007) 18

Aramark Facility Servs. v. Serv. Emps. Int'l Union,
530 F.3d 817 (9th Cir. 2008)... 29

Arizona v. United States,
132 S. Ct. 2492 (2012) 3, 25, 26

Boddie v. Connecticut,
401 U.S. 371 (1971) 11

Burton v. Sosinsky,
203 Cal. App. 3d 562 (1988)... 17

Camp v. Jeffer, Mangels, Butler & Marmaro,
35 Cal. App. 4th 620 (1995) 22, 23, 24

Cano v. Mallory Mgmt.,
760 N.Y.S.2d 816 (N.Y. App. Div. 2003) 12

Carmel Valley Fire Protection Dist. v. State,
25 Cal. 4th 287 (2001) 19

Carter v. Cohen,
188 Cal. App. 4th 1038 (2010) 20

Castro-Carvache v. INS,
911 F. Supp. 843 (E.D. Pa. 1995) 14

Castro-O'Ryan v. INS,
821 F.2d 1415 (9th Cir. 1987).. 25

Chellen v. John Pickle Co. Inc.,
446 F. Supp. 2d 1247 (N.D. Okla. 2006) 13

Clemente v. State,
40 Cal. 3d 202 (1985) 4, 12

Collins Foods Int'l, Inc. v. INS,
948 F.2d 549 (9th Cir. 1991)... 29

Commodore Home Sys., Inc. v. Superior Court,
32 Cal. 3d 211 (1982) 19

Cooper v. Rykoff-Sexton, Inc.,
24 Cal. App. 4th 614 (1994) 20

Cortez v. Purolator Air Filtration Prods. Co.,
23 Cal. 4th 163 (2000) 21

Darces v. Woods,
35 Cal. 3d 871 (1984) 5

David v. Signal International, LLC,
257 F.R.D. 114 (E.D. La. 2009)... 15

DeCanas v. Bica,
424 U.S. 351 (1976) 25

Doe v. Redd,
No. C 02-05570, 2003 WL 23893010 (N. D. Cal. Aug. 4, 2007) 15

Dyna-Med, Inc. v. FEHC,
43 Cal. 3d 1379 (1987) 19

Earl v. Saks & Co.,
36 Cal. 2d 602 (1951) 23

Escobar v. Spartan Sec. Serv.,
281 F. Supp. 2d 895 (S.D. Tex. 2003) 13

Estate of McInnis v. Sylvester,
182 Cal. App. 3d 949 (1986) 16

Farmers Bros. Coffee v. Workers' Comp. Appeals Bd.,
133 Cal. App. 4th 533 (2005) 14

Fibreboard Paper Prods. Corp. v. East Bay Union of Machinists,
227 Cal. App. 2d 675 (1964) 17

Figueroa v. INS,
886 F.2d 76(4th Cir. 1989) 14

First Am. Bank v. W. DuPage Landscaping, Inc.,
No. 00 C 4026, 2005 WL 2284265 (N.D. Ill. Sept. 19, 2005) 14

Flores v. Amigon,
233 F. Supp. 2d 462 (E.D.N.Y. 2002) 13

Garrett v. City of Escondido,
465 F. Supp. 2d 1043 (S.D. Cal. 2006) 12

Ghory v. Al-Lahham,
209 Cal.App.3d 1487 (1989) 20

Gonzalez v. City of Franklin,
403 N.W.2d 747 (Wis. 1987) 14

Hagl v. Jacob Stern & Sons, Inc.,
396 F. Supp. 779 (E.D. Pa. 1975) 12

Hernandez v. Paicius,
109 Cal. App. 4th 452 (2003) 12, 13, 14, 19

Hoffman Plastic Compounds, Inc. v. NLRB,
535 U.S. 137 (2002) .... passim

Jaramillo v. County of Orange,
200 Cal. App. 4th 811 (2011) 3

Judson Steel Corp. v. Workers' Comp. Appeals Bd.,
22 Cal. 3d 658 (1978) 1

Kendall-Jackson Winery, Ltd. v. Superior Court,
76 Cal. App. 4th 970 (1999) 4, 14, 17

Lewis and Queen v. N.M. Ball Sons,
48 Cal. 2d 141(1957) 20

Liu v. Donna Karan Int'l, Inc.,
207 F. Supp. 2d 191 (S.D.N.Y. 2002).. 13

Logan v. Zimmerman,
455 U.S. 422 (1982).. 10

Madeira v. Affordable Hous. Found. Inc.,
469 F.3d 219 (2nd Cir. 2006).. 14

Martinez v. Regents of the Univ. of Cal.,
50 Cal. 4th 1277 (2010) 3, 5

McKennon v. Nashville Banner Publ'g Co.,
513 U.S. 352 (1995).. 16, 17, 18, 22

Mendoza v. Ruesga,
169 Cal. App. 4th 270 (2009) 14, 20, 21

Mischalski v. Ford Motor Co.,
935 F. Supp. 203 (E.D.N.Y. 1996) 14

Murillo v. Rite Stuff Foods, Inc.,
65 Cal. App. 4th 833 (1998) 22, 23, 24

New El Rey Sausage Co., Inc. v. INS,
925 F.2d 1153 (9th Cir. 1991).. 29

Page v. Bakersfield Unif. & Towel Supply Co.,
239 Cal. App. 2d 762 (1966)..16, 21

Patel v. Quality Inn South,
846 F.2d 700 (11th Cir. 1988)...13

Payne v. Superior Court,
17 Cal. 3d 908 (1976) 11

People v. Freeman,
47 Cal. 4th 993 (2010) 12

Plyler v. Doe,
457 U.S. 202 (1982) ....passim

Purdy & Fitzpatrick v. State,
71 Cal. 2d 566 (1969) 11

Reyes v. Van Elk, Ltd.,
148 Cal. App. 4th 604 (2007) 11, 14

Rico v. Flore,
481 F.3d 234 (5th Cir. 2007)..15

Rios v. Enter. Ass'n Steamfitters Local Union 638 of U.A.,
860 F.2d 1168 (2nd Cir. 1988)..13

Rivera v. NIBCO, Inc.,
364 F.3d 1057 (9th Cir. 2004)...13, 18, 30

Rodriguez v. Kline,
186 Cal. App. 3d 1145 (1986)...12

Salas v. Sierra Chemical Co.,
129 Cal. Rptr. 3d 263 (Cal. Ct. App. Aug. 09, 2011) ....passim

Shuessler v. Benchmark Mkt'g & Consult'g, Inc.,
243 Neb. 425 (1993) 23

Singh v. Jutla & C.D. & R's Oil, Inc.,
214 F. Supp. 2d 1056 (N.D. Cal. 2002) 13

State Dept. of Health Services v. Superior Court,
31 Cal. 4th 1026 (2003) 18

Sullivan v. Oracle Corp.,
51 Cal. 4th 1191 (2011) 21

Superior Court v. County of Mendocino,
13 Cal. 4th 45 (1996) 20

Sure-Tan, Inc. v. NLRB,
467 U.S. 883 (1984) 2, 13

Ticconi v. Blue Shield of Cal. Life & Health Ins. Co.,
160 Cal. App. 4th 528 (2008) 17

Tyson Foods, Inc. v. Guzman,
116 S.W.3d 233 (Tex. App. 2003) 12

United States v. Brignoni-Ponce,
422 U.S. 873 (1975) 30

Yamataya v. Fisher,
189 U.S. 86 (1903) 10

Yick Wo v. Hopkins,
118 U.S. 356 (1886) 10

STATUTES

8 U.S.C.
§ 1229a(a)(1) 25
§ 1229a(a)(3) 25
§ 1252 26
§ 1324a 2
§ 1324A(b)(1)(A) 23
§ 1324a(e)(1) 26
§ 1324a(e)(2)(A) 26
§ 1324b 2

CAL. BUS. & PROF. CODE
§ 17200 .... 17, 21
§ 22440 21

CAL. CIV. CODE
§ 671 11
§ 3339 6

CAL. EDUC. CODE
§ 66021.6 5
§ 66021.7 5
§ 68130.5 5

CAL. LABOR CODE
§ 132a 1
§ 1171.5 .... 6, 11
§ 1194 20

CAL. GOV'T CODE
§ 7285 6
§ 12920 .... 1, 28
§ 12920.5 19
§12921 8
§ 12940 .... 1, 8
§ 12965(b) 19

CAL. HEALTH & SAFETY CODE
§ 24000 6

CALIFORNIA DREAM ACT 5

FAIR EMPLOYMENT AND HOUSING ACT .... passim

FAIR LABOR STANDARDS ACT 13

IMMIGRATION CONSULTANTS ACT 14, 21

IMMIGRATION REFORM AND CONTROL ACT OF 1986 .... passim

NATIONAL LABOR RELATIONS ACT .... passim

TITLE VII OF THE CIVIL RIGHTS ACT OF 1964 .... 13, 29

UNRUH ACT 18

OTHER AUTHORITIES

AFL-CIO, Immigrant Workers at Risk: The Urgent Need for Improved Workplace Safety and Health Policies and Programs (2005) 8

AFL-CIO, Marianne Brown et al., Voices from the Margins: Immigrant Workers' Perceptions of Health and Safety in the Workplace (2002) 8

E. Hull, Without Justice for All (1985) 25

Human Rights Watch, Cultivating Fear: The Vulnerability of Immigrant Farmworkers in the US to Sexual Violence and Sexual Harassment (2012) 9

Matt O'Brien, *Silicon Valley Foreign Worker Search Speeds Up After Lull*, S.J. Merc. News, May 21, 2012 7

Monica Ramirez and Mary Bauer, Injustice on Our Plates: Immigrant Women in the U.S. Food Industry (2010) 8

Ruth Milkman et al., Wage Theft and Workplace Violations in Los Angeles: The Failure of Employment and Labor Law for Low-Wage Workers (2010) 8

REGULATIONS

8 C.F.R.
§ 274a.12 27
§ 274a.12(a)(1) 27
§ 274a.12 (a)(5) 27
§ 274a.12 (b)(9) 27
§ 274a.12 (b)(13) 27
§ 274a.12 (b)(14) 27
§ 274a.12 (b)(20) 27

Cal. Code Regs. tit. 2,
§ 7286.5(b) 1

CONSTITUTIONAL PROVISIONS

Cal. Const.
art. I, § 7 13
art. I, § 20 11
art. IV, § 1 .... 19, 23

LEGISLATIVE MATERIALS

Senate Bill 1818 .... 5, 6

LAW REVIEW AND JOURNAL MATERIALS

Amanda Clark, *A Hometown Dilemma: Addressing the Sexual Harassment of Undocumented Women in Meatpacking Plants in Iowa and Nebraska*, 16 Hastings Women's L.J. 139 (2004) 9

Charles Gordon, Stanley Mailman and Stephen Yale-Loehr, Immigration Law and Procedure (rev. ed. 2010) 25

Diana Vellos, *Immigrant Latina Domestic Workers and Sexual Harassment*, 432 J. Gender & L. 407 (1997) 9

Maria Ontiveros, *Lessons from the Fields: Female Farmworkers and the Law*, 55 Maine L. Rev. 157 (2003) 9

Philip L. Martin & J. Edward Taylor, *California Farm Workers*, 54 Cal. Agric. 19 (2000) 7

Pia Orrenius et al., *Do Immigrants Work in Riskier Jobs?*, 46 Demography 535 (2009) 8

Rebecca Smith, *Immigrant Workers and Workers' Compensation: The Need for Reform*, 55 Am. J. Indus. Med. (2012) 8

William R. Tamayo, *The Role of the EEOC in Protecting the Civil Rights of Farm Workers*, 33 U.C. Davis L. Rev. 1075 (2000) 9

INTERNET REFERENCES

California Immigrant Policy Center, Looking Forward: Immigrant Contributions to the Golden State (2010), https://caimmigrant.org/contributions.html 7

Daniel C. Martin, Department of Homeland Security Office of Immigration Statistics, *Annual Flow Report: Refugees and Asylees* 1 (2011), http://www.dhs.gov/xlibrary/assets/statistics/publications/ois_rfa_fr_2010.pdf 4

Duren Banks and Tracey Kyckelhahn, U.S. Department of Justice Bureau of Justice Statistics, Characteristics of Suspected Human Trafficking Incidents, 2008-2010 1 (2011), http://www.bjs.gov/content/pub/pdf/cshti0810.pdf 4

EEOC, Rescission of Enforcement Guidance on Remedies Available to Undocumented Workers Under Federal Employment Discrimination Laws, No. 915.002 (June 27, 2002), http://www.eeoc.gov/policy/docs/undoc-rescind.html 13

Immigration Policy Center, New Americans in California (2012), http://www.immigrationpolicy.org/just-facts/new-americans-california .. 7

Jeffrey Passel and D'Vera Cohn, U.S. Foreign-Born Population: How Much Change from 2009 to 2010? 1 (2012), http://www.pewhispanic.org/files/2012/01/Foreign-Born-Population.pdf 6

Jeffrey S. Passel and D'Vera Cohn, A Portrait of Unauthorized Immigrants in the United States ii (2009), http://www.pewhispanic.org/files/reports/107.pdf.. 5

Jeffrey S. Passel, Unauthorized Immigrant Population: National and State Trends, 2010 (2011), http://pewresearch.org/pubs/1876/unauthorized-immigrant-population-united-states-national-state-trends-2010 7

Michael Hoffer *et al.*, Department of Homeland Security Office of Immigration Statistics, Population Estimates 5 (2010), http://www.dhs.gov/xlibrary/assets/statistics/publications/ois_ill_pe_2009.pdf........................ 4

Pew Hispanic Center, Unauthorized Immigrant Population: National and State Trends, 2010 24 (2011), http://pewhispanic.org/files/reports/133.pdf 7

Press Release, U.S. Bureau of Labor Statistics, Labor Force Characteristics of Foreign-Born Workers Summary (May 25, 2012), http://www.bls.gov/news.release/forbrn.nr0.htm...................................... 6

Public Policy Institute of California, At Issue: Illegal Immigration 9 (2011), http://www.ppic.org/content/pubs/atissue/AI_711HJAI.pdf 7

INTRODUCTION

The purpose of the Fair Employment and Housing Act (FEHA) is to protect all "persons" from unlawful discrimination.[1] The decision below threatens to strip this protection from undocumented immigrants and to undermine the principle that aliens, even those whose presence in this country is unauthorized, are "persons" guaranteed due process of law. *Plyler v. Doe*, 457 U.S. 202, 210 (1982). By assuming that undocumented status equates with having "unclean hands" and by using the after-acquired evidence doctrine to extinguish the rights of a person suspected of having that status, the decision potentially leaves an entire class of workers, one-tenth of the California workforce, without judicial recourse of any kind.

The trial court in this case found on disputed evidence that petitioner and appellant Vicente Salas ("Salas") had used someone else's Social Security number to obtain employment and concluded that equitable defenses therefore deprived him "as a matter of law" of any form of relief

---

[1] Section 12920 of the California Government Code declares the public policy of the State to protect all "persons" from unlawful discrimination. Section 12940 prohibits adverse actions taken because of the protected status of any "person," including refusing to hire or employ "the person," barring or discharging "the person" from employment, or discriminating against "the person" in compensation or in terms, conditions, or privileges of employment. FEHA regulations define "employee" as "[a]ny individual" under the direction and control of an employer. Cal. Code Regs. tit. 2, § 7286.5(b). The regulations define "applicant" as "[a]ny individual" who files a written application or who otherwise indicates a specific desire to be considered for employment. *Id.* California Labor Code section 132a declares it to be the "policy of this state that there should not be discrimination against workers who are injured in the course and scope of their employment." *See Judson Steel Corp. v. Workers' Comp. Appeals Bd.*, 22 Cal. 3d 658, 668-69 (1978). These statutes and regulations do not distinguish between workers who are documented and those who are not.

under FEHA.[2] *Salas v. Sierra Chemical Co.*, 129 Cal. Rptr. 3d 263, 272, 275 (Cal. Ct. App. Aug. 09, 2011). In affirming the grant of summary judgment, the Court of Appeal erroneously relied on the Immigration Reform and Control Act of 1986 (IRCA), 8 U.S.C. §§ 1324a-1324b, and the United States Supreme Court decision in *Hoffman Plastic Compounds, Inc. v. NLRB*, 535 U.S. 137 (2002). *Salas*, 129 Cal. Rptr. 3d at 275-76. Contrary to the Court's holding, the *Hoffman* decision affirmed the protected status of undocumented workers as "employees" under the National Labor Relations Act, and only limited their entitlement to certain prospective remedies as inconsistent with IRCA. *Hoffman*, 535 U.S. at 140, 151-52; *see Sure-Tan, Inc. v. NLRB*, 467 U.S. 883, 892 (1984) (holding that undocumented aliens "plainly come within the broad statutory definition of 'employee'").

Amici concur with the positions set forth in Appellant's Opening and Reply Briefs and will not repeat them here. This brief is submitted to address the troubling implications of the Court of Appeal's decision for the right to redress of all individuals suspected of being undocumented and for the statutory protections afforded to all workers in this State.

The decision below raises a number of critical concerns. First, equitable defenses may not, consistent with due process, bar access to the judicial system based solely on immigration status. Second, equitable doctrines cannot foreclose a finding of statutory liability or entitlement to remedies that are unaffected by IRCA. While equitable doctrines may limit certain forms of prospective relief, such as reinstatement or rehire, Salas does not seek such remedies. Third, vesting state trial courts with the task

[2] For reasons explained in Appellant's Opening Brief at 32-39, the trial court erred in finding that the evidence regarding Salas's immigration status was undisputed.

of interpreting and applying complex federal law governing immigration and work authorization status would run the risk of erroneous determinations on collateral issues, discourage many immigrants—both legal and undocumented—from challenging workplace abuses, and raise federal preemption concerns.[3]

Neither of the equitable doctrines relied on by the Court of Appeal can or should exempt an employer from liability for statutory claims or preclude remedies unrelated to the plaintiff's immigration status. The after-acquired evidence doctrine is potentially applicable in employment cases where, "after an employee's termination, the employer learns of employee wrongdoing that would have resulted in the employee's discharge in any event." *Jaramillo v. County of Orange*, 200 Cal. App. 4th 811, 819 (2011) (internal quotation marks omitted). It does not exculpate an employer from liability. The defense of unclean hands, which may apply where the plaintiff has engaged in "conduct that violates conscience, or good faith, or other equitable standards" in connection with the matter at issue, is

---

[3] As this Court recognized in *Martinez v. Regents of the Univ. of Cal.*, "determination of who should or should not be admitted into the country, and the conditions under which a legal entrant may remain" can trigger structural and automatic preemption. 50 Cal. 4th 1277, 1287 (2010) (internal citation omitted). In *Arizona v. United States*, the United States Supreme Court ruled that a state law imposing criminal penalties for unauthorized work was preempted under IRCA. 132 S. Ct. 2492, 2504 (2012). The Court noted that "Congress has made clear . . . that any information employees submit to indicate their work status 'may not be used' for purposes other than prosecution under specified federal criminal statutes." *Id.* The Court concluded that "[i]n the end, IRCA's framework reflects a considered judgment that making criminals out of aliens engaged in unauthorized work—aliens who already face the possibility of employer exploitation because of their removable status—would be inconsistent with federal policy and objectives." *Id.*

similarly inapplicable. *Kendall-Jackson Winery, Ltd. v. Superior Court*, 76 Cal. App. 4th 970, 979 (1999).

Expanding the relevance of immigration-related conduct to bar liability entirely and allowing inquiry into whether the plaintiff's reasons for immigrating "violate[d] conscience or good faith" would lead to prejudicial evidentiary side-shows, deter many valid claims, and lead to discovery fishing expeditions whenever the plaintiff's appearance or accent invites speculation that he or she may be a non-native. *Id.*; *see Clemente v. State*, 40 Cal. 3d 202, 211 (1985) (upholding exclusion of evidence of undocumented status in personal injury action, finding it speculative and highly prejudicial).

Undocumented workers come to this country for many reasons. Some were brought as children, only to discover as adults that they lack legal status.[4] Others came fleeing persecution and have not yet been granted asylum in this country.[5] Still others were victims of trafficking,[6] or overstayed lawful visas for compelling reasons, including medical necessity

---

[4] The Department of Homeland Security estimates that in 2009, approximately 1,320,000 undocumented children lived in the United States. Michael Hoffer *et al.*, Department of Homeland Security Office of Immigration Statistics, Population Estimates 5 (2010), http://www.dhs.gov/xlibrary/assets/statistics/publications/ois_ill_pe_2009.pdf.

[5] In 2010, the United States admitted 73,293 individuals as refugees, and granted 21,113 individuals asylum. Daniel C. Martin, Department of Homeland Security Office of Immigration Statistics, *Annual Flow Report: Refugees and Asylees* 1 (2011), http://www.dhs.gov/xlibrary/assets/statistics/publications/ois_rfa_fr_2010.pdf.

[6] Between 2008 and 2010, federally funded task forces investigated 2,515 suspected incidents of human trafficking. Duren Banks and Tracey Kyckelhahn, U.S. Department of Justice Bureau of Justice Statistics, Characteristics of Suspected Human Trafficking Incidents, 2008-2010 1 (2011), http://www.bjs.gov/content/pub/pdf/cshti0810.pdf.

or family ties, for which they may be entitled to immigration relief.[7] Even those who came solely to work may have been driven by economic necessity to seek a means to support themselves and their loved ones. Motivations and circumstances of this kind are not universally recognized as violating conscience or good faith. A plaintiff's access to the court system to enforce statutory rights should not depend on such elastic and subjective criteria.

The issue of whether unauthorized immigration should evoke moral outrage or humanitarian concern is the subject of intense national debate,[8] but the California Legislature has resolved that debate in the context of adjudicating cases brought under state law. It has enacted a comprehensive set of statutes, known as Senate Bill (SB) 1818, which affirm that "all protections, rights, and remedies available under state law, except any reinstatement remedy prohibited by federal law, are available to all individuals regardless of their immigration status" and that "[f]or purposes of enforcing state labor and employment laws, a person's immigration

---

[7] Increasingly, undocumented immigrants live in mixed-status families; approximately four million U.S. citizen children live in families headed by undocumented immigrants. Jeffrey S. Passel and D'Vera Cohn, A Portrait of Unauthorized Immigrants in the United States ii (2009), http://www.pewhispanic.org/files/reports/107.pdf; *cf. Darces v. Woods*, 35 Cal. 3d 871, 893 & n.24 (1984) (invalidating state welfare regulation as violating the equal protection rights of children whose families also included undocumented children, impermissibly classifying them based on an immutable trait—birth into an undocumented family—that included "historically disfavored" characteristics, national origin and ancestry).

[8] California has enacted measures designed to assist undocumented immigrants, including section 68130.5 of the California Education Code, which allows undocumented immigrants to pay in-state tuition rates at state universities. That statute was upheld by this Court in *Martinez*. 50 Cal. 4th 1277; *see also* California Dream Act, Cal. Educ. Code §§ 66021.6, 66021.7 (permitting undocumented college students to apply for private scholarships and State-funded grant programs).

status is irrelevant to the issue of liability." Cal. Lab. Code § 1171.5; CAL. Civ. Code § 3339; Cal. Gov. Code § 7285; Cal. Health & Safety Code § 24000.

The statutory framework of SB 1818 rests on compelling policy considerations. If equitable defenses based on immigration status can bar all forms of redress, the due process and statutory rights of all those suspected of being undocumented would be greatly diminished. Taken to the extreme, this approach could create a class to whom the judicial process is off-limits and for whom relief would be unavailable, even in cases of egregious mistreatment. Unscrupulous employers would be given a strong incentive to hire and exploit undocumented workers, the role of all workers in policing the workplace would be undermined, and the administration of justice in this State would suffer grievous damage. For these reasons, *amici* urge this Court to reverse the Court of Appeal's decision.

RELEVANT BACKGROUND

Immigrant workers play a crucial role in the United States economy. Working side by side with native-born coworkers, they are subject to the same risks and covered by the same legal protections. The total estimated foreign-born population in the United States is 39.9 million,[9] approximately 12 percent of the population as a whole[10] and 16 percent of the nation's labor force.[11] Of these individuals, over 11 million are undocumented.[12]

---

[9] Jeffrey Passel and D'Vera Cohn, U.S. Foreign-Born Population: How Much Change from 2009 to 2010? 1 (2012), http://www.pewhispanic.org /files/2012/01/Foreign-Born-Population.pdf.
[10] *Id.*
[11] Press Release, U.S. Bureau of Labor Statistics, Labor Force Characteristics of Foreign-Born Workers Summary (May 25, 2012), http://www.bls.gov/news.release/forbrn.nr0.htm.

From California's large agricultural industry[13] to the Silicon Valley,[14] immigrant workers, both documented and undocumented, play a significant role in the State's economy.[15] California's undocumented population has been estimated at 2.6 million—approximately 7 percent of the State's total population[16] and one-fourth of the population of undocumented immigrants nationwide.[17] Almost one in every ten workers in California is undocumented.[18]

Most undocumented workers are found in traditionally low-wage occupations such as agriculture, construction, manufacturing, and service industries, where workers face the greatest risk for exploitation.[19] According to a recent study, almost 76 percent of undocumented workers in Los Angeles worked off-the-clock without pay and over 85 percent did not

---

[12] Jeffrey S. Passel, Unauthorized Immigrant Population: National and State Trends, 2010 (2011), http://pewresearch.org/pubs/1876/unauthorized-immigrant-population-united-states-national-state-trends-2010.

[13] *Philip L. Martin & J. Edward Taylor, For California Farm Workers, 54 Cal. Agric.* 19 (2000) (reporting that during a typical year, 35,000 farm employers in California hire 800,000 to 900,000 individuals, most of whom are Hispanic immigrants).

[14] *See, e.g.*, Matt O'Brien, *Silicon Valley Foreign Worker Search Speeds Up After Lull*, S.J. Merc. News, May 21, 2012.

[15] Immigrant households make up 27% of the total household income in California, and have a combined federal tax contribution of more than $30 billion annually. California Immigrant Policy Center, Looking Forward: Immigrant Contributions to the Golden State (2010), https://caimmigrant.org/contributions.html. Undocumented immigrants in California paid $2.7 billion in state and local taxes in 2010. Immigration Policy Center, New Americans in California (2012), http://www.immigrationpolicy.org/just-facts/new-americans-california.

[16] Pew Hispanic Center, Unauthorized Immigrant Population: National and State Trends, 2010 24 (2011), http://pewhispanic.org/files/reports/133.pdf.

[17] *Id.* at 15.

[18] *Id.* at 24.

[19] Public Policy Institute of California, At Issue: Illegal Immigration 9 (2011), http://www.ppic.org/content/pubs/atissue/AI_711HJAI.pdf.

receive overtime pay.[20] Immigrant workers, both documented and undocumented, are disproportionately likely to be injured or killed on the job. Approximately 29 percent of workers killed in industrial accidents in California in recent years were immigrants.[21] Their rate of nonfatal occupational injuries is also higher than average.[22] Researchers suspect that the real numbers may be greater than reported, as immigrant workers often conceal work-related injuries or illnesses for fear of retaliation.[23] These numbers show that vigorous enforcement of statutes governing workplace standards is of crucial importance to workers who may be undocumented.

The statute at issue in this case, FEHA, is of great significance to immigrants generally because of its prohibition on national origin discrimination. Cal. Gov't Code §§ 12921, 12940. Its enforcement is of particular importance to immigrant women, who are especially vulnerable to sexual harassment, abuse, and violence on the job. Sexual violence against immigrant women in industries such as agriculture, domestic work, and food manufacturing and processing is widespread.[24] One recent study

---

[20] Ruth Milkman et al., Wage Theft and Workplace Violations in Los Angeles: The Failure of Employment and Labor Law for Low-Wage Workers 46-48 (2010).

[21] AFL-CIO, Immigrant Workers at Risk: The Urgent Need for Improved Workplace Safety and Health Policies and Programs 7 (2005).

[22] Immigrant workers suffer workplace injury at thirty-one injuries per 10,000, a rate higher than all workers. Pia Orrenius et al., *Do Immigrants Work in Riskier Jobs?*, 46 Demography 535 (2009).

[23] *Id.*; AFL-CIO, *supra* note 21, at 7 (citing Marianne Brown et al., Voices from the Margins: Immigrant Workers' Perceptions of Health and Safety in the Workplace (2002)); *see also* Rebecca Smith, *Immigrant Workers and Workers' Compensation: The Need for Reform*, 55 Am. J. Indus. Med. (2012) (forthcoming).

[24] Monica Ramirez and Mary Bauer, Injustice on Our Plates: Immigrant Women in the U.S. Food Industry 45-48 (2010); Amanda Clark, *A*

reports that hundreds of thousands of immigrant farmworker women and girls in the United States face a high risk of sexual violence and sexual harassment in the workplace, including rape, stalking, unwanted touching, exhibitionism, or vulgar and obscene language by supervisors, employers, and others in positions of power. Most farmworkers interviewed said they had experienced such treatment or knew others who had. And most said they had not reported these workplace abuses, fearing reprisals.[25] In another investigation of harassment against female agricultural workers, the Equal Employment Opportunity Commission (EEOC) found that "hundreds, if not thousands, of women had to have sex with supervisors to get or keep jobs and/or put up with a constant barrage of grabbing and touching and propositions for sex by supervisors."[26] A similar study of farmworker women surveyed in the Central Valley found that eighty percent had experienced some form of sexual harassment.[27] The protections of FEHA are crucial to these vulnerable workers.

These statistics paint a stark picture: unauthorized immigrants, working alongside citizen and legal resident coworkers, are concentrated in jobs offering the lowest pay, the worst working conditions, and the greatest risk of discrimination, harassment, and occupational injuries. Like all

---

Hometown Dilemma: Addressing the Sexual Harassment of Undocumented Women in Meatpacking Plants in Iowa and Nebraska, 16 Hastings Women's L.J. 139 (2004); Maria Ontiveros, *Lessons from the Fields: Female Farmworkers and the Law*, 55 Maine L. Rev. 157 (2003); Diana Vellos, *Immigrant Latina Domestic Workers and Sexual Harassment*, 432 J. Gender & L. 407 (1997).

[25] Human Rights Watch, Cultivating Fear: The Vulnerability of Immigrant Farmworkers in the US to Sexual Violence and Sexual Harassment (2012).

[26] Ontiveros, *supra* note 24, at 169 (citing William R. Tamayo, *The Role of the EEOC in Protecting the Civil Rights of Farm Workers*, 33 U.C. Davis L. Rev. 1075, 1080 (2000)).

[27] *Id.*

workers, they play a crucial role in policing the workplace and maintaining minimum standards to which all California workers are entitled. Ensuring that these statutory safeguards are enforced as legally required is, thus, critical.

ARGUMENT

A. APPLICATION OF EQUITABLE DEFENSES BASED ON UNDOCUMENTED STATUS IS INCONSISTENT WITH DUE PROCESS AND THE RIGHT OF FREE ACCESS TO THE COURTS.

All "persons" are entitled to redress through the courts, and noncitizens, even those whose presence in this country is unauthorized, are "persons" guaranteed due process of law. *Plyler*, 457 U.S. at 210. The Fourteenth Amendment to the United States Constitution and article I, section 7, subdivision (a), of the California Constitution provide that no "person" may be denied property without due process. The U.S. Supreme Court has repeatedly held that the Due Process and Equal Protection Clauses of the Fourteenth Amendment apply to all persons "without regard to any differences of race, of color, or of nationality." *Yick Wo v. Hopkins*, 118 U.S. 356, 369 (1886). These protections also apply to "an alien, who has entered the country, and has become subject in all respects to its jurisdiction, and a part of its population," although alleged to be here illegally. *Yamataya v. Fisher*, 189 U.S. 86, 99-101 (1903). In recognition of these fundamental principles, courts in California and throughout the nation have permitted undocumented immigrants to seek relief for violations of constitutional, statutory, and common law rights.

Because a cause of action is a species of property, "the Due Process Clauses protect civil litigants who seek recourse in the courts, either as

defendants hoping to protect their property or as plaintiffs attempting to redress grievances." *Logan v. Zimmerman*, 455 U.S. 422, 428-29 (1982) (holding that employee's right to use Illinois Fair Employment Practices Act's adjudicatory procedures was a species of property protected by the due process clause); *see also Payne v. Superior Court*, 17 Cal. 3d 908, 914 n.3 (1976).[28] The due process mandate has been interpreted to require, at a minimum, that "persons forced to settle their claims of right and duty through the judicial process must be given a meaningful opportunity to be heard." *Boddie v. Connecticut*, 401 U.S. 371, 377 (1971); *see also California Teachers Ass'n v. State*, 20 Cal. 4th 327, 339 (1999). Free access to the courts is also an aspect of the First Amendment right of petition. *California Teachers Ass'n*, 20 Cal. 4th at 339.[29] The court in *Reyes v. Van Elk, Ltd.* recognized this principle in holding that

---

[28] The right to hold property in California is not limited based on alienage. *See* Cal. Const. art. I, § 20 (providing that "[n]oncitizens have the same property rights as citizens"); Cal. Civ. Code § 671 (providing that "[a]ny person, whether citizen or alien, may take, hold, and dispose of property real or personal, within this State").

[29] Denying undocumented workers access to the courts based on equitable doctrines such as "unclean hands" could also have equal protection implications. While undocumented immigrants are not a "suspect class" for purposes of equal protection scrutiny, in *Plyler*, the U.S. Supreme Court subjected a classification based on undocumented status to an intermediate level of scrutiny because the persons involved were children who had been brought to this country. 457 U.S. 202. Even if the classification in this case is subjected to the minimum "rational basis" scrutiny, the approach of the Court of Appeal would raise serious equal protection concerns. The purpose of FEHA is to protect all workers from discrimination. As this Court has warned, the California Constitution requires that "persons similarly situated with respect to the legitimate purpose of the law receive like treatment." *Purdy & Fitzpatrick v. State*, 71 Cal. 2d 566, 578 (1969). Thus, all who are covered by the statute, both documented and undocumented, are similarly situated with respect to the statute's purposes and must be allowed to invoke its protections.

undocumented workers are entitled to seek recovery under California's prevailing wage statute and that earned but unpaid wages are vested property rights to which plaintiffs were constitutionally entitled. 148 Cal. App. 4th 604, 612 (2007) (recognizing that article I, section 20 of the California Constitution requires that noncitizens be guaranteed the same property rights as citizens).

The use of equitable defenses to defeat the claims of undocumented workers as a class deprives them of these basic rights. Undocumented immigrants may bring suit and recover damages for personal injury and other torts.[30] They may assert constitutional challenges to state actions affecting their interests.[31] They have the right to seek wages for work they have performed and damages for retaliation under section 16(b) of the Fair

---

[30] *Clemente*, 40 Cal. 3d at 221 (finding evidence of undocumented status in personal injury action speculative and prejudicial); *see Hernandez v. Paicius*, 109 Cal. App. 4th 452, 460 (2003) (noting that there is "no room for doubt about . . . the irrelevance of immigration status in enforcement of state labor, employment, civil rights, and employee housing laws"), *disapproved on other grounds in People v. Freeman*, 47 Cal. 4th 993 (2010); *Rodriguez v. Kline*, 186 Cal. App. 3d 1145, 1149 (1986) (holding that where plaintiff's deportability may limit damages for future lost earnings, issue of immigration status is to be decided as a question of law outside the jury's presence); *see also Hagl v. Jacob Stern & Sons, Inc.*, 396 F. Supp. 779, 784 (E.D. Pa. 1975) (stating that "every alien, whether in this country legally or not, has a right to sue those who physically injure him"); *Cano v. Mallory Mgmt.*, 760 N.Y.S.2d 816 (N.Y. App. Div. 2003) (holding that undocumented immigrant's status did not preclude negligence action); *Tyson Foods, Inc. v. Guzman*, 116 S.W.3d 233, 244 (Tex. App. 2003) (rejecting *Hoffman*-based challenge to tort award to undocumented alien and noting that *Hoffman* "only applies to an undocumented alien worker's remedy for an employer's violation of the NLRA and does not apply to common-law personal injury damages").

[31] *See, e.g.*, *Garrett v. City of Escondido*, 465 F. Supp. 2d 1043 (S.D. Cal. 2006) (granting a temporary restraining order to undocumented plaintiffs based on constitutional challenge to city ordinance).

Labor Standards Act (FLSA), 29 U.S.C. § 216(b),[32] and state wage and hour laws.[33] They are protected under the National Labor Relations Act, 29 U.S.C.A. § 151-169,[34] and anti-discrimination laws.[35] In most states, including California, they are entitled to workers' compensation benefits

---

[32] *Patel v. Quality Inn South*, 846 F.2d 700, 704 (11th Cir. 1988) (concluding that FLSA coverage of undocumented workers is "fully consistent" with the IRCA); *Singh v. Jutla & C.D. & R's Oil, Inc.*, 214 F. Supp. 2d 1056 (N.D. Cal. 2002) (holding undocumented worker could sue under the FLSA for retaliation and that *Hoffman* did not foreclose all remedies to undocumented workers); *Chellen v. John Pickle Co. Inc.*, 446 F. Supp. 2d 1247, 1276 (N.D. Okla. 2006) (concluding that "the definition of 'employee' under the FLSA imposes no limitation based on nationality or immigration status"); *Escobar v. Spartan Sec. Serv.*, 281 F. Supp. 2d 895, 897 (S.D. Tex. 2003) (same); *Flores v. Amigon*, 233 F. Supp. 2d 462, 463-64 (E.D.N.Y. 2002) (finding immigration status irrelevant to a claim for unpaid wages under the FLSA); *Liu v. Donna Karan Int'l, Inc.*, 207 F. Supp. 2d 191 (S.D.N.Y. 2002) (same); *Flores v. Albertsons, Inc.*, No. CV0100515, 2002 WL 1163623, at *4-*6 (C.D. Cal. Apr. 9, 2002) (same).

[33] *Hernandez*, 109 Cal. App. 4th at 460 (holding that employers must comply with California wage, hour and workers' compensation laws for all employees, including undocumented workers).

[34] *Sure-Tan*, 467 U.S. at 892 (1984) (holding that undocumented immigrants are "employees" within the meaning of the NLRA); *Agri Processor Co., Inc. v. NLRB*, 514 F.3d 1, 4 (D.C. Cir. 2008) (reaffirming, post-*Hoffman*, that undocumented workers are covered by the NLRA, finding that "nothing in IRCA's text alter[ed] the NLRA's [expansive] definition of 'employee.'").

[35] *See Rivera v. NIBCO, Inc.*, 364 F.3d 1057, 1067 (9th Cir. 2004) (finding *Hoffman* not broadly applicable and noting the differences between the NLRA and Title VII); *Rios v. Enter. Ass'n Steamfitters Local Union 638 of U.A.*, 860 F.2d 1168, 1173 (2nd Cir. 1988) (holding that Title VII applies to undocumented workers). The EEOC has concluded that *Hoffman* "in no way calls into question the settled principle that undocumented workers are covered by the federal employment discrimination statutes . . . ." EEOC, Rescission of Enforcement Guidance on Remedies Available to Undocumented Workers Under Federal Employment Discrimination Laws, No. 915.002 (June 27, 2002), http:// www.eeoc.gov/policy/docs/undoc-rescind.html.

for work-related injuries.[36] In California, they have the right to recover prevailing wages in public work projects, *Reyes*, 148 Cal. App. 4th 604, and to sue for violations of the Immigration Consultants Act. *Mendoza v. Ruesga*, 169 Cal. App. 4th 270 (2009). Indeed, undocumented status has been held inadmissible for impeachment based on various theories, including lack of relevance on the issue of credibility, undue prejudice, and inadmissible as specific acts to prove character.[37]

Here, the Court of Appeal sanctioned a means whereby these protections can be effectively eviscerated. Ironically, it did so by misapplying equitable doctrines designed to protect the integrity of the courts and to promote justice. *Kendall-Jackson Winery*, 76 Cal. App. 4th at 978-79 (explaining that the doctrine of unclean hands protects the court's interests). The result in this case does neither.

Other courts have recognized that judicial integrity and the promotion of justice require that equitable defenses ***not*** be allowed to block legitimate claims based solely on a plaintiff's undocumented status. The following examples lie at the extreme end of the spectrum of abuse and exploitation faced by many undocumented immigrants. They do, however,

---

[36] *Farmers Bros. Coffee v. Workers' Comp. Appeals Bd.*, 133 Cal. App. 4th 533 (2005); *see, e.g.*, *Madeira v. Affordable Hous. Found. Inc.*, 469 F.3d 219, 227-28 (2nd Cir. 2006).

[37] In *Hernandez*, the court held that evidence of immigration status was inadmissible to attack a party's credibility. 109 Cal. App. 4th at 460. The court noted that under California Evidence Code section 787, evidence of specific instances of conduct relevant only to prove a character trait "is inadmissible to attack or support the credibility of a witness." *Id.*; *see also Figueroa v. INS*, 886 F.2d 76, 79 (4th Cir. 1989) (same); *First Am. Bank v. W. DuPage Landscaping, Inc.*, No. 00 C 4026, 2005 WL 2284265, at *1 (N.D. Ill. Sept. 19, 2005); *Mischalski v. Ford Motor Co.*, 935 F. Supp. 203, 207-08 (E.D.N.Y. 1996); *Castro-Carvache v. INS*, 911 F. Supp. 843, 852 (E.D. Pa. 1995); *Gonzalez v. City of Franklin*, 403 N.W.2d 747, 759-60 (Wis. 1987).

illustrate the ways in which defendants have sought ***unsuccessfully*** to use status-based equitable defenses to escape the consequences of their own misconduct. If the Court of Appeal's decision in this case is not reversed, such defenses could metastasize far beyond their original purpose of protecting the integrity of the court, and become a shield for unscrupulous defendants to exploit and abuse undocumented workers at will.

In *Rico v. Flores*, the Fifth Circuit held that the Texas unlawful acts rule, the equivalent of California's unclean hands defense, did not bar wrongful death claims brought by the survivors of ten undocumented immigrants who died from lack of oxygen, dehydration, and overheating after being trapped in a train car by a railroad employee who failed to let them out. 481 F.3d 234, 241-44 (5th Cir. 2007).

In *Doe v. Reddy*, the federal court for the Northern District of California rejected the equitable defenses of unclean hands and *in pari delicto* in a case alleging that defendants had fraudulently induced plaintiffs to come to the United States with promises of education and employment, and instead subjected them to arduous working conditions and sexual and physical abuse upon arrival. No. C 02-05570, 2003 WL 23893010, at *6 (N. D. Cal. Aug. 4, 2003) (rejecting motion to dismiss RICO claims based on *in pari delicto* and unclean hands).

In *David v. Signal International, LLC*, a case brought by workers trafficked to the United States and subjected to forced labor, the federal court for the Eastern District of Louisiana rejected the employer's unclean hands defense based on the workers' undocumented status. 257 F.R.D. 114, 124-25 (E. D. La. 2009) (finding that the immigration status of putative class members was not relevant for purposes of damages, mitigation, or the employer's *in pari delicto* defense). According to the court, dismissal on the basis of an unclean hands defense would be

"tantamount to a categorical ruling precluding foreign nationals from any protection against the type of abuses alleged." *Id.* at 125.

The decision below has the potential to accomplish the same nefarious result. Equitable defenses designed to protect the integrity of the courts and promote justice would become tools for promoting injustice and exploitation.

B. EQUITABLE DEFENSES CANNOT BAR WORKERS FROM BRINGING CIVIL RIGHTS AND OTHER STATUTORY CLAIMS.

The Court of Appeal erred in applying equitable defenses to extinguish all liability for the violation of Salas's statutory rights. Such defenses cannot provide a complete shield to liability or preclude remedies unrelated to the alleged misconduct, especially when the claims brought involve the vindication of civil rights. *McKennon v. Nashville Banner Publ'g Co.*, 513 U.S. 352, 358 (1995).[38]

Courts have repeatedly held that "principles of equity cannot be used as a means to avoid the mandate of a statute." *Estate of McInnis v. Sylvester*, 182 Cal. App. 3d 949, 958 (1986); *see also Page v. Bakersfield Unif. & Towel Supply Co.*, 239 Cal. App. 2d 762, 770 (1966) (holding that

---

[38] By categorically denying any relief to plaintiff, the Court of Appeal''s decision also exceeds the scope of the Supreme Court's decision in *Hoffman*. 535 U.S. 137. While the *Hoffman* court curtailed the availability of back pay for unauthorized workers, it acknowledged the availability of "other significant sanctions" against the employer, whom the NLRB found had engaged in unfair employment practices under the NLRA. *Id*. at 152. The Court further noted that such remedies were necessary to "effectuate national labor policy." *Id.* By contrast, the Court of Appeal's application of the unclean hands and after-acquired evidence doctrines denies any relief to Salas, which means "the employer gets off scot-free" and disregards completely the state's interest in enforcing its "labor policy," including anti-discrimination laws. *Id.*

unclean hands cannot be used to defeat claims under section 17200 of the California Business and Professions Code). This rule applies even though equitable defenses may apply to actions at law as well as equity. *See Kendall-Jackson Winery*, 76 Cal. App. 4th at 978 (discussing the doctrine of unclean hands in the context of a tort action for damages for malicious prosecution).[39] However, while equitable defenses may limit available relief, even in cases brought for damages and other remedies available at law, such defenses do not allow defendants to avoid liability entirely for purely ***statutory*** wrongs. Otherwise, "[t]o allow such a defense would be to judicially sanction the defendant for engaging in an act declared by statute to be void or against public policy." *Ticconi v. Blue Shield of Cal. Life & Health Ins. Co.*, 160 Cal. App. 4th 528, 543 (2008).

1. While certain prospective remedies may be limited in some circumstances, courts must make a liability determination on claims seeking to vindicate a plaintiff's civil rights.

United States Supreme Court case law requires courts to make liability determinations in civil rights cases, regardless of what remedies may or may not be ultimately awarded even when after-acquired evidence and unclean hands are asserted as affirmative defenses. *McKennon*, 513 U.S. at 358. In *McKennon*, the high court reversed the affirmance of summary judgment in an age discrimination case based upon an assertion of equitable defenses by the employer. *Id.* at 360-62. The Court so held because the enforcement of civil rights laws is of the utmost importance to our society. *Id*. These laws were enacted "to eradicate discrimination in the workplace, reflect[ing] a societal condemnation of invidious bias in

---

[39] *See also Fibreboard Paper Prods. Corp. v. East Bay Union of Machinists*, 227 Cal. App. 2d 675, 728 (1964); *see also Burton v. Sosinsky*, 203 Cal. App. 3d 562, 574 (1988).

employment decisions." *Id.* at 357. Moreover, plaintiffs, who bring claims to vindicate their own civil rights, are the primary means for fulfilling these policy objectives. *Id.*; *see also Alexander v. Gardner-Denver Co.*, 415 U.S. 36, 45 (1974) ("[T]he private litigant not only redresses his own injury but also vindicates the important congressional policy against discriminatory employment practices").

The important objectives of anti-discrimination laws "are furthered when even a single employee establishes that an employer has discriminated against him or her." *McKennon*, 513 U.S. at 358. Disclosure of these incidents itself can act as an important deterrent, in part because the repeated occurrence of violations may indicate a deeper pattern or practice problem that could have larger ramifications. *Id.* By analogy, as a state civil rights law, the finding of liability under FEHA itself serves an important policy purpose of this State, and Salas was entitled to such a finding.

Although equitable principles may not be applied to defeat civil rights claims, such principles may be used to limit damages and will generally render reinstatement and front pay inappropriate. *Id.* Here, because Salas seeks no prospective remedies that could be affected by his immigration status, such as reinstatement (which could be precluded by IRCA) or front pay (which could be precluded by *Hoffman*), these defenses have no bearing on his case. *Angelucci v. Century Supper Club*, 41 Cal. 4th 160, 179 (2007) (noting that equitable defenses may reduce recovery under the Unruh Act); *State Dept. of Health Services v. Superior Court*, 31 Cal. 4th 1026, 1042-46 (2003) (holding that "avoidable consequences" doctrine may reduce damages in sexual harassment case); *see also Rivera v. NIBCO, Inc.*, 364 F.3d 1057-69 (9th Cir. 2004) (finding that whether the plaintiff is ineligible for certain forms of relief merely "goes to the issue of damages,

not liability") (internal quotation marks omitted); *Hernandez v. Paicius*, 109 Cal. App. 4th 452, 460 (2003) (holding that personal injury plaintiff's immigration status was irrelevant to liability).

Many remedies still remain available to Salas and the law affords him the opportunity to pursue them. FEHA affords full tort damages to persons who are victims of unlawful discrimination, including emotional distress, compensatory, and punitive damages. *Dyna-Med, Inc. v. FEHC*, 43 Cal. 3d 1379, 1383 (1987); *Commodore Home Sys., Inc. v. Superior Court*, 32 Cal. 3d 211, 221 (1982). Courts may also issue broad remedial injunctions under their authority to order "effective remedies that will both prevent and deter unlawful employment practices." Cal. Gov't Code § 12920.5; *see, e.g*., *Aguilar v. Avis Rent A Car Sys., Inc*., 21 Cal. 4th 121 (1999) (upholding injunction banning the use of racial epithets in the workplace). Finally, FEHA gives courts discretion to award reasonable attorneys' fees and costs. Cal. Gov't Code § 12965(b).

Salas is entitled to seek a finding of liability under FEHA and recovery of all remedies other than those which could conflict with IRCA. Since he seeks no conflicting remedy, his immigration status is irrelevant.

2. Courts are prohibited from using equitable defenses to extinguish other kinds of statutory rights designed for a plaintiff's protection.

Even beyond the civil rights context, statutory rights cannot be extinguished by the application of equitable defenses. The core functions of the legislative branch include passing laws and formulating legislative policy. *Carmel Valley Fire Protection Dist. v. State*, 25 Cal. 4th 287, 299 (2001) (citing Cal. Const., art. IV, §§ 1, 8(b), 10, 12). The choice between competing policy considerations in enacting laws is a legislative function. *Superior Court v. County of Mendocino*, 13 Cal. 4th 45, 53 (1996). The

courts may not interfere with these legislative functions through the use of their equitable powers.

As previously discussed, the Legislature has guaranteed in FEHA that all "persons" are to be protected from unlawful discrimination. It has also declared a legislative policy embodied in SB 1818 that immigration status is of no relevance in the enforcement of state labor, employment, and civil rights laws. Once the Legislature has spoken, it is the role of the courts to enforce its mandates, not to undermine them. Thus, when, as here,

> 'the Legislature enacts a statute forbidding certain conduct for the purpose of protecting one class of persons from the activities of another, a member of the protected class may maintain an action notwithstanding the fact that he has shared in the illegal transaction. The protective purpose of the legislation is realized by allowing the plaintiff to maintain his action against a defendant within the class primarily to be deterred.'

Mendoza, 169 Cal. App. 4th at 279 (quoting *Lewis and Queen v. N.M. Ball Sons*, 48 Cal. 2d 141, 153 (1957) (holding that unclean hands defense could not prevent undocumented immigrant from recovering under the California Business and Professions Code); *see also Cooper v. Rykoff-Sexton, Inc.*, 24 Cal. App. 4th 614 (1994) (holding that the after-acquired evidence doctrine could not defeat plaintiff's claim that he was fired in violation of his contractual rights and because of his age).

In *Ghory v. Al-Lahham*, the court rejected the equitable defense of unjust enrichment to a claim for back wages, holding that "[p]rinciples of equity cannot be used to avoid a statutory mandate" such as the requirement to pay overtime wages under section 1194 of the California Labor Code. 209 Cal. App. 3d 1487, 1492 (1989). In *Carter v. Cohen*, the court permitted plaintiff to recover excess rents under a rent stabilization

ordinance despite the fact that her suit had the effect of enforcing an unlawful rental agreement, because the rental unit had been built without permits, lacked a certificate of occupancy, and was unregistered under the ordinance. 188 Cal. App. 4th 1038, 1047-48 (2010). In *Mendoza*, the court held that the unclean hands doctrine is not an affirmative defense to a cause of action under the Immigration Consultants Act, Cal. Bus. & Prof. Code, § 22440, *et seq.*, because "[a]pplication of the doctrine would allow unscrupulous immigration consultants to go unpunished and undermine the protective purposes of the legislation." 169 Cal. App. 4th at 282-83.

Even where a plaintiff does not seek legal relief such as damages, but solely equitable relief such as restitution, equitable defenses cannot extinguish the claim if the equitable recovery is based on an underlying statute. Thus, this Court held that equitable defenses may not be asserted to wholly defeat a claim for restitution of unpaid wages under section 17200 of the Business & Professions Code, since it arises out of conduct prohibited by statute, although they might otherwise impact the remedy for plaintiff's unfair business practice. *Cortez v. Purolator Air Filtration Prods. Co.*, 23 Cal. 4th 163, 179 (2000); *see Page v. Bakersfield Uniform & Towel Supply Co.*. 239 Cal. App. 2d 762, 770 (1966) (holding that "[t]he equitable doctrine of the refusal of aid to anyone with 'unclean hands,' does not, as such, apply to actions under the Act"). *See also Sullivan v. Oracle Corp.*, 51 Cal. 4th 1191, 1205 (2011) (holding that "[t]o permit nonresidents to work in California without the protection of our overtime law would completely sacrifice, as to those employees, the state's important public policy goals of protecting health and safety and preventing the evils associated with overwork.").

The *Salas* court completely ignored the teaching of these cases, departing from its role as enforcer of statutory mandates and improperly using its equitable powers to undermine those mandates.

3. The Court of Appeal's Decision Was Based on a Misunderstanding of *Murillo* and *Camp*.

In ruling that Salas's claims were barred, the Court of Appeal improperly relied upon *Murillo v. Rite Stuff Foods, Inc.*, 65 Cal. App. 4th 833 (1998) and *Camp v. Jeffer, Mangels, Butler & Marmaro*, 35 Cal. App. 4th 620 (1995).

Unlike the claim in this case, *Camp* was a wrongful discharge case based on an employment contract and violation of public policy related to plaintiffs' alleged whistleblowing. The case had no civil rights component,[40] and the Court of Appeal in *Camp* recognized that, if plaintiffs' claims had been based on a civil rights statute, the result would have been different. It cited *McKennon* for the rule that after-acquired evidence may not extinguish a civil rights claim, although it may limit available remedies. 35 Cal. App. 4th at 633. It then ***distinguished*** *McKennon*, explaining that "after-acquired evidence may bar all recovery on a wrongful discharge claim based on ***contract*** because '[b]reach of contract does not give rise to the same concerns or demand the same protections as does an action based on ***discrimination***.'" *Id.* at 633 n.9 (emphasis added) (citing *Shuessler v. Benchmark Mkt'g & Consult'g, Inc.*,

[40] The court in *Camp* held that plaintiffs' at-will status barred their contract claims and that the after-acquired evidence doctrine barred their public policy claims. 35 Cal. App. 4th 620, 627. The court noted that Mr. Camp may have had a claim under FEHA for marital status discrimination, but it did not reach that issue. *Id.* at 635 n.13.

243 Neb. 425, 441-42 (1993)); *Earl v. Saks & Co.*, 36 Cal. 2d 602, 610-12 (1951)).

Camp is distinguishable for other reasons as well. First, the nature of the plaintiffs' misconduct (falsely certifying that they were not convicted felons), placed their law firm employer at high risk of losing an important federal contract. Here, Salas's alleged use of another person's social security number—even if true—would have put Sierra at no risk. The company was in compliance with IRCA once Salas provided it with facially-valid authorization documents. *See* 8 U.S.C. § 1324A(b)(1)(A).[41] Moreover, no dispute existed as to the Camps' prior felony convictions or the action that their employer would have taken with this knowledge. As Salas argues fully in his Opening Brief, this is not the case here.

The Court of Appeal's reliance on *Murillo* was also misplaced. In *Murillo*, a terminated employee sued for sexual harassment under Title VII and FEHA and also asserted wrongful termination and tort claims. The *Murillo* court held in relevant part that: (1) plaintiff's status as an undocumented alien did not bar her from the protection of FEHA; (2) a factual issue as to whether the employer would have terminated the employee had it known of her status as an undocumented alien precluded summary judgment on her sexual harassment claim based on the after-acquired-evidence doctrine; and (3) the employee's admitted fraud in obtaining falsified immigration documents in order to secure employment did not preclude recovery for sexual harassment based on the "unclean

---

[41] Even the receipt of a "no-match" letter from Social Security Administration (which did not happen in this case) is not, standing alone, justification for terminating or refusing to hire. *See* U.S. Dep't of Justice Office of Special Counsel for Immigration-Related Unfair Employment Practices, Name and Social Security Number (SSN) "No-Matches" Information for Employers, http://www.justice.gov/crt/about/osc/pdf/publications/SSA/Employers.pdf.

hands" doctrine. *Murillo*, 65 Cal. App. 4th 833, 846, 849-50. These holdings do not support the decision below. On the contrary, they support its reversal.

The Court of Appeal instead relied on dicta from *Murillo*, noting that "[i]n dismissing her wrongful discharge claims, [Murillo] ***conceded*** that the facts of this case would support application of at least the unclean hands doctrine to bar them." *Id.* at 845. As explained above, however, neither unclean hands nor any other equitable doctrine can entirely preclude liability imposed by a statute and the concession by the plaintiff in *Murillo* does not undermine this principle. Thus, neither *Camp* nor *Murillo* requires the dismissal of statutory claims based on equitable doctrines in this case. To the extent they can be read as supporting the result in this case, they should be disapproved.

C. STATE JUDICIAL OFFICERS, WHO ARE NOT EQUIPPED TO MAKE DETERMINATIONS OF IMMIGRATION AND WORK AUTHORIZATION STATUS, RUN THE RISK OF ERRONEOUS DETERMINATIONS AND CHILLING IMMIGRANT WORKERS FROM CHALLENGING WORKPLACE ABUSES.

1. State judicial officers are ill-suited to determine immigration and work authorization status.

The Court of Appeal's decision turns state court judges into arbiters of a party's immigration and work authorization status as a necessary predicate to determining whether equitable defenses apply. However, the complexity of federal immigration law and procedure, the extensive array of immigration classifications within that scheme, and the intricate interplay between immigration status and work authorization render state courts ill-equipped to make such determinations.

Federal law establishes an exclusively federal system for determining immigration eligibility and work authorization. *See Arizona v. United States*, 132 S. Ct. 2492 (2012) (declaring that "[t]he federal power to determine immigration policy is well settled"); *Plyler*, 457 U.S. at 225 (finding that, in the immigration context, states "enjoy no power with respect to the classification of aliens," since such power is committed exclusively "to the political branches of the Federal Government"); *DeCanas v. Bica*, 424 U.S. 351, 354 (1976) (noting that the "[p]ower to regulate immigration is unquestionably exclusively a federal power"). Within this system, immigration and work authorization are not static, but can change based on determinations made entirely in the federal realm, which exacerbates the complexities faced by state judicial officers in making determinations about immigration and work authorization. *See Castro-O'Ryan v. INS*, 821 F.2d 1415, 1419 (9th Cir. 1987) (characterizing the immigration laws as "'second only to the Internal Revenue Code in complexity'") (quoting E. Hull, Without Justice for All 107 (1985)).

The laws governing the acquisition and retention of immigration status are extremely complex. *See generally* Charles Gordon, Stanley Mailman and Stephen Yale-Loehr, Immigration Law and Procedure §§ 13.3-13.9A, 13-39 (rev. ed. 2010) (observing that "frustrating difficulties [are] often presented by such assessments"). As a threshold matter, a non-citizen's right to remain in the U.S. can only be determined by an immigration judge. 8 U.S.C. § 1229a(a)(1). This proceeding before an immigration judge is the "sole and exclusive procedure for determining whether an alien may be admitted to the United States or, if the alien has been so admitted, removed from the United States." 8 U.S.C. § 1229a(a)(3). This determination can be appealed to the Board of

Immigration Appeals and, in some circumstances, to the federal courts of appeal. 8 U.S.C. § 1252.

This exclusively federal system makes no provision for a state court to render determinations regarding immigration status. On the contrary, the discretion reserved for federal officials at various junctures throughout this process weighs against state judicial officers engaging in such determinations. As Justice Blackmun noted, "the structure of the immigration statutes makes it impossible for the State to determine which aliens are entitled to residence, and which eventually will be deported. Indeed, any attempt to do so would involve the State in the administration of the immigration laws." *Plyler*, 457 U.S. at 236 (Blackmun, J., concurring) (internal citation omitted).

As with the determination of immigration status, Congress has created an exclusively federal process for determining *work authorization status* and for defining, investigating, and adjudicating violations. In 1986, Congress passed IRCA, which, for the first time, established a "comprehensive framework" for the federal regulation of unauthorized workers. *Arizona*, 132 S. Ct. at 2504 ; *see also Hoffman*, 535 U.S. at 147. IRCA charges the U.S. Attorney General with establishing procedures to investigate complaints of violations, 8 U.S.C. § 1324a(e)(1), and vests exclusive authority to conduct such investigations and to hold hearings for violations in "immigration officers and administrative law judges." 8 U.S.C. § 1324a(e)(2)(A).

Underlying this complex procedural apparatus is an array of regulations issued by the Attorney General that authorize employment eligibility for dozens of categories of aliens. The immigration status of an individual is not dispositive of his work authorization. *See* 8 C.F.R. pt. 274A, subpt. B. For example, the federal regulations set forth numerous

categories of non-citizens who are eligible for work authorization. 8 C.F.R. § 274a.12

Work authorization status is subject to changes in circumstances and, in some cases, may not be easily documented. Federal regulations authorize certain immigrants to work despite the official expiration of their work authorization document. *See, e.g.*, 8 C.F.R. § 274a.12(a)(1), (a)(5), (b)(9), (b)(13), (b)(14), (b)(20). In some cases, non-citizens who have federal authorization to work will not be issued any document expressly authorizing employment. For numerous categories of non-citizens, work authorization is subject to federal discretion. In these instances, a party may have a difficult time proving his work authorization.

The complexity of the federal immigration scheme, the multitude of immigrant classifications within that scheme, and the intricate interplay between those classifications and federal work authorization all render state judicial officers ill-equipped to make immigration and work authorization status determinations.

2. State judicial officers run the risk of erroneous determinations that could conflict with federal law.

The Court of Appeal's decision thrusts state judicial officers into a difficult role that federal law reserves for trained federal officers and would require state judges to engage in complex immigration and work authorization status determinations. In *Farmers Brothers*, the Court of Appeal warned against precisely such an outcome in rejecting an employer's claim that its employee's unauthorized status rendered him ineligible for workers' compensation benefits. 133 Cal. App. 4th 533. The *Farmers Brothers* court reasoned that "[i]f [workers'] compensation benefits were to depend upon an alien employee's federal work

authorization, the Workers' Compensation Appeals Board would be thrust into the role of determining employers' compliance with the IRCA and whether such compliance was in good faith, as well as determining the immigration status of each injured employee, and whether any alien employees used false documents." *Id.* at 540-41. Based on the decision here, state judicial officers would face similar complex determinations and would run the risk of mistakenly finding that individuals lack immigration and work authorization status.

The *Farmers Brothers* court cautions against confusing the "remedial purpose" of workers' compensation and the "enforcement purpose" of IRCA, suggesting that the enforcement scheme established by IRCA should not be understood to trump categorically the remedial intent of workers' compensation law. *Id.* at 541. But that is precisely the error committed by the court in the present case. The *Salas* court not only completely overlooked the robust public policy and remedial purpose of FEHA, but its application of the unclean hands and after-acquired evidence doctrines categorically denies unauthorized workers any remediation for discriminatory employment practices in favor of an enforcement-only approach that conflicts with IRCA. *See* Cal. Gov't Code § 12920 ("It is hereby declared as the public policy of this state that it is necessary to protect and safeguard the right and opportunity of all persons to seek, obtain, and hold employment without discrimination . . . on account of . . . physical disability . . . .").

3. The *Salas* court's erroneous inference of lack of work authorization status from an alleged social security number discrepancy exemplifies the risk of state judicial determinations.

The difficulty faced by state courts in determining a party's immigration and work authorization status is exemplified by the Court of Appeal's error in the present case. The Court mistakenly concluded that Salas's use of the same social security number as that ostensibly claimed by a third party was *conclusive* evidence that he lacked authorization to work in the United States. *Salas*, 129 Cal. Rptr. 3d at 272. On that basis, the court affirmed summary judgment to Sierra Chemical.[42] *Id*. at 278.

The Ninth Circuit has recognized that "constructive knowledge" of an immigration violation "is to be narrowly construed . . . and requires positive information of a worker's undocumented status."[43] *Aramark Facility Servs. v. Serv. Emps. Int'l Union*, 530 F.3d 817, 820-21 (9th Cir. 2008). Such positive information is notably absent in the present case. The *Aramark* court cautioned that "an SSN discrepancy does not *automatically* mean that an employee is undocumented or lacks proper work authorization. In fact, the SSA tells employers that the information it provides them does not make any statement about . . . immigration status and is not a basis, in and of itself, to take any adverse action against the

---

[42] As argued above, equitable defenses may not bar access to judicial redress based solely on immigration status. Even assuming, *arguendo*, that Mr. Salas's alleged immigration status was a relevant consideration, the Court of Appeal erred in conclusively inferring a lack of immigration and work authorization status from an ostensible social security number discrepancy.

[43] The Ninth Circuit has recognized that "[t]he doctrine of constructive knowledge has great potential to upset" IRCA's deliberate balance of "preventing unauthorized alien employment while avoiding discrimination against citizens and authorized aliens." *Collins Foods Int'l, Inc. v. INS*, 948 F.2d 549, 554-55 (9th Cir. 1991). Therefore, the doctrine "should not be expansively applied." *Id.* at 555; *see also New El Rey Sausage Co., Inc. v. INS*, 925 F.2d 1153, 1158 (9th Cir. 1991) (finding that an employer had constructive knowledge of its employees' lack of work authorization based on the "specific, detailed information" that the INS had provided about which particular employees it considered unauthorized and why).

employee." *Id.* at 826 (emphasis in original) (internal quotation marks omitted). The court therefore concluded that, "without more," a notice from the Social Security Administration indicating a social security number discrepancy "did not provide constructive notice of any immigration violations." *Id.* at 828.

Here, the Court of Appeal erroneously rejected Salas's claim that the potential social security number discrepancy raised a triable issue of fact and instead granted summary judgment based on the mistaken inference the court drew from Sierra Chemical's allegation of a social security number discrepancy. *Salas*, 139 Cal. Rptr. at 273-78.

4. Application of the unclean hands doctrine by state judicial officers will chill immigrant workers from challenging workplace abuses.

The Court of Appeal's ruling will not only result in erroneous determinations, but will have a chilling effect on immigrant workers, deterring them from challenging workplace abuses.

The Ninth Circuit has recognized precisely this kind of chilling effect. *Rivera*, 364 F.3d at 1065 (finding that "most undocumented workers are reluctant to report abusive or discriminatory employment practices"); *see also United States v. Brignoni-Ponce*, 422 U.S. 873, 879 (1975) ("The aliens themselves are vulnerable to exploitation because they cannot complain of substandard working conditions without risking deportation."). In light of these concerns, the *Rivera* court recognized that requiring plaintiffs to answer questions about immigration status "in the discovery process would likely deter them, and future plaintiffs, from bringing meritorious claims." *Rivera*, 364 F.3d at 1064. The Court of Appeal's decision will result in a far greater chilling effect, since it not only focuses

judicial scrutiny on the immigration status of the plaintiff, but it directly conditions the availability of judicial relief upon that status.

CONCLUSION

If the right to due process is to have any meaning in cases brought by undocumented plaintiffs, equitable doctrines cannot foreclose all redress based on immigration status. Workers who are suspected of being undocumented suffer disproportionately from discrimination, harassment, underpayment and workplace injuries, yet because of their status, they are extremely vulnerable to retaliation when they complain. The courts should not use their equitable powers to erode protective legislation enacted for the benefit of all workers by leaving undocumented victims with no effective remedy. Appellant seeks to vindicate important civil rights upon which his immigration status has no bearing. His rights can and should be determined without addressing questions of federal immigration law or undermining important policies established by the California Legislature. For the foregoing reasons, the decision below should be reversed.

Dated: September 12, 2012 Respectfully submitted,

By: ____________________

Josh Stehlik
NATIONAL IMMIGRATION LAW CENTER
3435 Wilshire Boulevard, Suite 2850
Los Angeles, CA 90010
T: 213.639.3900
F: 213.639.3911

Della Barnett
IMPACT FUND
125 University Avenue, Suite 102
Berkeley, CA 94710

T: 510.845.0740
F: 510.845.3654

Eunice Hyunhye Cho
NATIONAL EMPLOYMENT LAW PROJECT
405 14th Street, Suite 1400
Oakland, CA 94612
T: 510.663.5707
F: 510. 663.2028

Attorneys for *Amicus Curiae*

CERTIFICATE OF WORD COUNT

Pursuant to Rule of Court 8.520(c), I certify that this Brief of *Amicus Curiae* Impact Fund, National Immigration Law Center, and National Employment Law Project in Support Of Petitioner and Appellant contains 9,223 words, not including the Table of Contents, Table of Authorities, this Certificate, the caption page, signature blocks, or attachments.

Dated: September 12, 2012 Respectfully submitted,

By: ____________________

Josh Stehlik
NATIONAL IMMIGRATION LAW CENTER
3435 Wilshire Boulevard, Suite 2850
Los Angeles, CA 90010
T: 213.639.3900
F: 213.639.3911

Della Barnett
Michael Caesar
IMPACT FUND
125 University Avenue, Suite 102
Berkeley, CA 94710
T: 510.845.0740
F: 510.845.3654

Eunice Hyunhye Cho
NATIONAL EMPLOYMENT LAW PROJECT
405 14th Street, Suite 1400
Oakland, CA 94612
T: 510.663.5707
F: 510.663.2028

Attorneys for *Amicus Curiae*

DECLARATION OF SERVICE

I declare that I am, and was at the time of service mentioned hereafter, at least 18 years of age and not a party to the above entitled action. My business address is 3435 Wilshire Boulevard, Suite 2850, Los Angeles, California 90010. I am a citizen of the United States and am employed in the City and County of Los Angeles. On September 13, 2012, I served the following document(s): **Application for Leave to File Amici Curiae Brief and Amici Curiae Brief of Impact Fund, National Employment Law Project, National Immigration Law Center and 12 Additional Public Interest Organizations in Support of Petitioner - Appellant Vicente Salas**, upon the parties as listed on the most recent service list in this action by placing true and correct copies thereof in sealed envelopes as follows:

***Via UPS Overnight Delivery*:**

Clerk of the Court
CALIFORNIA SUPREME COURT
350 McAllister Street, Rm 1295
San Francisco, CA 94102
Original & 14 Copies

Arnold J. Wolf
FREEMAN, D'AIUTO, GUREVE, KEELING & WOLF
1818 Grand Canal Blvd, Suite 4
Stockton, CA 95207

Christopher Ho
Araceli Martinez-Olguin
THE LEGAL AID SOCIETY – EMPLOYMENT LAW CENTER
180 Montgomery Street, Ste 600
San Francisco, CA 94104

David C. Rancano
RANCANO & RANCANO, PLC
1150 9th Street
Modesto, CA 95354

***Via U.S. Mail*:**

Clerk's Office
THIRD APPELLATE DISTRICT
621 Capitol Mall, 10th Floor
Sacramento, CA 95814

Clerk's Office
SAN JOAQUIN SUPERIOR COURT
222 E. Weber Avenue
Stockton, CA 95202

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct and that this declaration was executed on September 13, 2012, at Los Angeles, California.

____
SHEILA MILLER