IN THE

# Supreme Court of the State of Delaware

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| DELAWARE VALLEY FIELD SERVICES,<br>*Employer-Below/Appellant,*<br>*v.*<br>SAUL MELGAR-RAMIREZ,<br>*Claimant-Below/Appellee.* | **No. 556, 2012**<br><br>COURT BELOW:<br><br>SUPERIOR COURT OF THE STATE OF DELAWARE IN AND FOR NEW CASTLE COUNTY, C.A. NO. 12A-01-007-JOH |

## BRIEF FOR THE ACLU OF DELAWARE AS *AMICUS CURIAE* IN SUPPORT OF APPELLEE AND AFFIRMANCE


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## STATEMENT OF INTEREST

Proposed *amicus curiae*, the American Civil Liberties Union Foundation of Delaware (the "ACLU of Delaware"), submits this brief in support of appellee Melgar-Ramirez, claimant below, to urge affirmance of the Superior Court's decision. The issue addressed in this brief is whether federal law bars undocumented immigrant employees who are injured in the course of their employment from recovering workers' compensation benefits. Affirming the Superior Court's holding that federal law does not prevent Delaware from making workers' compensation benefits available to legal and undocumented workers alike is important in order to reduce the incentive for unscrupulous employers to exploit and use undocumented workers. This case is especially significant because it is apparently the first time the issue has arisen in Delaware, and therefore has significant potential precedential value in this State and in the nation.

The ACLU of Delaware has worked since 1961 through legal advocacy, engagement in the legislative process, and public education to support individual rights and equal justice. As part of its mission, the ACLU of Delaware is dedicated to protecting the rights of immigrants and to combating public and private discrimination against them. The ACLU of Delaware is a state affiliate of the American Civil Liberties Union ("ACLU"), a nonprofit, nonpartisan, 400,000-member organization founded in 1920 to protect and advance civil liberties throughout the United States. The motion to file this brief has been approved by the ACLU of Delaware's Legal Review Panel.

## ARGUMENT

### FEDERAL LAW DOES NOT BAR UNDOCUMENTED IMMIGRANTS INJURED ON THE JOB FROM RECEIVING WORKERS' COMPENSATION.

Saul Melgar-Ramirez, an undocumented alien, obtained employment with Delaware Valley Field Services ("DVFS") after DFVS's owner "wrote in a false resident alien number" on a Delaware wage form and "Ramirez supplied false information" on a federal I-9 form. Op. 3. He "was paid in cash for almost a year" before becoming a DVFS employee. Op. 3 n.4. The Superior Court stated that this "raises suspicion of knowledge" by DVFS that Melgar-Ramirez was an undocumented alien. *Id.*[1]

While working for DVFS, Melgar-Ramirez fell down six steps of stairs, landing on his low back. He was totally disabled as a result. Op. 4. Melgar-Ramirez was subsequently deported to Honduras. After he sought workers' compensation benefits, DVFS filed a petition to terminate those benefits. DVFS argued, among other things, that because federal law makes it illegal for an undocumented alien to work in the United States, Melgar-Ramirez should not be entitled to workers' compensation benefits. In a decision dated December 19, 2011, the Industrial Accident Board denied DVFS's petition to terminate Melgar-Ramirez's benefits. On September 13, 2012, the Superior Court affirmed. DVFS now appeals.

Contrary to DVFS's position, federal law does not bar undocumented aliens injured on the job from receiving workers' compensation. To be sure, the Immigration Reform and Control Act of 1986 ("IRCA") makes it illegal for employers to hire unathorized aliens or for unauthorized aliens to use false documents to obtain employment. But IRCA was not intended "to undermine or diminish in any way labor protections in existing law …." H.R. REP. NO. 99-682[I], at 58, *reprinted in* 1986 U.S.C.C.A.N. 5649, 5662. Federal courts applying other federal

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[1] Citations to "DVFS Br." refer to Appellant's Opening Brief filed November 20, 2012. Citations to "IAB Decision" refer to the Decision on Petition to Terminate Benefits of the Industrial Accident Board dated December 19, 2011 (attached to DVFS Br. as Exhibit 1). Citations to "Op." refer to the Memorandum Opinion of the Superior Court dated September 13, 2012 (attached to DVFS Br. as Exhibit 2).

statutes—such as the minimum wage requirements of the federal Fair Labor Standards Act—have held that IRCA does not prevent undocumented aliens from recovering benefits for work already performed. State courts have overwhelmingly held that IRCA does not preempt state workers' compensation benefits. Indeed, affording workers' compensation to undocumented workers is consistent with federal immigration policy, because it eliminates the incentive for unscrupulous employers to hire undocumented aliens that would be created if employers were excused from paying workers' compensation for such employees.

### A. The Delaware Workers' Compensation Act

The Delaware Workers' Compensation Act (the "Act") was enacted in 1917 and was changed from a voluntary system to a compulsory system in 1941. *Hill v. Moskin Stores, Inc*., 165 A.2d 447, 449 (Del. 1960). The Act provides that:

> Every employer and employee, adult and minor, except as expressly excluded in this chapter, shall be bound by this chapter respectively to pay and accept compensation for personal injury or death by accident arising out of and in the course of employment, regardless of the question of negligence and to the exclusion of all other rights and remedies.

19 *Del. C.* § 2304. The Act also requires employers to obtain a Delaware workers' compensation insurance policy. 19 *Del. C.* §§ 2371, 2372.

The purpose of the Act "is to give an injured employee, irrespective of the merits of his cause of action, a prompt and sure means of receiving compensation and medical care without subjecting himself to the hazards and delays of a law suit." *Frank C. Sparks Co. v. Huber Baking Co*., 96 A.2d 456, 461 (Del. 1953). The Act's remedial scheme acts as a substitute for the tort claims that an injured employee could otherwise bring against his employer. *Baker v. Smith & Wesson Corp*., 2002 WL 31741522, at *4 (Del. Super. Ct. Nov. 27, 2002) ("the Workers' Compensation Act has largely replaced tort law as it applied to injured workers and their employers"). The Act provides the exclusive remedy available to employees injured in the course of their employment, and "specifies various benefits for workers and their families, which are available without regard to fault, and without the costs and delay of civil

litigation." *Estate of Watts v. Blue Hen Insulation*, 902 A.2d 1079, 1081 (Del. 2006). "Thus, workers may not sue to recover damages for injuries, or death, caused by their employers' negligence." *Id.* "But if, through no fault of his own, [the injured employee] cannot legally resort to the workers' compensation system, he is free to pursue whatever remedies are available to him under tort law." *Cordero v. Gulfstream Dev. Corp.*, __ A.3d __, 2012 WL 5869431, at *5 (Del. Nov. 20, 2012).

"Because the Act was intended to benefit injured workers, our courts construe it liberally, and 'resolve any reasonable doubts in favor of the worker.'" *Estate of Watts*, 902 A.2d at 1081 (citation omitted).

**B. The Act's Definition of "Employee"**

Delaware's workers' compensation scheme covers "employees." That Melgar-Ramirez is an undocumented alien does not alter his status as an employee under the plain language of the Act.

**1.** The Act defines "[e]mployee" to include "*every person* in service of any corporation (private, public, municipal or quasi-public), association, firm or person, excepting those employees excluded by this subchapter, under any contract of hire, express or implied, oral or written, or *performing services for a valuable consideration* …." 19 *Del. C.* § 2301(10) (emphasis added). This broad definition should be interpreted liberally in favor of workers. *Estate of Watts*, 902 A.2d at 1081.

As the Industrial Accident Board correctly held—in a factual finding that DVFS did not contest on appeal—"it is beyond dispute that [Melgar-Ramirez] was 'performing services for a valuable consideration' for [DVFS]." IAB Decision 7. Thus, Ramirez falls within the statutory definition of "employee."

**2.** This conclusion is not changed by the fact that Melgar-Ramirez was an undocumented alien. The Act expressly excludes multiple classes of individuals—*e.g.*, the "spouse and minor children of a farm employer," persons "whose employment is casual and not in the regular course of the trade, business, profession or occupation of his employer," "persons to whom articles or materials are furnished or repaired, or adopted for sale in the worker's own home, or on the premises not under the control or management of the employer," "[i]nmates in the custody of the Department of Correction or inmates on work release" and "a sports official at a sports event in which the players are not compensated." 19

*Del. C.* § 2301(10). But the Act does not exclude aliens, undocumented or otherwise—strong evidence that the Act includes them. *See Brown v. State*, 36 A.3d 321, 325 (Del. 2012) (Delaware adheres to the "*expressio unius est exclusio alterius*" maxim of statutory interpretation—*i.e.*, "the 'expression of one thing is the exclusion of another.'") (citation omitted).[2]

The General Assembly was capable of writing the workers' compensation statute differently if it wished. Delaware's unemployment compensation statute, for example, expressly provides that "[b]enefits shall *not* be paid on the basis of services performed by an alien *unless such alien is an individual who … was lawfully present* for purposes of performing such services …." 19 *Del. C.* § 3314(10)(a) (emphasis added). That the General Assembly explicitly excluded undocumented aliens from receiving unemployment benefits, while adding no such carve-out for workers' compensation, provides further evidence that the General Assembly did not intend to exclude undocumented aliens from the definition of "employee" under the Act.

**3.** Undocumented aliens have a right to sue for negligence in Delaware courts. *See Irwin v. State Dep't of Pub. Welfare*, 125 A.2d 505, 506 (Del. Orph. 1956) ("Generally speaking, legal rights and remedies and access to our courts do not depend upon citizenship."). "[E]very alien, whether in this country legally or not, has a right to sue those who physically injure him," and such rights are guaranteed under "the Fifth and Fourteenth Amendments." *Hagl v. Jacob Stern & Sons, Inc.*, 396 F. Supp. 779, 784 (E.D. Pa. 1975); *see also* DEL. CONST., art. I, § 9 ("[E]very person for an injury done him or her in his or her … person … shall have remedy by the due course of law …."); 42 U.S.C. § 1981 ("All persons within the jurisdiction of the United States have the same right … to sue … and to the full and equal benefit of all laws and proceedings"); 3 C.J.S. ALIENS § 168 (Dec. 2012) ("[A]n alien illegally in the country is … eligible at common law to sue in state courts for personal injuries."). In light of undocumented aliens' general right of access to courts for personal injury suits, excluding them from the Delaware workers' compensation

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[2] The Act also states that its provisions "shall apply" to every "employer and employee in any employment in which 1 or more employees are engaged" unless "otherwise indicated." 19 *Del. C.* § 2306(a). Undocumented aliens are not "otherwise indicated."

scheme would create the anomalous situation of permitting undocumented aliens to bring suits for negligence in Delaware courts for work-related injuries, while citizens and legal aliens would be limited to workers' compensation as their sole remedy for identical injuries sustained on the job.

**4.** Many other states and the District of Columbia have workers' compensation statutes that contain similar definitions of "employee." Nearly every state court and administrative agency confronted with the question has found such a definition of "employee" to encompass undocumented aliens. *See, e.g.*, *Dowling v. Slotnik*, 712 A.2d 396, 409 (Conn. 1998) (concluding that undocumented aliens are included in the broad definition of "employee"); *Coma Corp. v. Kansas Dep't of Labor*, 154 P.3d 1080, 1083-84 (Kan. 2007) (same); *Rodriguez v. Integrity Contracting*, 38 So.3d 511, 516-18 (La. Ct. App. 2010) (holding that undocumented alien was an "employee" because "there is no exclusion for a worker who is in this country illegally"); *Design Kitchen & Baths v. Lagos*, 882 A.2d 817, 824 (Md. Ct. App. 2005) ("we have no doubt that the clear and unambiguous language of [Maryland's workers' compensation act] encompasses undocumented aliens"); *Cont'l PET Techs., Inc. v. Palacias*, 604 S.E.2d 627, 631 (Ga. Ct. App. 2004) (statutory term "'every person' would necessarily include illegal aliens"); *Cherokee Indus., Inc. v. Alvarez*, 84 P.3d 798, 801 (Okla. Civ. App. 2003) ("Being unauthorized does not change the fact that Alvarez was an employee at the time of his injuries.").

**5.** DVFS bases its argument that "an illegal alien should not be included in the definition of 'employee' under Delaware's Worker's Compensation Act" on the interpretation of Wyoming's workers' compensation act in *Felix v. State ex rel. Wyoming Workers' Safety & Compensation Division*, 986 P.2d 161 (Wyo. 1999) (cited at DVFS Br. 12). But unlike Delaware's Act, Wyoming's statute defined "employee" as "includ[ing] legally employed minors *and aliens authorized to work by the United States department of justice, immigration and naturalization service.*" *Felix*, 986 P.2d at 163 (quoting WYO. STAT. ANN. § 27-14-102(a)(vii) (1996)) (emphasis added). *Felix* thus illustrates that the General Assembly could have drafted the Act's broad definition of "employee" more narrowly if it wanted to do so. It did not.

### C. Federal Regulation of Immigration and the Immigration Reform and Control Act of 1986

**1.** Under the U.S. Constitution, the power to regulate immigration rests with the federal government. U.S. CONST., art. I, § 8, cl. 4; *Chy Lung v. Freeman*, 92 U.S. 275, 280 (1875). Congress's exercise of this power has evolved over the last two centuries.

**2.** In 1885, Congress enacted the Alien Contract Labor Law. That statute expressly voided certain employment contracts with aliens:

> [A]ll contracts or agreements, express or implied, parol or special, which may hereafter be made by and between any person[,] company, partnership, or corporation, and any foreigner or foreigners, alien or aliens, to perform labor or service or having reference to the performance of labor or service by any person in the United States, its Territories, or the District of Columbia previous to the migration or importation of the person or persons whose labor or service is contracted for into the United states, *shall be utterly void and of no effect*.

Act of Feb. 26, 1885, ch. 164, § 2, 23 Stat. 332 (1885) (emphasis added).

**3.** In 1952, Congress enacted the Immigration and Nationality Act ("INA"), which set forth a new statutory framework for regulating immigration. Among other things, the INA repealed the Alien Contract Labor Law. Pub. L. No. 82-414, § 403(a)(2), 66 Stat. 163 (1952). Under the INA, alien labor contracts were no longer expressly void. *See Gates v. Rivers Constr. Co.*, 515 P.2d 1020, 1022 (Alaska 1973) (discussing the INA's legislative history).

**4.** In 1986, Congress enacted the Immigration Reform and Control Act. The House Report regarding IRCA stated that "[t]his legislation seeks to close the back door on illegal immigration so that the front door on legal immigration may remain open." H.R. REP. 99-682(I), at 46, *reprinted in* 1986 U.S.C.C.A.N. 5649, 5650. According to the House Report, "[t]he principal means of closing the back door, or curtailing future illegal immigration, is through employer sanctions" and "the Committee remains convinced that legislation containing employer sanctions is the most humane, credible and effective way to respond to the large-scale influx of undocumented aliens." *Id.*

Under IRCA, it is illegal for an employer "to hire, or to recruit or refer for a fee, for employment in the United States an alien knowing the alien is an unauthorized alien." 8 U.S.C. § 1324a(a)(1). IRCA created an employment verification system, in which employers must examine potential employees' Social Security card, driver's license, or other documentation or evidence that authorizes employment in the United States and attest to the potential employees' eligibility before they start work. 8 U.S.C. § 1324a(b). IRCA also makes it a crime for an unauthorized alien to subvert the employer verification system by using or attempting to use "any forged, counterfeit, altered, or falsely made document" or "any document lawfully issued to or with respect to a person other than the possessor" for purposes of obtaining employment in the United States. 8 U.S.C. § 1324c(a). Like the INA, IRCA does not expressly void employment contracts of undocumented aliens. Nor does IRCA's text address workers' compensation.

### D. IRCA Does Not Preempt the Delaware Workers' Compensation Act.

DVFS argues that "providing illegal workers with work-related benefits contravenes federal immigration policy" reflected in IRCA, and that "[w]here the state enactment at issue is not consistent with the goals and objectives of federal legislation, there can be no other conclusion than that the statute is preempted by the action of Congress." DVFS Br. 10. Contrary to DVFS's claim, principles of preemption, IRCA's legislative history, and the overwhelming weight of precedent all make clear that IRCA does not preempt the Delaware Workers' Compensation Act.

**1.** The Supremacy Clause of the U.S. Constitution provides that "the Laws of the United States … shall be the supreme Law of the Land; … any Thing in the Constitution or Laws of any state to the Contrary notwithstanding." U.S. CONST., art. VI, cl. 2. "Congress may indicate pre-emptive intent through a statute's express language or through its structure and purpose. If a federal law contains an express pre-emption clause, it does not immediately end the inquiry because the question of the substance and scope of Congress' displacement of state law still remains. Pre-emptive intent may also be inferred if the scope of the statute indicates that Congress intended federal law to occupy the legislative field, or if there is an actual conflict between state and federal law." *Altria Grp., Inc. v. Good*, 555 U.S. 70, 76-77 (2008) (citations omitted).

**2.** DVFS does not argue that IRCA expressly preempts states from providing workers compensation to undocumented aliens. Indeed, IRCA contains an express preemption provision that does not mention workers' compensation:

> Preemption
>
> The provisions of this section preempt any State or local law imposing civil or criminal sanctions (other than through licensing and similar laws) upon those who employ, or recruit or refer for a fee for employment, unauthorized aliens.

8 U.S.C. § 1324a(h)(2). *Inclusio unius est exclusio alterius. See United States v. McQuilkin*, 78 F.3d 105, 108 (3d Cir. 1996) (applying *inclusio unius* doctrine to construe federal statute). The fact that IRCA only expressly preempts states from imposing parallel schemes of sanctions for employing unauthorized aliens suggests that IRCA *does not* preempt workers' compensation statutes, which are a substitute for worker tort claims and have nothing to do with sanctioning employers for hiring unauthorized aliens.

**3.** IRCA also does not implicitly preempt states from evenhandedly providing workers' compensation benefits to all employees injured on the job. To the contrary, IRCA's legislative history indicates that its drafters viewed "employer sanctions" as "the most humane, credible and effective way" to address illegal immigration, and that those sanctions were not intended "to undermine or diminish in any way labor protections in existing law …." H.R. REP. NO. 99-682[I], at 46, 58, *reprinted in* 1986 U.S.C.C.A.N. 5649, 5650, 5662.

Far from being "not consistent with the goals and objectives of [IRCA]" (DVFS Br. 10), requiring employers to pay workers' compensation to undocumented workers furthers IRCA's goals. If DVFS's position is accepted and employers are excused from paying workers' compensation to undocumented workers who are injured on the job, it will only increase employers' economic incentive to hire undocumented workers instead of legal ones.

**4.** DVFS asserts that the United States Supreme Court decision in *Hoffman Plastic Compounds, Inc. v. N.L.R.B.*, 535 U.S. 137 (2002), "recognized that providing illegal workers with work-related benefits

contravenes federal immigration policy." DVFS Br. 9-10. DVFS overstates *Hoffman*'s holding.

In *Hoffman*, an undocumented alien obtained employment by presenting documents that appeared to verify his authorization to work in the United States. The employer laid off the worker and other employees after they supported a campaign to organize a labor union at the employer's product plant. 535 U.S. at 140. Three years later, the National Labor Relations Board (the "NLRB") found that the layoffs violated the National Labor Relations Act (the "NLRA") by unlawfully selecting the undocumented alien for layoff based on his union activities. Exercising its "discretion to select and fashion remedies for violations of the NLRA" (*id.* at 142), "the Board ordered that [the employer] (1) cease and desist from further violations of the NLRA, (2) post a detailed notice to its employees regarding the remedial order, and (3) offer reinstatement and backpay to the four affected employees" (*id.* at 140-41). On appeal, the D.C. Circuit enforced the NLRB's order. *Id.* at 142. The United States Supreme Court reversed as to element (3) of the NLRB's order. Citing IRCA, the Court found that the award of reinstatement and backpay "lies beyond the bounds of the [NLRB]'s remedial discretion." *Id.* at 149.

*Hoffman* is distinguishable from this case:

- First, the wrong the NLRB was remedying in *Hoffman* was termination, which IRCA requires for undocumented alien workers. By exercising its discretion to award backpay—the monetary equivalent of cancelling the termination—the NLRB was effectively undoing what IRCA required. Here, IRCA did not require anyone to inflict disabling physical injury on Melgar-Ramirez.

- Second, the Court in *Hoffman* was reviewing a federal agency's discretionary decision, rather than mandatory workers' compensation.

- Third, *Hoffman* reversed an award of post-termination backpay for a period in which the terminated employee was not working for the employer. Here, DVFS seeks to be excused from paying workers' compensation—*i.e.*, a benefit that Delaware law considers wages (*see Delaware Ins. Guar. Ass'n v. Christiana Care Health Servs., Inc.*,

892 A.2d 1073, 1079 (Del. 2006))—for an injury Melgar-Ramirez sustained *while working* for DVFS.

- Finally, *Hoffman* did not involve federal preemption of state law at all, but review of a determination by a federal agency.

**5.** Federal cases since *Hoffman* have acknowledged these distinctions and have not accepted DVFS's overbroad reading. For example, multiple cases have held that IRCA does not prevent undocumented workers from recovering unpaid minimum wages and overtime under the Fair Labor Standards Act ("FLSA"). *See, e.g.*, *Chellen v. John Pickle Co.*, 446 F. Supp. 2d 1247, 1278 (N.D. Okla. 2006) ("workers are not precluded by virtue of their undocumented status from seeking relief under the FLSA for unpaid minimum wage and overtime claims"); *Zavala v. Wal–Mart Stores, Inc.*, 393 F. Supp. 2d 295, 321-25 (D.N.J. 2005) (rejecting attempt to invoke *Hoffman* and noting "the growing chorus acknowledging the right of undocumented workers to seek relief for work already performed under the FLSA"), *aff'd*, 691 F.3d 527 (3d Cir. 2012); *Flores v. Amigon*, 233 F. Supp. 2d 462, 463 (E.D.N.Y. 2002) (*Hoffman* inapplicable when "the plaintiffs had already performed the work for which unpaid wages were being sought").

The U.S. Department of Labor itself interprets the FLSA to cover undocumented workers. The Department emphasizes that *Hoffman* involved the National Labor Relations Act, and "does not mean that undocumented workers do not have rights under other U.S. labor laws." Department of Labor, Employment Standards Administration, Wage and Hour Division, ''Fact Sheet # 48: Application of U.S. Labor Laws to Immigrant Workers: Effect of *Hoffman Plastics* decision on laws enforced by the Wage and Hour Division,'' *available at* http://www.dol.gov/whd/regs/compliance/whdfs48.htm (revised July 2008). "The Department's Wage and Hour Division will continue to enforce the FLSA … without regard to whether an employee is documented or undocumented." *Id.* The Department of Labor fact sheet explains that "[*Hoffman*'s] concern … with awarding back pay 'for years of work not performed, for wages that could not lawfully have been earned,' does not apply to work actually performed." *Id.*

Courts applying other federal statutes have reached similar results. For example, in *Bollinger Shipyards, Inc. v. Director, Office Worker's*

*Compensation Programs*, 604 F.3d 864 (5th Cir. 2010), the Fifth Circuit held that IRCA did not preclude an undocumented alien from receiving benefits under the Longshore and Harbor Workers' Compensation Act (the "LHWCA"). Unlike the NLRA—the statute at issue in *Hoffman*—the LHWCA, "like most workers' compensation statutes," has a remedial scheme that acts as "a substitute for the tort claims that an injured employee could otherwise bring against his employer." *Id.* at 878. The court reasoned that, because "an undocumented immigrant employed as a longshoreman has the right to sue a vessel owner in tort for negligence, it follows that [an illegal immigrant] must have the corresponding right, *viz.*, the right to recover workers' compensation benefits under the LHWCA." *Id.* The court also noted that the LHWCA was a non-discretionary remedy, unlike the remedy in *Hoffman*. Workers' compensation is also non-discretionary in Delaware. Similarly, the court in *Martinez v. Mecca Farms, Inc.*, 213 F.R.D. 601 (S.D. Fla. 2002), found *Hoffman*'s limitations inapplicable where plaintiffs did not seek post-termination back pay, but rather "remedies for work already performed" under the federal Migrant and Seasonal Agricultural Worker Protection Act. *Id.* at 604-05.

**6.** State courts that have considered the question have overwhelmingly held that "[IRCA] does not preempt, either expressly or impliedly, the authority of the states to award workers' compensation benefits to undocumented aliens." *Dowling*, 712 A.2d at 405. *See, e.g.*, *Curiel v. Envtl. Mgmt. Servs. (MS)*, 655 S.E.2d 482 (S.C. 2007) (rejecting argument that IRCA preempted undocumented alien from receiving workers' compensation benefits where employee used fraudulent documents to misrepresent his legal status when applying for the job); *Design Kitchen*, 882 A.2d at 827-28 ("The arguments … that the IRCA preempts State workers' compensation Acts or, at the least, precludes an award of workers' compensation benefits to an undocumented worker … have been rejected by the courts that have considered them."); *Correa v. Waymouth Farms, Inc.*, 664 N.W.2d 324, 329 (Minn. 2003) ("[T]he IRCA was not intended to preclude the authority of states to award workers' compensation benefits to unauthorized aliens."); *Gonzalez v. Performance Painting, Inc.*, 258 P.3d 1098, 1104 (N.M. Ct. App. 2011) ("The IRCA does not preempt workers' compensation laws or otherwise preclude states from providing compensation benefits to undocumented workers."); *Amoah v. Mallah Mgmt., LLC*, 866 N.Y.S.2d 797 (N.Y. App. Div. 2008) (rejecting argument that IRCA preempted illegal alien from receiving

workers' compensation benefits where employee obtained employment through use of fraudulent documents); *Cont'l PET Techs., Inc.*, 604 S.E.2d at 630 (IRCA does not preempt state workers' compensation; "[n]othing in the IRCA or accompanying regulations hints at a desire to deny workers' compensation benefits to injured employees, whether undocumented or otherwise"); *Wet Walls, Inc. v. Ledezma*, 598 S.E.2d 60, 62 (Ga. Ct. App. 2004) (IRCA did not preempt injured worker who had been deported from recovering permanent partial disability benefits); *Safeharbor Emp'r Servs. I, Inc. v. Cinto Velazquez*, 860 So.2d 984, 986 (Fla. Dist. Ct. App. 2003) ("[T]he Florida legislature's right to enact workers' compensation benefits for illegal aliens is not preempted by federal action."); *Ruiz v. Belk Masonry Co.*, 559 S.E.2d 249, 251 (N.C. App. 2002) ("[F]ederal law … does not prevent illegal aliens … based solely on immigration status, from receiving workers' compensation benefits.").

**7.** All of the state cases that DVFS relies on in arguing that IRCA bars awards of workers' compensation to undocumented aliens are either distinguishable or actually support Melgar-Ramirez's position. *Doe v. Kansas Department of Human Resources*, 90 P.3d 940 (Kan. 2004), is not a case "where violations of the IRCA were found to have taken place," as DVFS claims. DVFS Br. 11. Rather, *Doe* concerned a Kansas state statute and never mentioned IRCA. Kansas cases since *Doe* have made clear that Kansas's Worker's Compensation law is not preempted by IRCA. *See Coma Corp.*, 154 P.3d at 1088-89 ("reject[ing] IRCA preemption of the [Kansas Workers' Protection Act]" and "disagree[ing] that IRCA makes the [employees'] contract illegal and therefore unenforceable").

DVFS claims that *Tarango v. State Industrial Insurance System*, 25 P.3d 175 (Nev. 2001), "determined [that] IRCA preempted Nevada's worker's compensation scheme." DVFS Br. 11. In fact, *Tarango* actually supports Melgar-Ramirez's position. The court affirmed the "district court's order awarding [Plaintiff] permanent partial disability payments, but denying him vocational rehabilitation benefits." 25 P.3d at 177. Thus, while *Tarango* held that the undocumented employee could not use Nevada's vocational training program—designed to "return the injured employee to the job he had before his injury" (*id.* at 179), *i.e.*, a job that IRCA made unavailable—the court affirmed the award of workers' compensation, the benefit at issue here.

DVFS also cites *Sanchez v. Eagle Alloy Inc.*, 658 N.W.2d 510, 518 (Mich. Ct. App. 2003) (DVFS Br. 12 & n.20). In that case, the court ruled that an employee was not entitled to weekly wage loss benefits because he forged documents and the Michigan Worker's Compensation Act specifically stated that such benefits were not available to those who were unable to work because of "commission of a crime." 658 N.W.2d at 518. Delaware's Workers' Compensation Act contains no such carve-out.

Finally, DVFS cites the *dissent* from the Pennsylvania Supreme Court decision in *Reinforced Earth* discussed above. DVFS Br. 14. That it is forced to cite a dissenting opinion highlights the weakness of DVFS's position.

**E. IRCA Does Not Render Employment Relationships Void.**

In an argument intertwined with its preemption argument, DVFS also contends that, because Melgar-Ramirez violated the IRCA, he "was not in the service of Delaware Valley under any legal contract of hire" and "[t]herefore his contract for hire should be rendered void and unenforceable and he should not be considered an employee under Delaware's Workers' Compensation Act." DVFS Br. 10-11. This argument must also fail, for at least two reasons.

**1.** First, as discussed at Point B.1, *supra*, the statutory definition of "[e]mployee" is not limited to a person "under any contract for hire." 19 *Del. C.* § 2301(10). Rather, it also includes a person who is "performing services for a valuable consideration." As the Industrial Accident Board held, "[r]egardless of the merits of the argument of whether there is a valid 'contract of hire,' it is beyond dispute that Claimant was 'performing services for valuable consideration' for Employer." IAB Decision 7. DVFS does not dispute this finding on appeal. Thus, even assuming that the "contract for hire" was void—which it is not—Melgar-Ramirez is still an "employee" under the Act.

**2.** Second, the history of Congressional regulation of immigration makes clear that an employment contract is not void simply because the employee is an undocumented worker. The repeal of the 1885 Alien Labor Contract law, which expressly voided certain employment contracts with undocumented aliens—and subsequent failure to reenact similar express language (*see* Point C.2-.3, *supra*)—indicates Congress's determination to select exclusion of certain aliens from the United States

and the sanction provisions of IRCA rather than rendering alien workers' contracts void. Other courts have found that the INA's legislative history reflects Congressional intent "that such contracts are no longer to be 'void and of no effect.'" *See Gates*, 515 P.2d at 1023; *Peterson v. Neme*, 281 S.E.2d 869, 871 (Va. 1981) ("Although Congress … might have criminalized an illegal alien's acceptance of employment, or declared any employment contract into which he entered unenforceable, or required forfeiture of any wages collected under such a contract, Congress did none of these"). DVFS's claim that IRCA renders the employment contracts of undocumented aliens void and unenforceable is thus without merit.

Public policy also weighs against voiding such contracts. The purpose of IRCA is to deter employers from hiring undocumented aliens. This objective would not be furthered by voiding employment contracts because this would permit employers to knowingly employ excludable aliens and then refuse to pay them for their services. Thus, if these contracts were void, it would encourage employers to hire undocumented workers—the very conduct IRCA sought to curtail.

**3.** DVFS does not cite any case supporting its position that employment contracts with undocumented aliens are void. To the contrary, courts that have considered the question have found such contracts valid. *See, e.g.*, *Design Kitchen*, 882 A.2d at 821 (rejecting argument that "any alleged contract of employment [of an undocumented alien] is void, as it is in direct conflict with [IRCA]"); *Dowling*, 712 A.2d at 409-10 ("we do not agree that an employment agreement between an employer and an illegal alien is so tainted by illegality that, as a matter of law, the agreement" is null and void); *Reinforced Earth Co. v. W.C.A.B.*, 749 A.2d 1036, 1038 (Pa. Commw. Ct. 2000) ("IRCA does not, in and of itself, preclude an illegal alien from being considered an 'employee' for purposes of the Act").[3]

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[3] DVFS also suggests that Melgar-Ramirez's use of false information to obtain employment may preclude him from receiving workers' compensation under *Air Mod Corp. v. Newton*, 215 A.2d 434 (Del. 1965). DVFS Br. 13-14. As detailed in Melgar-Ramirez's Answering Brief (pp. 15-17), *Air Mod* addresses circumstances where a person obtains employment through knowingly false statements about a preexisting physical condition, which may make the employee more likely

## CONCLUSION

Far from interfering with federal immigration policy, affording workers' compensation to undocumented alien workers who are injured on the job is consistent with federal policy, because it eliminates the incentive for unscrupulous employers to hire undocumented aliens that would otherwise be created. Principles of statutory construction, legislative history, and the overwhelming weight of precedent are all in accord. The Superior Court's decision should be affirmed.

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to suffer injury on the job. *Air Mod* does not apply to statements regarding immigration status, which do not increase susceptibility to injury. The Industrial Accident Board and the Superior Court agreed, stating that *Air Mod* "[o]bviously … do[es] not apply to the current case" (IAB Decision 9) and that DVFS's attempt to apply *Air Mod* here was "a causal leap too far" (Op. 21-22).