No. 00-1595

IN THE
Supreme Court of the United States

HOFFMAN PLASTIC COMPOUNDS, INC.,
Petitioner,

v.

NATIONAL LABOR RELATIONS BOARD,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

BRIEF *AMICI CURIAE* OF AMERICAN CIVIL LIBERTIES UNION FOUNDATION AND MAKE THE ROAD BY WALKING, INC. IN SUPPORT OF RESPONDENT

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INTEREST OF AMICI

The American Civil Liberties Union Foundation ("ACLU") and Make the Road by Walking, Inc. ("MRBW") respectfully submit this brief *amici curiae* in support of Respondent the National Labor Relations Board and to urge affirmance of the *en banc* decision of the United States Court of Appeals for the District of Columbia Circuit.[1]

The ACLU is a national non-partisan organization of almost 300,000 members dedicated to protecting the fundamental rights guaranteed by the Constitution and laws of the United States. Since its founding, the ACLU has sought to ensure that the protections of the Constitution and the Bill of Rights apply equally to all persons, including immigrants. Through its national Immigrants' Rights Project, the ACLU engages in litigation and advocacy to ensure that immigrants receive the full protection of federal civil rights and labor laws.

MRBW is a membership-based community organization located in Bushwick, Brooklyn, one of New York City's poorest neighborhoods. Through its Workplace Justice Project, MRBW engages in organizing, litigation and advocacy to secure the labor and employment rights of low-wage workers.

STATEMENT

This case presents the questions whether the award of backpay by the National Labor Relations Board ("Board") to an undocumented immigrant worker is permitted under *Sure-Tan, Inc. v. NLRB*, 467 U.S. 883 (1984), and the subsequently enacted Immigration Reform and Control Act of 1986 ("IRCA"), Pub. L. No. 99-603, 100 Stat. 3359. *Amici* believe that the Board's award is fully consistent with *Sure-*

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[1] Counsel for *amici curiae* authored this brief in its entirety. No person or entity other than *amici curiae*, their members, and their counsel made a monetary contribution to the preparation or submission of the brief. The written consent of all parties to the filing of this brief has been filed with the Clerk of this Court.

Tan for the reasons set forth in the Brief of *Amicus Curiae* the AFL-CIO, and we do not further address that question here. *Amici* instead focus on the second question, namely whether IRCA, which penalizes employers who knowingly hire individuals not authorized to be employed under the Immigration and Nationality Act, Pub. L. No. 82-414, 66 Stat. 163 (codified at 8 U.S.C. §§ 1101 *et seq.*), limits the Board's discretionary power to impose backpay as a remedy for workers discharged in violation of the National Labor Relations Act, if the unlawfully discharged employee is an undocumented immigrant.

Congress enacted IRCA principally to curtail illegal immigration into the United States and to protect domestic workers from the perceived adverse effects of that immigration. IRCA's approach is to make undocumented workers less attractive to U.S. employers by reducing the economic incentives to hire them. As this Court noted in *Sure-Tan*, "[i]f an employer realizes that there will be no advantage under the NLRA in preferring illegal aliens to legal resident workers, any incentive to hire such illegal aliens is correspondingly lessened." 467 U.S. at 893. IRCA thus focuses on changing *employers'* behavior. The Board's award of backpay in this case furthers IRCA's aims, and Petitioner's argument to the contrary represents a fundamental misunderstanding of the statute.

SUMMARY OF ARGUMENT

IRCA was enacted after years of study and debate in Congress concerning unauthorized immigration and its impact on the domestic labor market. Congress ultimately concluded that unauthorized immigration could be prevented only by negating the economic incentives that unscrupulous employers have to hire undocumented workers, and not by attempting to reduce the attractiveness of U.S. jobs to foreign workers.

IRCA is designed to attack employers' incentives to hire undocumented workers through two mechanisms. First, the

"employer sanctions" provisions of the law, 8 U.S.C. § 1324a, impose civil penalties and criminal sanctions on U.S. employers who hire undocumented workers. Second, IRCA provided for increased enforcement of labor standards legislation on behalf of undocumented workers. Both mechanisms increase the cost of hiring undocumented workers and thereby make such workers markedly less attractive to U.S. employers. Directing employers to award backpay to illegally discharged undocumented workers has exactly the same effect, thus furthering IRCA's primary goal and complementing the statute's principal mechanisms for achieving that goal.

The Board's award of backpay in this case also furthers IRCA's aim of protecting the wages and working conditions of domestic workers. Congress concluded that the availability of easily exploitable workers—workers willing to accept subminimum wages and substandard working conditions—places downward pressure on the wages and working conditions of all workers. In order to address that concern, Congress endeavored to keep undocumented workers out of the United States, offered legalization to a large portion of the undocumented population present in the United States, and, critically, authorized increased enforcement of employment standards legislation on behalf of undocumented workers. Each of these mechanisms is designed to protect domestic workers by limiting U.S. employers' ability to take advantage of exploitable undocumented workers. Awarding backpay to undocumented workers similarly reduces their exploitability, and accordingly furthers IRCA's goal of protecting the wages and working conditions of domestic workers.

For over a century, Congress has legislated in the immigration area with an eye to American labor markets, often in order to protect the wages and working conditions of domestic workers. IRCA reflects longstanding congressional conclusions about the complex relationship between immigration—especially unauthorized immigration—and domestic labor, and the statute's goals and chosen mechanisms are

consistent with these past legislative initiatives. The Board's award of backpay in this case is consistent not only with IRCA, but with over a century of legislation aimed at protecting domestic labor from the perceived adverse effects of unauthorized immigration.

ARGUMENT

I. BACKPAY AWARDS FOR ILLEGALLY DISCHARGED UNDOCUMENTED WORKERS ARE CONSISTENT WITH IRCA'S AIMS OF CURTAILING ILLEGAL IMMIGRATION AND PROTECTING DOMESTIC WORKERS.

A. Congress Enacted IRCA To Address Unauthorized Immigration and Its Perceived Effects on Domestic Workers.

IRCA was the culmination of substantial study by Congress of the impact of unauthorized immigration on the United States and on the American labor market. The reports and analyses on which Congress based its actions frequently noted that "the adverse impact of illegal aliens was substantial, and warranted legislation both to protect U.S. labor and the economy, and to assure the orderly entry of immigrants into this country." H.R. Rep. No. 94-506, at 3 (1975).

In 1978, Congress created the Select Commission on Immigration and Refugee Policy ("SCIRP") to study immigration and recommend legislative responses. *See* Pub. L. No. 95-412, 92 Stat. 907 (1978).[2] The SCIRP's Final Report,

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[2] Among the SCIRP commissioners was Senator Alan Simpson, later the Senate sponsor of IRCA. IRCA's sponsors in both the House and Senate stressed the special reliance that Congress placed on the SCIRP Final Report and the recommendations contained therein. In the final Senate debate on IRCA, Senator Simpson remarked that IRCA was "the basic work product" of the Commission. 132 Cong. Rec. S16611, 16614 (daily ed. Oct. 16, 1986). Likewise, Representative Mazolli, IRCA's sponsor in the House, commented that the SCIRP report "forms the outlines of the bill before this body today." 132 Cong. Rec. H9708, 9713 (daily ed. Oct. 9, 1986).

issued in 1981, noted that illegal migration to the United States is "extensive," and estimated that between 3.5 and 6 million undocumented residents lived in the United States in 1978. Senate and House Comms. on the Judiciary, 97th Cong., *U.S. Immigration Policy and the National Interest* 10, 36 (Joint Comm. Print 1981) ("*SCIRP Final Report*"). The Report further concluded that unauthorized immigration was having "serious adverse effects" on the American labor force, *id.* at 11, and that "the continuing flow of undocumented workers across U.S. borders has certainly contributed to the displacement of some U.S. workers and the depression of some U.S. wages," *id*. at 41. [3]

Following the release of the SCIRP Final Report, Senator Simpson and Representative Mazzoli introduced legislation in the 97th and 98th Congresses that ultimately led to the passage of IRCA. The House Judiciary Committee Report on H.R. 6514, the Immigration Reform and Control Act of 1982, summarized the impetus for the legislation as the need

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[3] The impact of undocumented immigration on domestic labor is a matter of intense debate and controversy among economists. *Amici* express no view on the economic debate regarding the soundness of the Commission's findings. For a sample of competing views, see, e.g., Staff Report of the Select Commission on Immigration and Refugee Policy 509-10 & nn. 63-64 (1981) (citing Gilbert Cardenas, *Illegal Aliens in the Southwest a Case Study, in* National Council on Employment Policy, *Illegal Aliens: An Assessment of the Issues* (1976); Edwin Reubens, unpublished testimony before the Select Commission on Immigration and Refugee Policy (Oct. 29, 1979)). *See also* L. Tracy Harris, Note, *Conflict or Double Deterrence? FLSA Protection of Illegal Aliens and the Immigration Reform and Control Act*, 2 Minn. L. Rev. 900, 904 n.24 (1988) (summarizing opposing views); Michael R. Curran, *Flickering Lamp Beside the Golden Door: Immigration, the Constitution, & Undocumented Aliens in the 1990s*, 30 Case W. Res. J. Int'l L. 57, 72 (1998) ("Whether these immigrants benefit or burden society is a matter of dispute. At one extreme, people argue that aliens often fill jobs that U.S. citizens do not want, and they pay taxes without receiving benefits. The counterargument is that undocumented aliens increase unemployment for citizens and depress wages . . . .") (internal quotations and footnote omitted).

to "secure our borders" and to "protect our own workers from adverse competition in the labor market." H.R. Rep. No. 97-890, at 30-31 (1982).[4]

The 99th Congress picked up where the previous Congresses had left off. Senator Simpson introduced the Immigration Reform and Control Act of 1985 (S. 1200) and the Senate Judiciary Committee report on that bill again focused on the "adverse job impacts, especially on low-income, low-skilled Americans, who are the most likely to face direct competition" from undocumented aliens. S. Rep. No. 99-132, at 5 (1985). "Such adverse impacts," the Senate Report concluded, "include both unemployment and less favorable wages and working conditions." *Id.* [5]

These legislative initiatives culminated with the passage in 1986 of IRCA.

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[4] In its Report on H.R. 1510, the Immigration Reform and Control Act of 1983, the House Judiciary Committee included a statement by the U.S. Department of Labor that reflected the concerns and goals of the legislation. On behalf of the Department, the Deputy Under Secretary for International Labor Affairs wrote:

> I applaud your continuing efforts to achieve the pressing and long overdue reform of our immigration laws. . . . Illegal immigration . . . depresses the wages and working conditions of low-skilled workers in this country, and reduces their employment opportunities.

H.R. Rep. No. 98-115, pt. 1, at 95-96 (1983) (statement of Robert W. Searby).

[5] The Senate Subcommittee on Immigration and Refugee Policy conducted three days of public hearings on S. 1200. *See* S. Rep. No. 99-132, at 26. Representative Mazzoli's bill, H.R. 3810, was the subject of four days of hearings before the Subcommittee on Immigration, Refugees and International Law, which took testimony from 50 additional witnesses. *See* H.R. Rep. No. 99-682, pt. 1, at 56 (1986)

B. IRCA Aims To Curtail Illegal Immigration by Reducing U.S. Employers' Incentives To Hire Undocumented Workers.

Petitioner argues (Pet. Br. 22) that by awarding backpay to Castro, "the NLRB failed to properly account for the objectives of the immigration laws." To the contrary, the Board's action furthers IRCA's stated goal of reducing unauthorized immigration into the U.S. by deterring employers from hiring undocumented immigrants.

IRCA sought to make undocumented workers less attractive to U.S. employers and thereby to reduce employers' incentives to hire such workers. Notably, IRCA focuses entirely on the need to change *employers'* behavior and motivations.[6] The statute does not adopt any new provisions that penalize undocumented immigrants for working in the United States or that seek to make U.S. jobs less attractive to foreign workers by making them more vulnerable to exploitation by unscrupulous employers. Indeed, Congress recognized that any such provisions would have the perverse effect of *increasing* employers' economic incentives to hire such workers. Therefore, IRCA enacted mechanisms that reduce the attractiveness of undocumented workers by making it more costly for U.S. employers to employ them. Awards of backpay, like the one ordered here, are a necessary and appropriate part of this overall approach and are thus entirely consistent with IRCA's approach to curtailing unauthorized

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[6] The Court of Appeals for the Second Circuit recognized this in *NLRB v. A.P.R.A. Fuel Oil Buyers Group, Inc.*, 134 F.3d 50 (2d Cir. 1997), writing that "IRCA . . . demonstrates Congress's intent to focus on employers, not employees, in deterring unlawful employment relationships," *id.* at 56, and that "IRCA was passed to reduce the incentives for employers to hire illegal aliens," *id.* at 55. The Court of Appeals for the Eleventh Circuit reached the same conclusion in *Patel v. Quality Inn South*, 846 F.2d 700, 704 (11th Cir. 1988), *cert. denied*, 489 U.S. 1011 (1989), stating that "Congress enacted the IRCA to reduce illegal immigration by eliminating employers' economic incentive to hire undocumented aliens."

immigration. *Cf. NLRB v. A.P.R.A. Fuel Oil Buyers Group, Inc.*, 134 F.3d 50, 57 (2d Cir. 1997) ("[P]recluding the [backpay] remedy would increase the incentives for employers to hire undocumented aliens.").

IRCA's statutory mechanisms for increasing the costs of hiring undocumented workers are twofold. First, employer sanctions make it illegal for employers knowingly to hire aliens not authorized to be employed. *See* 8 U.S.C. § 1324a(a)(1). An employer who hires such aliens is subject to an escalating series of fines, ranging from $250 to $10,000. *Id.* § 1324a(e)(4)(A). Criminal penalties and additional fines may be imposed on employers who engage in a "pattern or practice" of hiring undocumented immigrants. *Id.* § 1324a(f). These sanctions impose substantial economic risks on employers who hire undocumented workers, thus reducing employers' economic incentives to do so.

Second, IRCA explicitly authorizes funds for the U.S. Department of Labor's Wage and Hour Division to enforce employment standards laws on behalf of undocumented workers. *See* IRCA § 111(d). Congress recognized, as § 111(d) explicitly states, that such enforcement furthers IRCA's purpose by diminishing the incentive for employers to hire undocumented workers in order to take advantage of a more easily exploitable workforce. Section 111(d) reads:

> There are authorized to be appropriated . . . such sums as may be necessary to the Department of Labor for enforcement activities of the Wage and Hour Division . . . in order to *deter the employment* of unauthorized aliens and *remove the economic incentive* for employers to exploit and use such aliens.

Id. (emphasis added). The Wage and Hour Division enforces, among other employment laws, the Fair Labor Standards Act ("FLSA"), which requires covered employers to pay their employees the federal minimum wage, and to pay employees one and one-half times their regular rate of pay for overtime hours worked. *See* 29 U.S.C. §§ 202, 206,

207(a)(1). FLSA authorizes awards of backpay in cases of retaliation against employees who exercise their rights under the Act. *See* 29 U.S.C. § 216(b).

By enforcing employment laws such as FLSA on behalf of undocumented workers, the Wage and Hour Division drives up the cost of employing these workers and thereby reduces the economic incentives to hire them. When an employer is forced to pay his undocumented employees the same minimum wage and overtime pay as other workers, and when an employer is ordered to make a backpay award to an undocumented employee discharged for exercising his rights under FLSA, the economic incentives to hire such workers are reduced.[7] The backpay award ordered by the Board in this case achieves precisely the same effect and is, therefore, equally consistent with IRCA's goals and methods.

IRCA's legislative history further confirms Congress's decision to target employers' economic incentives to hire undocumented workers. The SCIRP Final Report found, for example, that border patrols and INS interdiction efforts were insufficient responses to undocumented immigration, and concluded that "the success of any campaign to curb illegal

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[7] Section 111(d) was not unprecedented in its appropriation for greater wage and hour enforcement on behalf of undocumented workers. In 1977, for example, Congress appropriated funds for 260 additional positions in the Wage and Hour Division "to strengthen enforcement of the Fair Labor Standards Act, including minimum wage and overtime provisions." S. Rep. No. 95-564, at 35 (1977); *see* Supplemental Appropriations Act, Pub. L. No. 95-240, 92 Stat. 107, 111 (1978); *see also* Richard E. Blum, Note, *Labor Standards Enforcement and the Results of Labor Migration: Protecting Undocumented Workers After Sure-Tan, the IRCA, and Patel*, 63 N.Y.U. L. Rev. 1342, 1361 (1988). According to the House Report supporting the appropriation, the funds were earmarked for investigations "directed at employers of undocumented workers" and "targeted in those industries with a high incidence of undocumented workers." H.R. Rep. No. 95-644, at 26 (1977). Congress felt that such targeted enforcement would help to "remove the economic incentive for employers to hire undocumented workers." *Id.*

migration is dependent on the introduction of new forms of economic deterrents." *SCIRP Final Report* at 59.[8]

When Congress turned to devising economic deterrents, it considered two distinct sets of economic incentives that accounted for unauthorized immigration. First, it noted the attractiveness of U.S. jobs to immigrant workers. *See* S. Rep. No. 99-132, at 1 ("The primary incentive for illegal immigration is the availability of U.S. employment . . . ."); H.R. Rep. No. 99-682, pt. 1, at 46 ("Employment is the magnet that attracts aliens here illegally . . . .").[9] Congress decided, however, that it could not legislate away the disparity between U.S. and foreign jobs. Even if wages for immigrant workers in the U.S. could be artificially lowered, for example, they would still exceed the wages available in the workers' home country. As the SCIRP Final Report observed, "however low the salaries of undocumented/illegal aliens in the United States, the studies indicate that their U.S. wages are many

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[8] The Senate Report on IRCA similarly stated that:

> [a]ll objective, comprehensive studies of the problem of illegal immigration, including those by the . . . Select Commission on Immigration and Refugee Policy, have concluded that adequate enforcement of U.S. immigration laws cannot be achieved by direct enforcement alone. The Committee agrees.

S. Rep. No. 99-132, at 8; *see also* S. Rep. No. 98-62, at 7 (1983) ("adequate enforcement of U.S. Immigration laws cannot be achieved by direct enforcement alone"); S. Rep. No. 97-485, at 7 (1982) (same).

IRCA does contain some standard immigration enforcement measures designed physically to prevent unauthorized entry into the United States. Section 111(a) of the law calls for "an increase in the border patrol and other inspection and enforcement activities of the Immigration and Naturalization Service and of other appropriate Federal agencies in order to prevent and deter the illegal entry of aliens into the United States." IRCA § 111(a)(1). Section 112 enacts criminal penalties for those who illegally transport aliens into the United States. *Id.* § 112.

[9] Similarly, the SCIRP Final Report recognized that "[t]he vast majority of undocumented/illegal aliens are attracted to this country by employment opportunities," *SCIRP Final Report* at 59, and concluded that "[t]he attraction of what are usually lower status but higher paying jobs in the United States is powerful," *id.* at 37.

times that of previous wages in the home country." *SCIRP Final Report* at 37.

Similar conclusions emerged during floor debates on IRCA. Senator Simpson, for example, explained the futility of attempting to flatten the disparity between U.S. and foreign job conditions:

> The most generous aid program which Congress might ever pass is unlikely in the foreseeable future to reduce sufficiently the large wage differentials which now exist. U.S. wages are often 10 or 15 times as high.

131 Cong. Rec. S11242, 11258 (daily ed. Sept. 11, 1985). Accordingly, Congress did not try to reduce the attractiveness of U.S. jobs to immigrant workers or to impose new or special penalties on immigrant workers by, for example, reducing the protections to which they are entitled.[10]

In addition to considering the appeal of U.S. jobs to foreign workers, Congress looked at the attractiveness of foreign workers to U.S. employers. It believed that U.S. employers had economic incentives to hire undocumented workers because they "are vulnerable to exploitation" and that "employers prey on their fear." 132 Cong. Rec. H9708, 9712 (daily ed. Oct. 9, 1986). Congressman Rodino stated that when an undocumented employee's "employer shortchanges [him], or doesn't pay [him] for overtime, or pays [him] less than minimum wage, [he] will complain to no one." *Id.* at H9709. Congressman Lungren noted that IRCA was directed at employers "who have hired illegal aliens specifically so that they can exploit them." 132 Cong. Rec.

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[10] The SCIRP also considered but explicitly rejected the suggestion that "penalties must be imposed on those aliens who work illegally in the United States if illegal entry is to be effectively discouraged." *SCIRP Final Report* at 65-66. Anticipating Congress's decision in IRCA not to pursue such an approach, the Final Report concluded that "the imposition of penalties, in addition to that of deportation, is unnecessary and unworkable." *Id.* at 66.

H10583, 10596 (daily ed. Oct. 15, 1986). And in his supplemental statement to the SCIRP Final Report, Senator Kennedy (one of the SCIRP Commissioners) made clear that "[p]art of the incentive to hire undocumented aliens is their willingness to accept substandard wages and working conditions." *SCIRP Final Report* at 361.

Unlike efforts to make U.S. jobs less attractive to immigrant workers, which Congress considered futile, Congress decided that legislation aimed at reducing *employers'* economic incentives to hire undocumented immigrants was more likely to achieve the desired end.[11] Therefore IRCA aimed to negate these economic incentives. The Select Commission's Final Report concluded that Congress should make undocumented workers more expensive to U.S. employers:

> Without an enforcement tool to make the hiring of undocumented workers *unprofitable*, efforts to prevent the participation of undocumented/illegal aliens in the labor market will continue to meet with failure.

Id. at 62 (emphasis added).

Congress crafted just such an enforcement tool by enacting employer sanctions:

> The principal means of closing the back door, or curtailing future illegal immigration, is through employer sanctions. . . . Employers will be deterred by the penalties in this legislation from hiring unauthorized aliens and this, in turn, will deter aliens from entering illegally or violating their status in search of employment.

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[11] During the 92d Congress, the House Judiciary's immigration subcommittee related a similar conclusion. A summary of the hearings held by the subcommittee states that "the U.S. employer, unlike the illegal alien, is amenable to deterrence—vis a vis—economic and criminal sanctions." Subcommittee No. 1 of the House Comm. on the Judiciary, 93d Cong., *Illegal Aliens: A Review of Hearings Conducted During the 92d Congress* (Serial No. 13, pts. 1-5) at 22 (Comm. Print 1973).

H.R. Rep. No. 99-682, pt. 1, at 46.[12]

In addition, Congress sought to deter employers from hiring undocumented workers by directing the vigorous enforcement of employment laws on behalf of those workers. The House Education and Labor Committee report makes clear that Congress intended the full panoply of the Nation's labor and employment laws, *including the National Labor Relations Act*, to be enforced on behalf of undocumented workers:

> [T]he committee does not intend that any provision of this Act would limit the powers of State and Federal labor standards agencies such as the . . . Wage and Hour Division of the Department of Labor, . . . the National Labor Relations Board, . . . in conformity with existing law, to remedy unfair practices committed against undocumented employees for exercising their rights before such agencies or for engaging in activities protected by these agencies. *To do otherwise would be counter-productive of our intent to limit the hiring of undocumented employees* and the depressing effect on working conditions caused by their employment.

H.R. Rep. No. 99-682, pt. 2, at 8-9 (1986) (emphasis added).

Senator Kennedy, who introduced the amendment that eventually became § 111(d), *see* S. Rep. No. 98-62, at 29, likewise concluded that enforcing labor standards legislation on behalf of undocumented workers would help reduce illegal immigration:

> We must . . . intensify the enforcement of existing [labor standards] laws. . . . Vigorous and effective enforcement of these laws will reduce the incentive for employers to hire undocumented workers.

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[12] The Report also noted that "it is the Committee's belief that by and large most employers will desist from hiring undocumented aliens when it is known that civil and criminal penalties will attach to such activity." *Id.* at 59.

SCIRP Final Report at 361.[13] Senator Simpson echoed this view during hearings on IRCA by stating that "[w]e are all aware that the answer to illegal immigration rests with increased border enforcement, and increased labor law enforcement." *Immigration Reform and Control Act of 1985: Hearings on S. 1200 Before the Subcomm. on Immigration and Refugee Policy of the Senate Comm. on the Judiciary*, 99th Cong. 27 (1985). Section 111(d) thus embodies the Congressional view that undocumented immigration will be curtailed by the full enforcement of labor standards laws on behalf of undocumented workers.

Accordingly, vigorous enforcement of the labor laws on behalf of undocumented workers is not only consistent with the immigration laws in general, it is part and parcel of IRCA's approach to curtailing unauthorized immigration. An award of backpay in the circumstances presented here is necessary to furthering IRCA's goals and acts as a complement to the statute's mechanisms for achieving those goals.

C. IRCA Attempts To Protect Domestic Workers by Reducing the Availability of Exploitable Immigrant Workers.

In addition to adopting new mechanisms to curtail unauthorized immigration, IRCA aims to protect domestic workers from the downward pressure on wages and working conditions that Congress believed was caused by the availability of exploitable undocumented workers. IRCA therefore tried to reduce the presence of such exploitable, undocumented workers in the workforce by reducing employer incentives to hire them, by legalizing some undocumented immigrants, and by enforcing employment standards legislation on behalf of those undocumented workers who find employment in the

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[13] The SCIRP Final Report called for "the increased enforcement of existing wage and working standards legislation." *SCIRP Final Report* at 70.

United States.[14] Awards of backpay such as the one at issue here similarly reduce the exploitability of undocumented workers, and therefore are consistent with IRCA's approach to protecting domestic workers.

First, as discussed above, IRCA responded to the availability of exploitable undocumented workers by seeking to eliminate employers' incentives to hire such workers and thereby to minimize the number of undocumented workers in the workforce. *See supra* pp. 7-14.

Second, IRCA enacted a special legalization program for some undocumented immigrants to, *inter alia*, reduce the pool of exploitable undocumented workers. Section 201 of IRCA established a process by which immigrants who had been in the United States in undocumented status for the requisite number of years could apply for temporary resident status and eventually permanent resident status. *See* 8 U.S.C. § 1255a. IRCA's legislative history makes clear that one goal of the legalization program was to protect domestic workers. The SCIRP Final Report recommended a program to "legalize a substantial portion of the undocumented/illegal

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[14] Several other provisions of IRCA reflect Congress's concern with the impact of immigration on domestic workers. The statute created a new nonimmigrant subcategory, H-2A, for the admission of foreign temporary agricultural workers. *See* IRCA § 301. That provision, now codified at 8 U.S.C. § 1188, conditions approval of H-2A petitions on certification that "the employment of the alien in such labor or services will not adversely affect the wages and working conditions of workers in the United States similarly employed." *Id.* § 1188(a)(1)(B). Moreover, Title IV of the law requires the President to submit a number of reports to Congress, several of which pertain to the impact of immigration on domestic workers. *See* IRCA §§ 401-406. Section 402 calls on the President to provide Congress with annual reports on the implementation of the employers sanctions provision codified at 8 U.S.C. § 1324a. The reports were to contain "an analysis of the impact of the enforcement of that section on—(A) the employment, wages, and working conditions of United States workers . . . ." IRCA § 402(3)(A). Section 403 requires a similar report regarding the impact of the H-2A program on "the wages and working conditions of United States agricultural workers." *Id.* § 403(a)(3).

aliens now in our country" because "[l]egalizing those who have settled in this country and who are otherwise qualified will have many positive benefits for the United States as a whole. . . . No longer exploitable at the workplace, [they] no longer will contribute to depressing U.S. labor standards and wages." *SCIRP Final Report* at 12-13.[15] The Senate Judiciary Committee report made the same point:

> through legalization . . . [we seek] to eliminate the illegal subclass now present in our society. . . . [T]heir illegal status and resulting weak bargaining position cause these people to depress U.S. wages and working conditions.

S. Rep. No. 99-132, at 16 (1985).[16]

Third, and critically, IRCA attempts to prevent the exploitation of undocumented immigrants who are nonetheless employed in the United States. IRCA accomplishes this purpose in the same way that it negates employers' incentives to hire undocumented workers: by enhancing the enforcement of employment standards legislation on behalf of undocumented workers. The text of § 111(d) makes clear that Congress intended this enforcement to prevent the exploitation of undocumented workers. *See* IRCA § 111(d) (funding en-

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[15] Legalization provisions were also part of the proposed immigration reform laws taken up by prior Congresses. *See, e.g.*, S. Rep. No. 97-485, at 18 (1982); S. Rep. No. 98-62, at 19 (1983). The provisions were introduced in part to protect domestic workers. *See* S. Rep. No. 97-485, at 19; S. Rep. No. 98-62, at 20.

[16] On the House side, the Judiciary Committee report concluded that legalization "would help to prevent the exploitation of this vulnerable population in the workplace." H.R. Rep. No. 99-682, pt. 1, at 49. Congressman Mazzoli, moreover, in his remarks on the House floor, commented that undocumented immigrants "live in a subrosa, twilight society. They are vulnerable to exploitation because of their illegal status. Unscrupulous employers prey on their fear of discovery and use threats of deportation to quell complaints about treatment, working conditions, and pay." 132 Cong. Rec. at H9712-9713.

forcement to "remove the economic incentive for employers *to exploit* . . . [undocumented] aliens" (emphasis added)).

The legislative history of § 111(d) confirms that Congress intended to enforce labor standards legislation on behalf of undocumented workers in order to protect domestic workers. The SCIRP Final Report, for example, called for "increased enforcement of existing wage and working standards legislation" in order to ensure that immigration reform "results in the improvement of wages and working conditions for those authorized to work in the United States." *SCIRP Final Report* at 70. Specifically, the Report supported budgetary increases to allow the Department of Labor Employment Standards Administration "to increase its efforts to monitor the workplace." *Id.*

Similarly, the House Education and Labor Committee report, quoted above (*see supra* p. 13), concluded that failing to enforce such legislation or limiting the remedies for violations of these laws would be "counterproductive" of IRCA's "intent to limit the hiring of undocumented employees *and the depressing effect on working conditions caused by their employment.*" H.R. Rep. No. 99-682, pt. 2, at 8-9 (emphasis added). In addition, the House Judiciary Committee stressed its intention that employment and labor laws, including the National Labor Relations Act, be enforced on behalf of undocumented workers to protect the wages and working conditions of domestic workers:

> It is not the intention of the Committee that the employer sanctions provisions of the bill be used to undermine or diminish in any way labor protections in existing law, or to limit the powers of federal or state labor relations boards, labor standards agencies, or labor arbitrators to remedy unfair practices committed against undocumented employees for exercising their rights before such agencies or for engaging in activities protected by existing law. . . . As the Supreme Court observed in *Sure-Tan, Inc. v. NLRB*, 467 U.S. 883 (1984) application of the

> NLRA "helps to assure that wages and employment conditions of lawful residents are not adversely affected by the competition of illegal alien employees who are not subject to the standard terms of employment." 467 U.S. at 893.

H.R. Rep. No. 99-682, pt.1, at 58.

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In sum, awarding backpay to undocumented workers furthers two of IRCA's statutory purposes—the curtailment of illegal immigration and the protection of domestic workers. Such awards are thus entirely consistent with IRCA, and denying the Board's authority to order a limited backpay award as in this case would be violative of Congress's nuanced approach to immigration and labor policy as codified in IRCA.

II. FOR MORE THAN A CENTURY CONGRESS HAS PASSED IMMIGRATION LEGISLATION DESIGNED TO PROTECT THE WAGES AND WORKING CONDITIONS OF DOMESTIC WORKERS.

Although IRCA may be the most comprehensive congressional attempt to negotiate the relationship between labor markets and immigration, Congress has always legislated in the immigration area with an eye to American labor markets, often in order to protect the wages and working conditions of domestic workers. Without regard to whether Congress's view of immigrant workers' effects on the domestic labor market is empirically sound, the history of immigration legislation is entirely consistent with the assumptions underlying IRCA. Indeed, as much as IRCA represents a departure from more traditional approaches to immigration enforcement, it is also part of a long history of immigration legislation designed to protect domestic labor. Therefore, the Board's order in this case is consistent not only with IRCA but with the long history of Congressional efforts to protect domestic workers from the perceived adverse effects of immigration.

For more than a century, Congress has been acutely aware of the complicated connections between immigration law and domestic labor markets. Indeed, "[a]n element that runs through congressional debate and action on immigration is that of labor market considerations. It would in fact be difficult to determine where immigration policy ends and labor policy begins, the two are so closely interrelated." E.P. Hutchinson, *Legislative History of American Immigration Policy 1798-1965*, at 492 (1981); *see also id.* at 502 ("Congress in designing immigration legislation has been responsive to considerations of the labor supply and the labor market."). At times, Congress has responded to the labor needs of certain sectors of the domestic economy by adopting immigration measures designed to facilitate the entry of immigrants with certain needed skills.[17] At other times, and more importantly for present purposes, Congress has acted to protect the domestic labor force from what it perceived as undue immigrant competition. *See Sure-Tan*, 467 U.S. at 893 ("A primary purpose in restricting immigration is to preserve jobs for American workers . . . .").

Through time, Congress has repeatedly legislated on the assumption that immigrant labor, and particularly unauthorized immigrant labor, puts downward pressure on the wages and working conditions of domestic workers. This conception dates at least to 1882, when Congress enacted the Chi-

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[17] During the 1940s and 1950s, for example, Congress perceived a shortage of domestic agricultural workers and acted to redress this shortage by authorizing, through a series of international agreements and legislative enactments popularly referred to as the "Bracero" program, the entry of thousands of immigrant laborers. *See, e.g.*, S. Rep. No. 88-391, at 2-4 (1963); *see also* Act of July 12, 1951, 65 Stat. 117. Since 1924, Congress has accorded preferences within the immigration quota system to immigrants seeking entry into the United States who can demonstrate job-related skills in certain targeted sectors of the economy. *See* Act of May 26, 1924, § 4d, 43 Stat. 153, 155; *see also* 8 U.S.C. § 1153(b) (establishing current scheme of employment-based immigration preferences); *see generally* Hutchinson, *supra*, at 494-99 (discussing history of occupational preference classes in immigration law).

nese Exclusion Act (Act of May 6, 1882, 22 Stat. 58) in part to protect domestic workers from having to compete with Chinese labor. *See* House Comm. on the Judiciary, 100th Cong., *Grounds for Exclusion of Aliens under the Immigration and Nationality Act: Historical Background and Analysis* 8 (Comm. Print 1988) ("*Grounds for Exclusion*") ("The Chinese Exclusion Act . . . was enacted out of a concern for protecting domestic labor from foreign competition, combined with racial prejudice.").[18] The consequences of such competition, Congress had found, were the depression of wages to "ruinously low rates" incapable of "furnish[ing] the barest necessities of life to an American," and the occupation of so many jobs by immigrant laborers that there was "a lack of employment" for domestic workers. S. Rep. No. 44-689, at IV-V (1877). The Chinese Exclusion Act and its successor statutes[19] addressed that concern by generally forbidding Chinese workers from entering the country.

The contract labor laws, the first of which passed in 1885 (Act of Feb. 26, 1885, 23 Stat. 332), pursued similar objectives:

> The first of the alien contract labor laws was enacted . . . against a background of depression, strikes, and intense lobbying by the Knights of Labor. The Act prohibited the importation of contract foreign labor [with certain exceptions for skilled labor]. Its purpose was to protect domestic labor, primarily by curtailing the practice of employers importing large numbers of foreign workers in order

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[18] To be sure, this early concern with labor competition also found expression in overtly racist provisions. *See, e.g.*, H.R. Rep. No. 46-572, at 11 (1880); H.R. Rep. No. 45-240, at 2-3 (1878). Nonetheless, it is evident that the Chinese Exclusion Act was motivated in part by distinct labor-protecting aims.

[19] *See* Act of July 5, 1884, 23 Stat. 115; Act of Sept. 13, 1888, 25 Stat. 476; Act of Oct. 1, 1888, 25 Stat. 504; Act of May 5, 1892, 27 Stat. 25; Act of Apr. 29, 1902, 32 Stat. 176; Act of Apr. 27, 1904, 33 Stat. 428.

> to force domestic workers to work at reduced wages.

Grounds for Exclusion at 8;[20] *see also* Act of Feb. 23, 1887, 24 Stat. 414; Act of Oct. 19, 1888, 25 Stat. 565; Act of Mar. 3, 1891, 26 Stat. 1084; Act of Apr. 30, 1900, 31 Stat. 141; Act of Mar. 3, 1903, 32 Stat. 1213; Act of Feb. 20, 1907, 34 Stat. 898; Act of Feb. 5, 1917, 39 Stat. 874.[21]

Congress was similarly motivated in 1907 when it granted the President greater discretionary authority to limit

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[20] *See also* S. Rep. No. 81-1515, at 50 (1950) (noting that the contract labor laws sought to end "the practice of certain employers importing cheap labor from abroad . . . . [in order] to oversupply the demand for labor so that the domestic laborers would be forced to work at reduced wages.").

[21] At the same time as it was passing immigration legislation designed to protect domestic labor, Congress recognized the need to respond directly to the exploitation of some immigrant workers in this country by targeting the employers guilty of such exploitation. As early as 1874, for example, Congress in the Padrone Act responded to the phenomenon of young boys being taken from their families in Italy and brought to this country to work by making it a criminal offense to "willfully bring into the United States . . . any person inveigled or forcibly kidnapped in any other country, with intent to hold such person . . . in confinement or to any involuntary service," or to sell or hold any such person to such involuntary service. Act of June 23, 1874, 18 Stat. 251; *see United States v. Kozminski*, 487 U.S. 931, 947 (1988) ("Congress enacted the Padrone statute in 1874 'to prevent [this] practice of enslaving, buying, selling, or using Italian children.'") (alteration in original) (quoting 2 Cong. Rec. 4443 (1874) (Rep. Cessna)).

Congress demonstrated some direct concern for immigrants' working conditions in the Bracero program as well. Congress concluded that the program would reduce the exploitability of immigrant farmworkers by legalizing their status and by regulating the conditions of their employment. *See* H.R. Rep. No. 83-1199, at 4 (1954) (noting that workers would be paid the prevailing wage under the program); H.R. Conf. Rep. No. 82-668 (1951), *available at* 65 Stat. 1569, 1580 (stating that the program would reduce exploitability); Act of July 12, 1951, 65 Stat. 117 (requiring the federal government to guarantee employers' compliance with individual work contracts relating to the payment of wages and the furnishing of transportation).

immigration that he determined was harmful to domestic labor. Specifically, a 1907 statute authorized the President to deny admission to persons whose entrance he deemed to be "to the detriment of labor conditions therein." Act of Feb. 20, 1907, 34 Stat. 898, proviso to § 1; *see also* Act of Feb. 5, 1917, 39 Stat. 874, proviso to § 3. A Senate Report later explained that this authorization "was a result of the growing alarm, particularly on the Pacific coast and in States adjacent to Canada and Mexico, that labor conditions would be seriously affected by continuation of the then existing rate of increase in admission of Japanese laborers." S. Rep. No. 81-1515, at 57 (1950); *accord* H.R. Rep. No. 82-1365, at 19 (1952).

A central immigration restriction in place throughout much of the last century—the admittedly racist nationality-based quota system—was similarly enacted in part as an attempt to protect domestic workers. When Congress passed the Immigration and Nationality Act of 1921 (Act of May 19, 1921, Pub. L. No. 67-5, 42 Stat. 5) establishing quotas on the basis of nationality, it stated explicitly that one of its purposes was to protect the domestic labor market. H.R. Rep. No. 65-1015, at 8 (1919) (stating that, in the wake of World War One, it would be a "tragedy if we allow thousands of aliens to come to our shores to work for low wages and thereby secure the jobs that ought to go to the returning American soldiers and the war workers"). Put slightly differently, the "large unemployment in the United States [made] it impracticable for the United States to accept a heavy immigration." H.R. Rep. No. 67-4, at 3 (1921).

By the early 1950s, Congress had focused its concern about the adverse competitive effects of immigrant labor, concentrating on the special problems posed by unauthorized immigration:

> The illegal immigrant is always subject to deportation, and under such circumstances, the wetback will work for wages far below a level which will enable him to maintain a proper standard of living for

> himself or his family. At the same time, their employment under cuts the going wage of domestic farm later and thus forces the latter to accept substandard wages also, or move on to other work.

S. Rep. No. 82-214 (1951), *available at* 65 Stat. 1569, 1570-71.[22] That is, Congress concluded that because unauthorized immigrant workers are especially likely to work for substandard wages, they exert exceptionally strong downward pressure on prevailing wages and workplace standards throughout the labor pool.

While comprehensive legislation targeted specifically at alleviating the impact of *undocumented* immigration on the domestic workforce generally did not appear until IRCA itself,[23] Congress continued through the twentieth century to tailor the laws governing legal immigration to the needs and interests of domestic labor markets. The certification system is a prime example of that tailoring. In § 212(a)(14) of the

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[22] Again, that Congress expressed itself in a decidedly racist manner does not negate its focus on domestic labor.

[23] There were some precursors, however. The 1974 amendments to the Farm Labor Contractor Act of 1963 (Pub. L. No. 93-518, 88 Stat. 1652), for example, established criminal penalties for certain contactors who knowingly engaged the services of illegal aliens. The goal of the amendments was to mitigate the adverse impact of illegal immigrant labor, as the Senate Report accompanying the amendments made clear:

> The Committee is aware that illegal aliens have become an increasingly large source of farm labor in this country, and that the services of a contractor are often utilized to procure this clandestine work force. . . . [I]f this tide of illegal immigration is to be stemmed, stricter enforcement and stronger penalties must be applied against those who violate the [Farm Labor Contractor] Act. These additional steps are necessary in light of the adverse effect such importation of illegal aliens has had on the wages and job security of native Americans and lawfully admitted aliens, especially in times of high unemployment.

S. Rep. No. 93-1295, at 4 (1974); *accord* S. Rep. No. 93-1206, at 4 (1974).

Immigration and Nationality Act of 1952, Congress enacted a provision (now codified at 8 U.S.C. § 1182(a)(5)) aimed at providing strong "safeguards for American labor" by:

> provi[ding] for the exclusion of aliens seeking to enter the United States for the purpose of performing skilled or unskilled labor if the Secretary of Labor has determined that there are sufficient available workers in the locality of aliens' destination who are able, willing, and qualified to perform such skilled or unskilled labor and that the employment of such aliens will adversely affect the wages and working conditions of workers in the United States similarly employed.

H.R. Rep. No. 82-1365, at 50-51 (1952); *see also* H.R. Rep. No. 93-461, at 13 (1973); H.R. Rep. No. 94-1553, at 10 (1976).[24] This certification requirement was designed specifically to "protect the domestic labor force." *Patel v. INS*, 811 F.2d 377, 383 (7th Cir. 1987); *see Londono v. INS*, 433 F.2d 635, 636 (2d Cir. 1970) (describing the certification procedures as a "safeguards carefully erected to protect the domestic labor market.").

In short, for over a century Congress has focused on protecting domestic workers from what it perceived to be the adverse effects of immigration by regulating the entrance of aliens into the country. Read against this history, IRCA's choice of mechanisms to address unauthorized immigration

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[24] Similar certification requirements were enacted for particular categories of immigrants, such as contract workers, earlier in the twentieth century. *See* Act of July 12, 1951, 65 Stat. 117, 118 ("No workers [shall be admitted] unless the Secretary of Labor has determined and certified that (1) sufficient domestic workers [are not available], (2) the employment of such workers will not adversely affect the wages and working conditions of domestic agricultural workers similarly employed . . . ."); Act of Feb. 5, 1917, 39 Stat. 874, proviso to § 3 ("[S]killed labor, if otherwise admissible, may be imported if labor of like kind unemployed can not be found in this country."); Act of Feb. 20, 1907, 34 Stat. 898, proviso to § 2; Act of Mar. 3, 1903, 32 Stat. 1213, proviso to § 2.

and protect domestic workers is best understood as reflecting longstanding congressional conclusions about the complex relationship between immigration—especially unauthorized immigration—and domestic labor. Accordingly, the Board's award of backpay in this case is entirely consistent not only with IRCA itself, but also with over a century of congressional action aimed at protecting domestic labor.

CONCLUSION

For the reasons stated above, the judgment of the court of appeals should be affirmed.

Respectfully submitted,

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December 2001