12-1199

IN THE

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

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

Petitioners,

- v.-

NATIONAL LABOR RELATIONS BOARD,

Respondent.

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

BRIEF FOR PETITIONERS CHRISTIAN PALMA, ANTONIO GONZALEZ, FRANCISCO JAVIER JOYA, JOSE ANTONIO QUINTUNA, and JOSE ARMANDO SAX-GUTIERREZ

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MISCELLANEOUS:

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

No. 12-1199

CHRISTIAN PALMA, ANTONIO GONZALEZ,
FRANCISCO JAVIER JOYA, JOSE ANTONIO QUINTUNA, and
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JURISDICTIONAL STATEMENT

This case is before the Court on the petition of employees Christian Palma, Antonio Gonzalez, Francisco Javier Joya, Jose Antonio Quintuña and Jose Armando Sax-Gutierrez (collectively, the "employees" or "discriminatees") to review a Supplemental Decision and Order of the National Labor Relations Board ("NLRB" or the "Board") issued on August

9, 2011, and reported at 357 NLRB No. 47, JA 10-35, and an unpublished Order Denying Motion for Reconsideration issued on November 3, 2011, JA 36-39.[1] The Charging Party before the Board was the Puerto Rican Legal Defense and Education Fund, who filed a charge with the NLRB on behalf of several discharged employees, including the Petitioners.[2] *See* JA 40. The Charged Party is Mezonos Maven Bakery, Inc. ("Mezonos").

Petitioners are five former employees of Mezonos who were unlawfully discharged but denied reinstatement and backpay by the NLRB. On that basis, Petitioners are "person[s] aggrieved by a final order of the Board . . . denying in whole or in part the relief sought" within the meaning of Section 10(f) of the National Labor Relations Act ("NLRA" or the "Act"), 29 U.S.C. § 160(f). Petitioners therefore have standing to petition for review of the NLRB's decision in this case. *See Liquor Salesmen's Union v. NLRB*, 664 F.2d 1200, 1206 n.8 (D.C. Cir. 1981) (standing to appeal an order of the Board within the meaning of Section 10(f) requires an "adverse effect in

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[1] "JA" references are to the Joint Appendix filed together with this brief. Parallel citations are provided to the slip opinion of the NLRB's Supplemental Decision and Order as "*Mezonos*, slip op. [page number]," and to the Board's unpublished Order Denying Motion for Reconsideration as "Order Denying Reconsideration, at [page number]."

[2] Charging Party Puerto Rican Legal Defense and Education Fund subsequently changed its name to LatinoJustice PRLDEF, as is reflected in the NLRB's Order Denying Motion for Reconsideration. *See* Order Denying Reconsideration, at 1 & n.1, JA 36.

fact" on the petitioners (quoting *Retail Clerk's Union 1059 v. NLRB*, 348 F.2d 369, 370 (D.C. Cir. 1965)).

The NLRB had subject matter jurisdiction over the unfair labor practice proceeding under Section 10(a) of the NLRA. 29 U.S.C. § 160(a). The Board's Supplemental Decision and Order and Order Denying Motion for Reconsideration are final with respect to all parties. The Court has jurisdiction over this proceeding pursuant to Sections 10(e) and (f) of the Act, 29 U.S.C. § 160(e) and (f), because the unfair labor practices took place at Mezonos's facility in New York.

Petitioners filed their petition for review on March 27, 2012. The petition for review was timely as the NLRA places no limit on the time for filing actions to review a Board order.

STATEMENT OF THE ISSUES PRESENTED FOR REVIEW

(1) Whether the NLRB's interpretation of *Hoffman Plastic Compounds, Inc. v. NLRB*, 535 U.S. 137 (2002), as categorically prohibiting the Board from ordering backpay to any employee who is party to an unlawful employment relationship, even where only the employer, and not the employees, violated the relevant law, was error;

(2) Whether the NLRB's refusal to order reinstatement of the employees in this case without providing any explanation for its decision was error;

(3) Whether, if the answer to either or both of the first two questions is "Yes," this Court must remand this case back to the NLRB to fashion an appropriate remedy for Mezonos's uncontested violations of the NLRA that "accommodat[es] . . . [the NLRA's] statutory scheme to [the Immigration Reform and Control Act]." *Southern S.S. Co. v. NLRB*, 316 U.S. 31, 47 (1942).

STATEMENT OF THE CASE

This case involves the NLRB's Supplemental Decision and Order, reported at 357 NLRB No. 47 (Aug. 9, 2011), denying reinstatement and backpay to several unlawfully-discharged employees, including the Petitioners in this case, whom the Board had previously ordered reinstated and made whole for lost wages and benefits. JA 55-56. The NLRB based its decision to deny backpay solely on its interpretation of the Supreme Court's decision in *Hoffman Plastic*, which the Board held categorically foreclosed it from ordering backpay to any employee employed in an unlawful employment relationship. *See Mezonos*, slip op. 1, JA 10. In contrast, the Board's majority stated in a concurrence that, if such an award

were not foreclosed by *Hoffman Plastic*, it would have, as a policy matter, awarded backpay in this case. *Mezonos*, slip op. 5 (Liebman, Chairman, and Pearce, Member, concurring), JA 14. The Board also denied even conditional reinstatement to the unlawfully-discharged employees without providing any explanation for its decision.

After the NLRB issued its Supplemental Decision and Order, the Charging Party filed a motion for reconsideration on the basis that the Board decided this case on a ground not raised by any party – that the discriminatees were not entitled to backpay as a matter of law because they were party to an unlawful employment relationship – and that this ground conflicted with the Board's own precedent. *See* Order Denying Reconsideration, at 2-3, JA 37-38 (summarizing Charging Party's arguments). In an unpublished decision issued on November 3, 2011, *see* JA 36-39, the NLRB denied the motion for reconsideration.

The Board's findings, as well as the Supplemental Decision and Order and the Order Denying Motion for Reconsideration, are summarized below.

STATEMENT OF FACTS

I. After Mezonos does not contest that its discharge of the employees violated the NLRA, the Board orders reinstatement with backpay

Mezonos discharged the employees who are the Petitioners in this case "after they concertedly complained about the treatment they were

receiving from a supervisor." *Mezonos*, slip op. 1, JA 10.[3] The Puerto Rican Legal Defense and Education Fund filed an unfair labor practice charge with the NLRB on behalf of the discharged employees, alleging that Mezonos's actions violated Sections 8(a)(1) and (3) of the National Labor Relations Act, 29 U.S.C. §§ 158(a)(1) and (3). JA 40.

Mezonos entered into a formal settlement stipulation with the NLRB rather than contest the charge. JA 45-53. Pursuant to that settlement stipulation, the Board issued an unpublished Decision and Order, JA 54-59, later enforced by this Court, that ordered Mezonos to reinstate the employees and make them whole for lost wages and benefits, *Mezonos*, slip op. 1, JA 10.

II. The Administrative Law Judge rejects Mezonos's *Hoffman Plastic* defense to the Compliance Specification and orders conditional reinstatement with backpay

The NLRB's General Counsel issued a Compliance Specification seeking reinstatement and specifying the backpay due to the employees. JA 60-74. In response, Mezonos raised as an affirmative defense the allegation that discriminatees were undocumented workers who were not entitled to reinstatement or backpay pursuant to the Supreme Court's decision in

[3] Two additional unlawfully-discharged workers, Luis Marcelo Gonzalez Hurtado and Miguel Quintana, participated in the NLRB proceedings below, *see Mezonos*, slip op. 1 n. 4, JA 10, but are not petitioners in this case.

Hoffman Plastic Compounds, Inc. v. NLRB, 535 U.S. 137 (2002). JA 75-78.[4] The NLRB's General Counsel agreed to proceed with the compliance hearing on the assumption that the discriminatees lacked authorization to work in the United States, *Mezonos*, slip op. 10, JA 19, but contended that *Hoffman Plastic* did not foreclose an award of reinstatement and backpay in this case because Mezonos knowingly hired the discriminatees despite their alleged immigration status, *Id.* at 14, JA 23.

The ALJ found that Mezonos "fail[ed] to verify its employees' documentation and continu[ed] to employ the . . . discriminatees with knowledge of their undocumented status." *Id.* at 16-17, JA 25-26. By contrast, the ALJ found that, in obtaining employment with Mezonos, "none [of the discriminatees] presented any fraudulent documents concerning their immigration status." *Id.* at 10, JA 19. In sum, the ALJ concluded that Mezonos "is the wrongdoer while the employees are innocent of violating IRCA." *Id.* at 17, JA 26.

On the basis of these findings, the ALJ rejected Mezonos's affirmative defense to the Board's reinstatement order, suggesting that the

[4] Mezonos also contended that it offered reinstatement to the discriminatees in the months after their discharge in 2003. The ALJ found that any such offers made by Mezonos in 2003 were invalid as a matter of law, *Mezonos*, slip op. 14, JA 23, a finding that the Board did not address in dismissing the Compliance Specification in its entirety.

proper remedy in this case was the "conditional reinstatement . . . order in *A.P.R.A. Fuel Oil Buyers Group*, 320 NLRB 408, 417 (1995), enfd. 134 F.3d 50, 56 (2d Cir. 1997)," which requires the employer "to offer immediate and full reinstatement to the workers 'provided that they complete, within a reasonable time, INS Form I-9, including the presentation of the appropriate documents in order to allow the employer to meet its obligations under IRCA.'" *Mezonos*, slip op. 13-14, JA 22-23. The ALJ noted that, contrary to Mezonos's argument, "*Hoffman* [*Plastic*] did not disturb the conditional reinstatement part of the order in *A.P.R.A. Fuel*." *Id.* at 13, JA 22.

The ALJ also rejected Mezonos's affirmative defense to the Board's backpay order, explaining that because the company "fail[ed] to verify its employees' documentation and continu[ed] to employ the . . . discriminatees with knowledge of their undocumented status, . . . [Mezonos] should not be permitted to evade its liability for backpay." *Id.* at 16-17, JA 25-26. Contrasting this case to *Hoffman Plastic*, the ALJ explained that "[j]ust as the Court denied a remedy to the wrongdoing party [in *Hoffman Plastic*], employee [Jose] Castro who presented false immigration documents, here [Mezonos] is the sole wrongdoer since it violated IRCA in hiring the workers without obtaining proof of their immigration status. Accordingly,

[Mezonos] should not be rewarded for knowingly and intentionally violating IRCA and the [National Labor Relations] Act." *Id.* at 17, JA 26.

III. On exceptions, the Board refuses to order backpay based on its reading of *Hoffman Plastic* and refuses without explanation to order reinstatement

Mezonos filed exceptions to the ALJ's decision with the Board, "contending that because the discriminatees are unauthorized to work in the United States, backpay is foreclosed by the Court's decision in *Hoffman* [*Plastic*]." *Mezonos*, slip op. 2, JA 11.

The NLRB granted Mezonos's exceptions and dismissed the Compliance Specification in its entirety. *Id.* at 4, JA 13. By doing so, the Board dismissed both the reinstatement order (about which it did not comment) and the backpay order, holding "categorically" that "backpay may not be awarded to undocumented aliens" because undocumented workers "are party to an employment relationship the Court [in *Hoffman Plastic*] deemed criminal." *Id.* at 2-3, JA 11-12. The Board explained that, as it read *Hoffman Plastic*, "[t]he unlawful character of the relationship does not depend on whether it is the employee or the employer who has violated IRCA." *Id.* at 3, JA 12. Rather, "[r]egardless of which party violates [IRCA], the result is an unlawful employment relationship." *Id.* at 2, JA 11.

Two members of the Board's three-member panel filed a concurrence stating that "[i]f the issue were an open one, we would not hesitate to reject [Mezonos]'s backpay defense," explaining that "[t]he arguments in favor of extending that remedy to undocumented workers – particularly where, as here, the discriminatees never proffered fraudulent documents, and the Respondent hired and continued to employ them in knowing violation of IRCA – are compelling." *Id.* at 5, JA 14 (Liebman, Chairman, and Pearce, Member, concurring). The concurring Board members, however, felt "compelled to conclude that the Supreme Court's decision in *Hoffman Plastic Compounds* categorically precludes the Board from awarding backpay to undocumented workers." *Ibid.*

IV. The Board denies the motion for reconsideration

The Charging Party filed a motion for reconsideration on the basis that the NLRB decided this case on a ground not raised by any party – namely, that the discriminatees were not entitled to backpay as a matter of law because they were employed in an unlawful employment relationship. The Charging Party explained that this rationale conflicted with Board precedent holding that where an employer hires and employs workers knowing that they are legally ineligible to hold their positions and then discharges them in violation of the NLRA, the employer may be held liable

for backpay, at least for that part of the backpay period during which the employer continues to employ other legally-ineligible employees. *See* Order Denying Reconsideration, at 3-4 & n.7, JA 38-39 (discussing *Future Ambulette, Inc.*, 307 NLRB 769, 769 n.4 (1992), enfd. mem. 990 F.2d 622 (2d Cir. 1993), and other cases cited by Charging Party in its motion for reconsideration).

The Board denied the Charging Party's motion for reconsideration, explaining that "the Board did not rest its decision to deny backpay on its own finding that the discriminatees were party to an unlawful relationship," "[r]ather, . . . this was the rationale the Court relied on in *Hoffman* [*Plastic*]." *Id.* at 3, JA 38. The Board also stated that "we find no merit to the Charging Party's argument that the decision is inconsistent with Board precedent" and briefly sought to distinguish *Future Ambulette* and several of the other similar cases cited by the Charging Party in its motion for reconsideration. *Id.* at 3-4 & n.7, JA 38-39.

Discriminatees Palma, Gonzalez, Joya, Quintuña, and Sax-Gutierrez then filed this petition for review. JA 82-85.

SUMMARY OF THE ARGUMENT

Mezonos did not contest that it violated the NLRA by unlawfully discharging the employees in this case and admitted to violating the

Immigration Reform and Control Act (IRCA) by failing to verify the employees' authorization to work in the United States before employing them. In contrast, it is undisputed that none of the employees used fraudulent documents to obtain employment with Mezonos or otherwise violated IRCA.

Despite these uncontested facts, the NLRB refused to award backpay to the unlawfully-discharged employees on the sole basis that it read *Hoffman Plastic* as categorically foreclosing the Board from awarding backpay to any employee employed in an unlawful employment relationship. In fact, *Hoffman Plastic* did nothing of the sort. As this Court recognized in *Madeira v. Affordable Housing Foundation, Inc.*, 469 F.3d 219, 247 (2d Cir. 2006), *Hoffman Plastic* only prohibits the Board from awarding backpay to employees who use fraudulent documents to obtain employment in violation of IRCA. And, as the Supreme Court recently affirmed in *Arizona v. United States*, 567 U.S. __, 132 S. Ct. 2492 (June 25, 2012), Congress deliberately chose not to impose criminal sanctions on aliens for unauthorized work (as opposed to the use of fraudulent documents to obtain work) for the precise reason that such a sanction would make employees too vulnerable to employer exploitation based on their removable status.

The Board's categorical reading of *Hoffman Plastic* as foreclosing an award of backpay to any employee who is party to an unlawful employment relationship conflicts with NLRB precedent that distinguishes between situations where an employer knowingly employs a legally-ineligible worker and situations where an employer does so unknowingly. *Hoffman Plastic* fully accords with the Board's reasoning in these cases because, properly read, the Court's decision stands for the proposition that, in ordering remedies for violations of the NLRA, the identity of the law-violator matters.

The NLRB also refused to order reinstatement of the unlawfully-discharged employees without providing any explanation for its decision. The Board's unexplained departure from its ordinary remedy of ordering reinstatement conditioned upon compliance with IRCA's verification requirements was error as well.

The relevant point for this petition for review, then, is that both the NLRB's error in interpreting *Hoffman Plastic* as categorically prohibiting it from awarding backpay and the Board's denial of reinstatement to the employees without providing any explanation require a remand. But for the NLRB's errors, the Board could have ordered a remedy of the sort approved of by this Court in *NLRB v. Future Ambulette, Inc.*, 903 F.2d 140, 145 (2d

Cir. 1990) – reinstatement conditioned upon the employees' compliance with IRCA's verification requirements and backpay for those parts of the backpay period when Mezonos continued to employ workers who lacked authorization to work in the United States. Such an award would have compensated the employees for Mezonos's unlawful discrimination while creating a positive incentive for the company to comply with IRCA with regard to all of its employees in order to toll the accrual of backpay.

Because the NLRB relied on an erroneous interpretation of *Hoffman Plastic* rather than exercising its administrative expertise to "accommodate[e] . . . [the NLRA's] statutory scheme to [IRCA]," *Southern S.S. Co. v. NLRB*, 316 U.S. 31, 47 (1942), this Court must remand this case so that the Board can undertake this accommodation in the first instance. On remand, the NLRB must exercise its special administrative competence to determine an appropriate remedy for the uncontested violations of the NLRA that occurred in this case.

STANDARD OF REVIEW

"Because the ultimate issue [in this case] is one of proper interpretation of a Supreme Court opinion" – whether the NLRB's reading of *Hoffman Plastic* as categorically foreclosing it from awarding backpay to any employee employed in an unlawful employment relationship is correct –

"[this Court's] review is *de novo*." *NLRB v. United States Postal Serv.*, 660 F.3d 65, 68 (1st Cir. 2011). As the Board's majority acknowledged, this Court "owe[s] no deference to [the NLRB's] interpretation of *Hoffman*" because a reviewing court is "'not obligated to defer to an agency's interpretation of Supreme Court precedent under *Chevron* or any other principle.'" *Mezonos*, slip op. 5 n.3, JA 14 (Liebman, Chairman, and Pearce, Member, concurring) (quoting *New York New York, LLC v. NLRB*, 313 F.3d 585, 590 (D.C. Cir. 2002)).

Deference to the NLRB, in other words, is inappropriate here because the decision at issue is *not* based on the Board's exercise of its administrative expertise. To the contrary, the Board majority stated that, as a policy matter, "relieving the employer of economic responsibility for its unlawful conduct . . . can serve only to frustrate the policies of . . . the Act." *Id.* at 9, JA 18. And the Board did not provide *any* explanation – policy-based or otherwise – for its decision to refuse to order the reinstatement of the unlawfully-discharged employees.

ARGUMENT

I. The Board erred by interpreting *Hoffman Plastic* as a categorical bar to backpay for any employee who is party to an unlawful employment relationship

It is undisputed that Mezonos unlawfully discharged the employees in this case in violation of the NLRA. *See Mezonos*, slip op. 1, JA 10. Under Section 10(c) of the Act, 29 U.S.C. § 160(c), the Board has wide discretion to order affirmative action to "expunge" the "effects of [such] unfair labor practices." *Virginia Electric Co. v. NLRB*, 319 U.S. 533, 539 (1943). The Board's ordinary remedy in this type of case is to "require[] . . . compensation for the loss of wages [and] also offers of employment to the victims of discrimination" in order to restore "the situation, as nearly as possible, to that which would have obtained but for the illegal discrimination." *Phelps Dodge Corp. v. NLRB*, 313 U.S. 177, 194 (1941). And, that was the remedy initially ordered by the Board in this case. JA 55-57.

A respondent is free to contest an NLRB order of reinstatement and backpay on various grounds, including on the basis that the discriminatees were legally ineligible to hold their former positions. In this case, Mezonos contested the Board's reinstatement and backpay order on the ground that the discriminatees were not authorized to work in the United States and, for that reason, ordering Mezonos to reinstate the discriminatees or pay them

backpay would violate the Immigration Reform and Control Act of 1986 (IRCA) as interpreted by the Supreme Court in *Hoffman Plastic*.[5]

Mezonos admitted that it had violated IRCA by "failing to verify its employees' documentation" and then "continuing to employ the . . . discriminatees with knowledge of their undocumented status." *Mezonos*, slip op. 16-17, JA 25-26. By contrast, in obtaining employment with Mezonos, "none [of the discriminatees] presented any fraudulent documents concerning their immigration status." *Id.* at 10, JA 19.

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[5] As the Supreme Court summarized in *Hoffman Plastic*:

> "IRCA mandates that employers verify the identity and eligibility of all new hires by examining specified documents before they begin work. [8 U.S.C.] § 1324a(b). If an alien applicant is unable to present the required documentation, the unauthorized alien cannot be hired. § 1324a(a)(1).
>
> Similarly, if an employer unknowingly hires an unauthorized alien, or if the alien becomes unauthorized while employed, the employer is compelled to discharge the worker upon discovery of the worker's undocumented status. § 1324a(a)(2). Employers who violate IRCA are punished by civil fines, § 1324a(e)(4)(A), and may be subject to criminal prosecution, § 1324a(f)(1). IRCA also makes it a crime for an unauthorized alien to subvert the employer verification system by tendering fraudulent documents. § 1324c(a). It thus prohibits aliens from using or attempting to use 'any forged, counterfeit, altered, or falsely made document' or 'any document lawfully issued to or with respect to a person other than the possessor' for purposes of obtaining employment in the United States. §§ 1324c(a)(1)-(3). Aliens who use or attempt to use such documents are subject to fines and criminal prosecution. 18 U.S.C. § 1546(b)." 535 U.S. at 148.

Despite Mezonos's admission that it and not the employees had violated IRCA, the Board held that it was "categorically" barred from ordering reinstatement or backpay to the discriminatees because "[r]egardless of which party violates [IRCA], the result is an unlawful employment relationship." *Id.* at 2, JA 11. The Board read the Supreme Court's decision in *Hoffman Plastic* as establishing this categorical rule, but *Hoffman Plastic* did nothing of the sort. Rather, as this Court has observed, "the Supreme Court [in *Hoffman Plastic*] . . . recognized a backpay or lost earnings award to conflict with federal immigration law only when the IRCA violation prompting employment was committed by the employee, not . . . by the employer." *Madeira v. Affordable Housing Foundation, Inc.*, 469 F.3d 219, 247 (2d Cir. 2006).[6]

[6] Although *Madeira* involved a claim under New York's "Scaffold Law" – and thus was analyzed as a preemption case – its holding that "a backpay or lost earnings award . . . conflict[s] with federal immigration law only when the IRCA violation prompting employment was committed by the employee, not . . . by the employer," 469 F.3d at 247, is nonetheless binding here. That is because in *Madeira*, as in this case, it was necessary to determine whether *Hoffman Plastic* categorically precludes all backpay or lost earnings awards in order to determine the lawfulness of the particular remedy at issue. Of course, as a preemption case, *Madeira* did not address the specific "conflict concerns" raised by a backpay award when an employer violates both the NLRA and IRCA, *ibid.*, an issue left open by *Hoffman Plastic* that, as we discuss in the text, must be addressed by the NLRB in the first instance.

The Board did not cite *Madeira* in its decision at all, but instead quoted *NLRB v. Domsey Trading Corp.*, 636 F.3d 33 (2d Cir. 2011), as

Hoffman Plastic concerned an unlawfully-discharged employee, Jose Castro, who "use[d] . . . false documents to obtain employment," 535 U.S. at 148 – namely, a "fraudulently obtain[ed] . . . California driver's license and . . . Social Security card," *Id.* at 141. This use of false documents to obtain employment violated the provision of IRCA that "makes it a crime for an unauthorized alien to subvert the employer verification system by tendering false documents." *Id.* at 148 (citing 8 U.S.C. § 1324c(a)).

On this basis, the Court analogized the circumstances presented in *Hoffman Plastic* to those of *NLRB v. Fansteel Metallurgical Corp.*, 306 U.S. 240 (1939) – involving a sit-down strike in violation of state criminal and trespass laws – and *Southern S.S. Co. v. NLRB*, 316 U.S. 31 (1942) – involving a shipboard strike that constituted a mutiny – cases in which the Court held that the Board could not "award[] reinstatement or backpay to employees found guilty of serious illegal conduct in connection with their

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support for its reading of *Hoffman Plastic* as categorically holding "that undocumented immigrants are ineligible for backpay under the NLRA ." *Mezonos*, slip op. 2 n.11, JA 11 (quoting *Domsey Trading*, 636 F.3d at 38). *Domsey Trading*, however, was only "an evidentiary decision" considering whether "*Hoffman* notwithstanding, the Board may place some limits on immigration-related questioning in compliance proceedings," a question this Court answered in the affirmative. 636 F.3d at 38. Moreover, in *Domsey Trading*, as in *Hoffman Plastic* and in contrast to the present case, the employer claimed that employees submitted fraudulent documents to obtain employment and were ineligible for reinstatement and backpay on that basis. *Id.* at 35.

employment." *Hoffman Plastic*, 535 U.S. at 143. An award of backpay to Jose Castro, the Court held, "would unduly trench upon explicit statutory prohibitions critical to federal immigration policy as expressed in IRCA," namely, "IRCA['s] criminaliz[ation] [of] the misuse of documents" by employees to obtain employment. *Id.* at 149 & 151 n.5. "What matters here," the Court emphasized, "is that Congress has expressly made it criminally punishable for an alien to obtain employment with false documents." *Id.* at 149.

In this case, in contrast, there is no conflict between the Board's traditional remedies for violations of the NLRA and IRCA. Mezonos "fail[ed] to verify its employees' documentation" and then "continu[ed] to employ the . . . discriminatees with knowledge of their undocumented status." *Mezonos*, slip op. 16-17, JA 25-26. Unlike Jose Castro, who used fraudulent documents to evade Hoffman Plastic's efforts to verify his work authorization, in this case, "none [of the discriminatees] presented any fraudulent documents concerning their immigration status." *Id.* at 10, JA 19. In sum, Mezonos "is the wrongdoer, while the employees are innocent of violating IRCA." *Id.* at 17, JA 26.

These factual distinctions are key because – as the Supreme Court recently affirmed in an opinion released after the Board's decision in this

case – in enacting IRCA, "Congress made a deliberate choice *not* to impose criminal penalties on aliens who seek, or engage in, unauthorized employment." *Arizona v. United States*, 567 U.S. __ , 132 S. Ct. 2492, 2504 (June 25, 2012) (emphasis added). That is, "Congress made IRCA's new sanctions applicable only to aliens who knowingly or recklessly used false documents to obtain employment. It did not otherwise prohibit undocumented aliens from seeking or maintaining employment." *Madeira*, 469 F.3d at 231 (internal citations omitted). The rationale for Congress's "deliberate choice" not to criminalize mere unauthorized work is directly relevant to this case: "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." *Arizona*, 132 S. Ct. at 2504 (emphasis added). In short, if Mezonos and the discriminatees were, as the Board put it, "party to an employment relationship the [law] deems criminal," *Mezonos*, slip op. 3, JA 12, it is Mezonos and *not* the discriminatees who is the "criminal."

Where it is the employer and not the worker who violates IRCA, this Court recognized that "the facts simply do not present the same concern for subversion of federal immigration law that was identified in *Hoffman*

Plastic. . . . [T]he challenged remedy would be assessed against [a] part[y] . . . who[] violated IRCA, and not awarded to the IRCA violator himself, as in *Hoffman Plastic*." *Madeira*, 469 F.3d at 237. As a result, an award of reinstatement and backpay here would in no way "'subvert' IRCA [by] penaliz[ing] the employer's unfair labor practice but . . . discount[ing] the worker's immigration violation." *Id.* at 236-37 (quoting *Hoffman Plastic*, 535 U.S. at 149-50).

Because in this case it was "[Mezonos], not the employees, [who] violated IRCA," *Mezonos*, slip op. 1, JA 10, and because, as this Court has recognized, *Hoffman Plastic* bars the Board from awarding backpay "only when the IRCA violation prompting employment was committed by the employee, not . . . by the employer," *Madeira*, 469 F.3d at 247, the Board's conclusion that it was categorically foreclosed by *Hoffman Plastic* from ordering reinstatement and backpay to the discriminatees in this case was error.

II. Where the employer violates both the NLRA and IRCA, awarding reinstatement and backpay comports with Board precedent and effectuates the purposes of both statutes

Prior to this case, in ordering employers to reinstate unlawfully-discharged employees and make them whole, the NLRB had consistently distinguished between situations where an employer knowingly employs a

legally-ineligible worker and situations where an employer does so unknowingly. Nothing in *Hoffman Plastic* calls these decisions into question; indeed, *Hoffman Plastic* reinforces the Board's distinction between culpable and innocent employers.

The Board has awarded reinstatement and backpay, for example, in several cases in which an unlawfully-discharged worker was legally ineligible to work but the employer was aware of this ineligibility and employed the worker anyway. In *New Foodland Inc.*, 205 NLRB 418 (1973), the employer knowingly employed a worker who was too young to sell alcohol under local law. After the worker was fired for joining a union, the Board concluded that she was entitled to reinstatement and backpay, explaining that "Respondent knew that [she] was under age when she was hired" and "did not consider her age an impediment to her employment prior to the time that she joined the Union." *Id.* at 420. In *The Embers of Jacksonville, Inc.*, 157 NLRB 627, 631 (1966), the Board, confronted with a similar scenario, held that underage busboys fired in violation of the Act were entitled to reinstatement and backpay because "Respondent had frequently hired busboys under 18 years of age [in violation of state law], and then attempted to rely on having no knowledge of such situations until it was specifically called to their attention." *See also Douglas Aircraft Co.*, 10

NLRB 242, 282, 285 (1938) (discriminatee entitled to conditional reinstatement and backpay even though as a non-citizen he was legally ineligible to work on federal contracts, "[s]ince [his] ineligibility for [such] work was not a factor in the refusal of his reinstatement after the strike").[7]

In other cases, the Board has awarded reinstatement and backpay where, although the unlawfully-discharged worker lacked a required license, the employer was aware of this legal bar at the time it employed the worker. In *Future Ambulette, Inc.*, 293 NLRB 884 (1989), enfd. as modified, 903 F.2d 140 (2d Cir. 1990), modified, 307 NLRB 769 (1992), enfd. mem., 990 F.2d 622 (2d Cir. 1993), the Board ordered conditional reinstatement of a driver who lacked a required license as well as payment of backpay for "the period . . . [when] the Respondent employed other unlicensed drivers." 307 NLRB at 769 n.4. Likewise, in *Local 57, Int'l Union of Operating*

[7] The Board sought to distinguish *New Foodland* and *The Embers of Jacksonville* on the basis that "nothing in either decision suggests that the propriety of [a backpay award to a legally-ineligible employee] was put at issue," and sought to distinguish *Douglas Aircraft* on the basis that "the decision contains no discussion of the law or its policy objectives." Order Denying Reconsideration, at 3-4 n.7, JA 38-39. But the Board does not dispute that in each case it awarded backpay to discriminatees who the Board explicitly acknowledged were legally ineligible for their positions. Moreover, the Board has previously cited these cases as standing for the proposition that a "discriminatee [may be] awarded backpay for [the] entire [backpay] period, including [a] portion when she was [legally ineligible] for employment." *A.P.R.A. Fuel Oil Buyers Group, Inc.*, 320 NLRB 408, 409 n.9 (1995) (describing *New Foodland*).

Engineers, 108 NLRB 1225, 1228 (1954), the Board ordered payment of backpay to an engineer who lacked a required license, explaining that "the record . . . conclusively proves . . . that the licensing law was not complied with by the employer on the project involved in this case." *See also Robinson Freight Lines*, 129 NLRB 1040, 1042, 1047 (1960) ("[Discriminatee's] lack of a license did not render him ineligible for backpay.").[8]

Hoffman Plastic fully accords with the Board's reasoning in these cases because it stands for the proposition that, in ordering remedies for

[8] The Board sought to distinguish *Future Ambulette* and *Local 57* on the basis that in those cases "the Board found backpay warranted despite the discriminatee's lack of a relevant *state-issued* license during the backpay period," whereas "[i]n *Hoffman*, by contrast, the Court overturned the Board's backpay award because it conflicted with congressional policies underlying a *federal* statute." Order Denying Reconsideration, at 3-4 n.7, JA 38-39 (emphasis in original). But in *Fansteel*, the Supreme Court refused to enforce a Board order to reinstate sit-down strikers who engaged in "acts of trespass or violence against the employer's property," 306 U.S. at 255, *i.e.*, who violated state criminal and property laws. And in *Future Ambulette* this Court did not consider the distinction between state and federal legal requirements relevant, modifying the Board's unconditional order to reinstate an unlicensed driver because "[w]e cannot condone an order which may encourage . . . a violation of New York's motor vehicle laws." 903 F.2d at 145. Neither decision was based on preemption principles; rather, both Courts required the Board to "tailor[]" its remedies to the requirements of state law in order to "effectuate the policies of the [NLRA]." *Ibid.* *See Fansteel*, 306 U.S. 254-57. What matters, in short, is whether the unlawfully-discharged employee "ha[s] committed serious criminal acts," *Hoffman Plastic*, 535 U.S. at 143 (discussing *Fansteel*), not whether those acts violate state versus federal law.

violations of the NLRA, the identity of the law violator matters. Just as the Board may not "recogniz[e] employer misconduct [under the NLRA] but discount[] the misconduct of illegal alien employees [under IRCA]," *Hoffman Plastic*, 535 U.S. at 150, the Board may not "discount[] the misconduct" of an employer who discharges workers in violation of the NLRA after knowingly violating IRCA by hiring those workers without regard to their undocumented status.

Hoffman Plastic notes that awarding backpay in the circumstances presented by that case might encourage the unlawfully-discharged employee to commit further violations of IRCA in an effort to mitigate damages. *Id.* at 150-51. But nothing in the facts of this case suggest that the discriminatees – who did not violate IRCA to obtain employment with Mezonos – would provide false documents to another employer. Considering that Mezonos has admitted to violating IRCA, allowing that violation to preclude monetary relief for the company's violation of the NLRA would simply reward Mezonos for violating IRCA and directly encourage it to engage in further violations of both statutes.

As the Board majority explained in this case, "precluding backpay awards [for NLRA violations] would undermine the deterrent effect of IRCA penalties by creating offsetting savings." *Mezonos*, slip op. 8, A 17

(Liebman, Chairman, and Pearce, Member, concurring). "Employers who knowingly employ undocumented workers are aware that they risk IRCA penalties. On the other hand, such employers enjoy labor-cost savings. Giving them immunity from backpay liability can only tilt the cost-benefit calculus in the direction of encouraging employers to run that risk." *Ibid.*

III. Because *Hoffman Plastic* does not categorically bar reinstatement or backpay for undocumented workers, the Board should have sought to accommodate traditional NLRA remedies to IRCA

While we submit that the Board should have upheld the ALJ's reinstatement and backpay orders in their entirety because of Mezonos's flagrant disregard of both the NLRA and IRCA, the relevant point for purposes of this petition for review is that the Board erred in concluding that it was categorically foreclosed by *Hoffman Plastic* from awarding backpay to the discriminatees and in refusing without explanation to order the reinstatement of the unlawfully-discharged employees. The Board is therefore required to either provide an appropriately-tailored remedy for Mezonos's uncontested violations of the NLRA that accommodates IRCA or provide a reasoned explanation for its decision not to do so.

On remand, the Board could order, for example, conditional reinstatement, the Board's primary method of accommodating its traditional remedy to other statutory schemes "when reinstatement would require the

removal of a legal disability." *A.P.R.A. Fuel*, 134 F.3d at 56. *See, e.g.*, *Consolidated Bus Transit, Inc.*, 350 NLRB 1064, 1066-67 (2007), enfd., 577 F.3d 467 (2d Cir. 2009) (conditioning reinstatement on state certification to drive school bus); *Epic Security Corp.*, 325 NLRB 772, 774 (1998) (conditioning reinstatement on gun license); *Future Ambulette, Inc.*, 307 NLRB at 771-72 (conditioning reinstatement on driver's license); *De Jana Industries*, 305 NLRB 845, 845 (1991) (conditioning reinstatement on driver's license); *Douglas Aircraft*, 10 NLRB at 282 (conditioning reinstatement on admission to U.S. citizenship).

In the case of unlawfully-discharged employees who lack authorization to work in the United States, the Board conditions reinstatement upon the "present[ation] within a reasonable time[] [of] INS Form I-9 and the appropriate supporting documents, in order to allow the Company to meet its obligations under IRCA." *A.P.R.A. Fuel*, 134 F.3d at 57 (quoting with approval *A.P.R.A. Fuel Oil Buyers Group, Inc.*, 320 NLRB 408, 415 (1995)). As this Court has explained, such an order "provides a measure of compensatory relief that is properly gauged to [the discriminatees'] right (or lack thereof) to work in the United States" while "felicitously keep[ing] the Board out of the process of determining an

employee's immigration status, leaving compliance with IRCA to the private parties to whom the law applies." *Ibid.*

With regard to make-whole remedies, on remand, the Board could order backpay for those parts of the backpay period when Mezonos continued to employ other legally-ineligible employees. That is the holding of *Future Ambulette*, in which this Court modified an NLRB order to award backpay to an unlicensed driver for "those periods during which [the employer] employed other unlicensed drivers." 903 F.2d at 145. As this Court explained, the unlawfully-discharged employee "was wronged . . . to the extent that the company failed to employ him while continuing to employ other unlicensed drivers," such that it was only "[a]t the point that [the employer] may stop employing unlicensed drivers, [that] its discrimination against [the employee] would . . . cease." *Ibid.*

This Court approved of the *Future Ambulette* remedy because it does not "tend[] to pressure the company to rehire [the discriminatee] even if he lacks [legal eligibility], in order to avoid backpay liability." *Ibid.* As a result, "nothing in [this type of] Board[] order requires the company or the employees to violate IRCA." *A.P.R.A. Fuel*, 134 F.3d at 58 (citing *Future Ambulette*, 903 F.2d at 145). To the contrary, awarding backpay during those periods when the employer continues to employ other undocumented

workers creates a positive incentive for the employer to comply with IRCA's requirements with regard to *all* of its employees in order to toll the accrual of backpay liability to the discriminatees. At the same time, such an award "compensates [the discriminatees] for the economic injury they suffered as a result of the Company's unlawful discrimination against them," *ibid.*, thus effectuating the NLRA's basic statutory purposes.

IV. Both the Board's reliance on its erroneous reading of *Hoffman Plastic* to deny backpay and its failure to explain its decision to deny reinstatement require a remand

Both the Board's erroneous interpretation of *Hoffman Plastic* as "categorically" foreclosing the Board from awarding reinstatement and backpay to any undocumented worker who is party to "an unlawful employment relationship" "[r]egardless of which party violates [IRCA]," *Mezonos*, slip op. 2, A 11, and its unexplained refusal to order Mezonos to conditionally reinstate the discriminatees require a remand so that the Board can engage in "an appropriate, measured exercise of [its] affirmative remedial authority . . . to carry out [its] statutory obligation to effectuate the policies of the Act," *De Jana*, 305 NLRB at 845.

"Section 10(c) . . . charges the Board with the task of devising remedies to effectuate the policies of the Act." *NLRB v. Seven-Up Bottling Co.*, 344 U.S. 344, 346 (1953). "[T]h[is] power, which is a broad

discretionary one, is for the Board to wield, not for the courts," because "[i]n fashioning remedies to undo the effects of violations of the Act, the Board must draw on enlightenment gained from experience." *Ibid.*

Although the Board's interpretation of IRCA and reading of *Hoffman Plastic* is not entitled to deference, *Hoffman Plastic*, 535 U.S. at 143-44, "Congress has unmistakably delegated to the [Board] initial authority to resolve the kind of issue" presented by this case – namely, the accommodation of the Board's traditional remedies with the requirements of IRCA – based on the Board's responsibility to "administer [the NLRA] on a day-to-day basis," *New York Shipping Assoc. v. Federal Maritime Comm.*, 854 F.2d 1338, 1364 (D.C. Cir. 1988). Thus, "[w]hile the Board's decision is not the last word, it must assuredly be the first." *Marine Engineers Beneficial Assoc. v. Interlake S.S. Co.*, 370 U.S. 173, 185 (1962).

If the Board had sought to "accommodat[e] . . . [the NLRA's] statutory scheme to [IRCA]," *Southern S.S. Co.*, 316 U.S. at 47, rather than base its decision on an erroneous reading of *Hoffman Plastic*, it likely would have ordered a remedy analogous to that ordered by this Court in *Future Ambulette* – conditional reinstatement and a limited award of backpay for that part of the backpay period when Mezonos employed other undocumented workers, a remedy that "redresses . . . the company's actual

discrimination" without "tend[ing] to pressure the company" to violate IRCA, *Future Ambulette*, 903 F.2d at 145. Indeed, the Board's majority, in its concurrence in this case, reached a similar conclusion, that, in the case of a knowing employer, "awarding backpay to undocumented workers not only accommodates IRCA's central purpose, it furthers that purpose." *Mezonos*, slip op. 8, A 17 (Liebman, Chairman, and Pearce, Member, concurring).

Be that as it may, because the Board as a body concluded that it was "categorically" foreclosed from awarding backpay in any case in which an employee is engaged in "an unlawful employment relationship" "[r]egardless of which party violates the law," *id.* at 2, JA 11, "[t]he Board's reliance on its mistaken analysis of [Supreme Court precedent] compels a remand." *Jacoby v. NLRB*, 233 F.3d 611, 617 (D.C. Cir. 2000) (internal quotation marks omitted). *See also* Henry J. Friendly, *Chenery* Revisited: Reflections on Reversal and Remand of Administrative Orders, 1969 Duke L.J. 199, 222 (April 1969) ("Where the agency has rested decision on an unsustainable reason, the court should generally reverse and remand.").

Likewise, both the NLRB's failure to distinguish its own precedent awarding backpay where an employer knowingly hires workers who are legally ineligible to work and then discharges them in violation of the NLRA and the Board's unexplained refusal to order conditional reinstatement,

which departed from the Board's established practice of ordering reinstatement in cases like this one, require a remand as well. *See Brusco Tug & Barge Co. v. NLRB*, 247 F.3d 273, 278 (D.C. Cir. 2001) ("It is axiomatic that an agency adjudication must either be consistent with prior adjudications or offer a reasoned basis for its departure from precedent." (internal quotation marks omitted)).

On remand, the Board must exercise its "special competence" to determine an appropriate remedy for the uncontested violation of the NLRA in this case. *NLRB v. J. Weingarten, Inc.*, 420 U.S. 251, 266-67 (1975). In doing so, the Board must "give clear indication that it has exercised the discretion with which Congress has empowered it," *Phelps Dodge*, 313 U.S. at 197, rather than rely on *Hoffman Plastic* as categorically forbidding it from ordering Mezonos to make the discriminatees whole.

CONCLUSION

The Petition for Review should be granted and this case should be remanded to the NLRB.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I hereby certify that the foregoing brief complies with the type-volume limitations set forth in Fed. R. App. P. 32(a)(7). The foregoing brief was prepared using Microsoft Word 2010 and contains 7,369 words in 14-point proportionately-spaced Times New Roman font.

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CERTIFICATE OF SERVICE

I hereby certify that on August 3, 2012, the foregoing Brief for Petitioners Christian Palma, Antonio Gonzalez, Francisco Javier Joya, Jose Antonio Quintuna, and Jose Armando Sax-Gutierrez was filed with the Clerk of the Court for the United States Court of Appeals for the Second Circuit by using the appellate CM/ECF system and by UPS Next Day Delivery.

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