April 16, 2013

Presiding Justice Joan D. Klein
and Associate Justices California Court of Appeal
Second Appellate District – Division Three
Ronald Reagan State Building
300 S. Spring Street, 2nd Floor
Los Angeles, CA 90013

Re: *Mejia, et. al., v. Superior Court of Los Angeles County,* No. B248080 (Los Angeles County Super. Ct. No. BC 467685)
***Amicus Curiae* Letter in Support of Petition for Writ of Mandate**

To the Honorable Presiding Justice Joan D. Klein and Associate Justices:

This letter in support of Orlando Mejia and Olga Islas's petition for a writ is submitted by the following *amici curiae*: The Legal Aid Society – Employment Law Center, the National Employment Law Project, and the National Immigration Law Center. The *amici* respectfully submit that the legal issues raised by Petitioners are a matter of substantial public interest, and that we present authorities and analysis that may be of assistance to the Court in considering this writ. Accordingly, we seek leave to file this *amicus curiae* letter.

I. THE NATURE OF *AMICI'S* INTEREST

Amicus Curiae **The Legal Aid Society – Employment Law Center** (LAS-ELC) is a San Francisco-based, non-profit public interest law firm that advocates on behalf of the workplace rights of historically underrepresented communities, including persons of color, women, recent immigrants, individuals with disabilities, and the working poor. As the first legal services organization west of the Mississippi, LAS-ELC litigates cases in which the rights of undocumented workers to be protected against employment abuses are at issue. Among LAS-ELC's published decisions are *Singh v. Jutla* (N.D. Cal. 2002) 214 F.Supp.2d 1056, which reaffirmed the vitality of the same rights and remedies available to undocumented workers after *Hoffman Plastic Compounds, Inc. v. NLRB* (2002) 535 U.S. 137, and *Rivera v. NIBCO, Inc.* (9th Cir. 2004) 364 F.3d 1057, *cert. denied* (2005) 544 U.S. 905, in which the Ninth Circuit barred a defendant from engaging in discovery to ascertain the immigration status of the plaintiffs because their immigration status was irrelevant to their standing to bring suit and such discovery would impermissibly chill the ability of workers to enforce their workplace rights.

Amicus curiae **National Employment Law Project** (NELP) is a nationwide advocacy organization that has worked for over forty years to defend and expand the labor rights of low wage and immigrant workers. Through training, policy advocacy, education, and strategic intervention in court cases, NELP works to uphold the labor and employment protections of all workers, regardless of their immigration status, so that labor standards are followed for and by all. NELP has participated as *amicus curiae* in cases around the country addressing the issue of labor rights of immigrant workers, including in the U.S. Supreme Court's decision in

Hoffman Plastic Compounds, *supra*, 535 U.S. 137, and *Rivera v. NIBCO*, *supra*, 364 F.3d 1057. This Court's decision will directly enhance NELP's, its clients', and its constituents' goals of securing safe workplaces and ensuring coverage under labor and employment laws for all workers.

Amicus curiae **National Immigration Law Center** (NILC) is a national legal advocacy organization whose mission is to defend and advance the rights of low-income immigrants and their families. NILC has a national reputation for its expertise in the complex intersection of employment and immigration law. NILC has litigated key immigration-related employment law cases, drafted legal reference materials relied on by the field, trained countless advocates, attorneys, and government officials, and provided technical assistance on a range of legal issues affecting low-wage immigrant workers, regardless of immigration status. NILC was co-counsel in *Rivera v. NIBCO, supra*, 364 F.3d 1057, and *Singh v. Jutla, supra,* 214 F.Supp.2d 1056.

II. AMICUS CURIAE LETTER

Amici write in support of Petitioners' request for a writ to this Court pursuant to Cal. Civil Code § 1084. Petitioners worked as janitors at Cheesecake Factory locations owned by the Marotto Corporation, dba All American Maintenance ("Marotto"). Petitioners, who were forced to work off-the-clock, brought suit to recover unpaid wages on behalf of themselves and other similarly-situated workers. Prior to class certification, however, Marotto sought to compel deposition testimony regarding Petitioner Mejia's immigration status and social security number ("SSN"). Although the court below correctly precluded questions regarding immigration status, the court ordered Mr. Mejia to answer questions regarding his SSN or withdraw as a class representative. [Order of Feb. 8, 2013 Ruling on Submitted Matter in *Mejia et al. vs. Marotto Corporation* at pp. 1-2 (hereinafter "Ruling")].

By ordering Mr. Mejia to answer questions related to his SSN, the trial court failed to recognize that: (1) the Legislature's 2002 enactment of SB 1818[1] necessarily precludes inquiry into a class representative's SSN; (2) use of a false SSN does not preclude a person from serving as a class representative; and (3) because of the *in terrorem* effect on workers who assert their workplace rights, inquiries into a worker's SSN should be barred.[2]

A. Introduction

1. *Immigrant Workers in California Are Vulnerable to Abuse by Employers.*

---

[1] Codified at Civ. Code § 3339(a), Gov't Code § 7285(a), Health & Safety Code § 24000, and Lab. Code 1171.5(a).

[2] Nothing in this *amicus curiae* letter is intended to imply that Mr. Mejia lacks authorization to work in the United States. Defendants' fishing expedition for information that may lead to the discovery of immigration status will deter even documented workers—who "may fear that their immigration status would be changed, or that their status would reveal the immigration problems of their family or friends"—from pursuing their legal rights. *Rivera v. NIBCO*, *supra,* 364 F.3d at 1065.

Immigrant workers play a crucial role in the United States economy. Working side by side with native-born co-workers, they are subject to the same risks and covered by the same legal protections. The total estimated foreign-born population in the United States is 39.9 million,[3] approximately 12 percent of the population as a whole[4] and 16 percent of the nation's labor force.[5] Of these individuals, over 11 million are undocumented.[6] From California's large agricultural industry[7] to the Silicon Valley,[8] immigrant workers, both documented and undocumented, play a significant role in the State's economy.[9] California's undocumented population has been estimated at 2.6 million—approximately 7 percent of the State's total population[10] and one-fourth of the population of undocumented immigrants nationwide.[11] Almost one in every ten workers in California is undocumented.[12]

Most undocumented workers are found in traditionally low-wage occupations such as agriculture, construction, manufacturing, and service industries, where workers face the greatest risk for exploitation.[13] According to a recent academic study, almost 76 percent of undocumented workers in Los Angeles worked off-the-clock without pay and over 85 percent did not receive overtime pay.[14]

These statistics paint a stark picture: undocumented immigrants, working alongside citizen and legal resident coworkers, are concentrated in jobs offering the lowest pay. Like all

---

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

[4] *Id.*

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

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

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

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

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

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

[11] *Id.* at 15.

[12] *Id.* at 24.

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

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

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

B. SB 1818 Necessarily Prohibits Employers From Inquiring Into Petitioners' SSN Information During Discovery

1. *Employers Use SSN Information to Intimidate and Retaliate Against Immigrant Workers Who Exercise Their Workplace Rights.*

Although California and federal labor and employment laws equally protect all workers, regardless of immigration status, many undocumented workers do not bring suit to enforce their labor rights because they have legitimate fears that employers will use their immigration status against them during litigation. Even worse, employers know that the worker may face criminal charges or end up in deportation proceedings if discovered to be undocumented. Some employers either threaten deportation or actually attempt to turn workers into local law enforcement or immigration authorities when complaints about unlawful working conditions are raised, even though such actions clearly constitute unlawful retaliation.[15] One analysis of more than 1,000 union certification elections supervised by the National Labor Relations Board found that "[i]n 7 percent of all campaigns—but 50 percent of campaigns with a majority of undocumented workers and 41 percent with a majority of recent immigrants—employers made threats of referral to [immigration authorities]."[16]

More importantly, employers routinely attempt to use employees' SSNs to ascertain their immigration status and intimidate workers.[17] (See, e.g., *Cabrera v. Ekema*

---

[15] Rebecca Smith and Eunice Hyunhye Cho, *Worker Rights on ICE: How Immigration Reform Can Stop Retaliation and Advance Labor Rights* (2013), *available at* http://www.nelp.org/page/-/Justice/2013/Workers-Rights-on-ICE-Retaliation-Report.pdf?nocdn=1; Harris, *Undocumented Workers' Grim Reality: Speak Out on Abuse and Risk Deportation—Migrants in the Low-Wage Depths of the U.S. Economy Say They're Being Targeted for Simply Standing Up for Employees' Rights*, The Guardian UK (March 28, 2013), http://www.guardian.co.uk/world/2013/mar/28/undocumented-migrants-worker-abuse-deportation.

[16] See Kate Bronfenbrenner, Econ. Policy Inst., *No Holds Barred: The Intensification of Employer Opposition to Organizing* 12 (2009), *available at* http://epi.3cdn.net/edc3b3dc172dd1094f_0ym6ii96d.pdf.

[17] Although there is a widespread but erroneous belief that potential discrepancies with a social security number ("SSN") reflect an employee's lack of work authorization, as both the Ninth Circuit and the federal government have recognized, such discrepancies are not conclusive of a plaintiff's immigration status. "SSN mismatches could generate a no-match letter for many reasons, including typographical errors, name changes, compound last names prevalent in immigrant communities, and inaccurate or incomplete employer records." *Aramark Facility Services v. Service Employees International Union, Local 1877* (9th Cir. 2008) 530 F.3d 817, 826. Similarly, the Department of Justice advises that "an employer should not assume that an employee referenced in a no-match letter is not work authorized." U.S. Department of Justice, Office of Special Counsel for Unfair Immigration-Related Employment Practices, Frequently Asked Questions about Name/Social Security

(Mich.Ct.App. 2005) 695 N.W.2d 78, 83; *Castillo v. Hernandez* (W.D.Tex., Apr. 20, 2011, No. EP–10–CV–247–KC) 2011 WL 1528762, *4; *Flores v. Albertson's Inc.* (C.D.Cal., Apr. 9, 2004,) No. CV 01-0515 PA(SHX),*2; *Flores v. Amigon* (E.D.N.Y. 2002) 233 F.Supp.2d 462, 462-463; *Romero-Vargas v. Shalala* (N.D.Ohio 1995) 907 F.Supp. 1128, 1131). It is common, and as with the plaintiffs in the underlying case, that employers make inquiries into an employee's SSN and immigration status only *after* workers have asserted their workplace rights. (See *Cabrera*, *supra,* 695 N.W.2d at 83; *Castillo*, *supra,* 2011 WL 1528762 at *1; *Flores v. Albertson's*, *supra,* 2004 WL 3639290 at *1; *Flores v. Amigon*, *supra,* 233 F.Supp.2d at 462-463; *Romero-Vargas*, *supra,* 907 F.Supp. at 1131). Courts have recognized that such inquiries can be a means to retaliate against employees and chill them from exercising their labor and employment rights.

Romero-Vargas v. Shalala provides a clear example of how an unscrupulous employer can use workers' SSNs as a means of retaliating against them for attempting to enforce their workplace rights. Although *Romero-Vargas* involved a complaint against the Social Security Administration for violations of the federal Privacy Act, the underlying case which gave rise to it was an employment action. (See *Romero-Vargas*, *supra,* 907 F.Supp. at 1131 [noting that the case arose out of an earlier claim involving violations of the Migrant and Seasonal Agricultural Worker Protection Act and Fair Labor Standards Act (FLSA)]). Although plaintiffs in the employment case had obtained a series of restraining orders to protect them from retaliation, the employer nevertheless used the plaintiffs' SSNs "as part of an attempt to investigate every plaintiff's immigration status." (*Ibid*.) The employer contacted the Social Security Administration and was able to access detailed, private information about each plaintiff by providing the plaintiff's name and SSN despite regulations prohibiting such disclosures. (*Ibid*.)

Contreras v. Corinthian Vigor Insurance Brokerage, Inc. (N.D.Cal.2000) 103 F.Supp.2d 1180, provides a chilling example of the potentially devastating effects on a plaintiff of an unscrupulous employer's retaliatory use of the plaintiff's SSN information. Like the present case, *Contreras* involved a claim for unpaid wages and overtime. After the plaintiff filed her wage claim, the employer reported her to the Immigration and Naturalization Service (INS) and filed a report with the Social Security Administration that plaintiff was using a fraudulent SSN. As a result of employer's actions, "[plaintiff] Contreras was arrested by the INS . . . and held in their custody for a week."[18] (*Id.* at 1182-1183). In

---

Number No-matches, http://www.justice.gov/crt/about/osc/pdf/publications/SSA/FAQs.pdf. Nonetheless, employers' routine use of workers' SSNs to retaliate against workers who assert their workplace rights is sufficient to include SSNs under SB 1818's ambit of protection.

[18] There are numerous other examples of cases involving the retaliatory use of immigration-related information, both in California and around the country. (See, e.g., *Fuentes v. INS*, (9th Cir. 1985) 765 F.2d 886, 887, vacated as moot (9th Cir. 1988) 844 F.2d 699, 700 [employer reported all plaintiff employees to INS after they filed a lawsuit to recover owed wages]; *Nortech Waste*, 336 N.L.R.B. No. 79 (2001) [employer committed an unfair labor practice by contacting the INS about employees soon after a union representation election]; *Singh v. Jutla*, *supra*, 214 F.Supp.2d 1056 [plaintiff was jailed by INS for nearly 15 months after his employer reported him to immigration authorities the day after

another case, Omar Damian Ortega, a welder in Milwaukee, Wisconsin, injured his back and filed a workers' compensation claim for medical treatment. However, after receiving his claim, his employers' insurance agency contacted the local police department to investigate Mr. Ortega's SSN information. Mr. Ortega was soon after charged with misdemeanors for use of a false SSN, and then transferred to immigration custody, where he faced deportation proceedings.[19]

As these cases demonstrate, conditioning an immigrant worker's ability to assert his workplace rights on the disclosure of his SSN information will result in decreased enforcement of those rights because of the potential civil and even criminal consequences. Recognizing that many immigrant workers "would withdraw their claims or refrain from bringing an action . . . in the first place" if required to disclose SSN information, one court prohibited employers from making such inquiries. (*Flores v. Amigon*, *supra,* 233 F.Supp.2d at 465 fn. 2 [issuing a protective order that includes SSN information]). As the Ninth Circuit and courts across the country have recognized, an employer's mere inquiry into a plaintiff's immigration-related information is often enough to chill an immigrant worker's pursuit of his workplace rights.[20]

In this case, the trial court below failed to recognize that employers routinely attempt to discover a plaintiff's immigration status through discovery of SSN information and the *in terrorem* effect of such an inquiry. Ruling, at 2. Considering that employers use SSN information to gain information about a worker's immigration status, the potential for inquiry into a plaintiff's SSN is itself a sufficient and serious deterrent to plaintiff's pursuit of his claim, warranting the court's protection.

---

he settled his wage claim with the employer]; *Sure-Tan v. NLRB*, (1984) 467 U.S. 883, 886 [employer reported employees to INS two hours after they voted in favor of union representation].) *See also* Smith and Cho, *supra* note 15 [documenting numerous examples of immigration-based retaliation against workers exercising their labor and employment rights]).

[19] Smith and Cho, *supra* note 15, at 10; Claudia Torrens, *Inmigrantes Piden Proteccion para Usar Papeles Falsos* (Immigrants Seek Protection for Using False Papers), El Diario (Feb. 26, 2013), http://www.eldiariony.com/Inmigrantes-piden-proteccion-usar-papeles-falsos-reforma-migratoria#.UVzTjDdKvWd (documenting Ortega's story).

[20] The clear trend among courts has been to disallow discovery into plaintiffs' immigration status because of its lack of relevance to claims for unpaid wages under the Fair Labor Standard Act (FLSA) and analogous state wage and hour laws and because of the chilling effect such discovery would have on immigrant workers' willingness to bring such claims. (See *Rivera v. NIBCO, Inc.*, *supra,* 364 F.3d 1057 at 1065 [finding that "[g]ranting employers the right to inquire into workers' immigration status . . . would allow them to raise implicitly the threat of deportation and criminal prosecution every time a worker, documented or undocumented, reports illegal practices"]; see also, *David v. Signal International, LLC*, (E.D.La. 2009) 257 F.R.D. 114, 122 [finding that *in terrorem* effect warranted protective order precluding discovery of immigration status and authorization to work]; *In re Reyes*, (5th Cir. 1987) 814 F.2d 168, 170 [issuing a writ of mandamus to prohibit discovery into plaintiffs' immigration status, since such information is irrelevant to their FLSA and AWPA claims and "could inhibit petitioners in pursuing their rights in the case because of possible collateral wholly unrelated consequences"]; *Topo v. Dhir*, (S.D.N.Y. 2002) 210 F.R.D. 76, 79 [disallowing discovery of immigration status because of its *in terrorem* effect even though status could be relevant to a collateral issue under the Alien Tort Claims Act].

2. *In Enacting SB 1818, the Legislature Intended to Preclude Inquiry Into A Plaintiff's Immigration Status,Which Necessarily Includes SSN Information.*

In light of unscrupulous employers' use of a worker's immigration status as a means to suppress workers' rights, the California Legislature enacted SB 1818 in 2002 to preclude all inquiries into a worker's immigration status during the course of discovery. The trial court below too narrowly interpreted SB 1818's unequivocal prohibition on inquiries into immigration status and held that Mr. Mejia's SSN information was subject to discovery. In unduly narrowing the scope of SB 1818, the trial court abused its discretion and was in error.

SB 1818 is an unambiguous declaration that workers are entitled to assert their rights under California labor and employment laws, irrespective of their immigration status. The California State Legislature enacted the bill in response to *Hoffman Plastic Compounds, supra,* 535 U.S. 137. Prior to *Hoffman*, judicial consensus established that, with few exceptions, undocumented workers were entitled to rights and remedies equal to those enjoyed by all workers under protective statutes including the National Labor Relations Act,[21] the Fair Labor Standards Act,[22] and Title VII of the Civil Rights Act of 1964.[23] *Hoffman*, however, held that a worker who admitted to fraudulently obtaining a SSN could not recover back pay as a remedy under the National Labor Relations Act, even though he was unlawfully fired in retaliation for his union activities. By sharply departing from the longstanding baseline of equal rights and remedies, *Hoffman* thus suggested that courts might, in some cases, draw significant distinctions between undocumented workers and other workers, with possible spillover effects into the realm of state law.

The California Legislature quickly responded to this threat to the rights of undocumented California workers. Only five months after *Hoffman* was decided, the Legislature enacted SB 1818, which (as codified in Labor Code § 1171.5) provides as follows, in relevant part:

> The Legislature finds and declares the following:
>
> a) All protections, rights, and remedies available under state law, except any reinstatement remedy prohibited by federal law, are available to all individuals regardless of immigration status who have applied for employment, or who are or who have been employed, in this state.

---

21 (See, e.g., *Sure-Tan, Inc. v. NLRB*, *supra*, 467 U.S. at 891; *Local 512, Warehouse and Office Workers' Union v. NLRB* (*"Felbro")* (9th Cir. 1986) 795 F.2d 705, 716 (abrogated by *Hoffman*); *NLRB v. Kolkka* (9th Cir. 1999) 170 F.3d 937, 941. But see *Del Rey Tortilleria, Inc. v. NLRB* (7th Cir. 1992) 976 F.2d 1115, 1121-22).

22 (See, e.g., *Mester Mfg. Co. v. INS* (9th Cir. 1989) 879 F.2d 561, 567; *Patel v. Quality Inn South* (11th Cir. 1988) 846 F.2d 700, 704; *In re Reyes* (5th Cir. 1987) 814 F.2d 168, 170).

23 (See, e.g., *EEOC v. Hacienda Hotel* (9th Cir. 1989) 881 F.2d 1504, 1517; *Rios v. Enterprise Ass'n Steamfitters Local Union 638* (2d Cir. 1988) 860 F.2d 1168, 1172; *Bevles Co. v. Teamsters Local 986* (9th Cir. 1986) 791 F.2d 1391, 1392-93).

> b) For purposes of enforcing state labor and employment laws, *a person's immigration status is irrelevant* to the issue of liability, and in proceedings or discovery undertaken to enforce those state laws *no inquiry shall be permitted into a person's immigration status* except where the person seeking to make this inquiry has shown by clear and convincing evidence that the inquiry is necessary in order to comply with federal immigration law.

(emphasis added.)

SB 1818 could hardly be more clear. Not only does SB 1818 ensure that all state labor and employment laws apply to undocumented workers, but it also prohibits discovery of information related to a worker's immigration status.[24] As one Court of Appeal observed:

> [The statutory codifications of SB1818] leave no room for doubt about this state's public policy with regard to the irrelevance of immigration status in enforcement of state labor, employment, civil rights, and employee housing laws.[25]

In other words, the Legislature recognized that unscrupulous employers might use *Hoffman* as a pretext to compel discovery about the worker's immigration status. By codifying Labor Code § 1171.5(b), the Legislature forbade employers from intimidating workers by inquiring into their immigration status. As the Senate Labor and Industrial Relations Committee observed in the bill analysis, certain courts had already precluded such inquiry: "a U.S. District Court judge decided the *immigrant status* of supermarket janitors was *not relevant in a class-action suit* that seeks to collect minimum wages for years of work."[26] (Sen. Comm. on Labor and Industrial Relations, Rep. On Sen. Bill No. 1818 (2001-2002 Reg. See.) as amended May 9, 2002, at 2 [emphasis added].)

---

[24] Considering SB 1818's carve out for when inquiry is necessary to comply with federal immigration law, courts have consistently rejected federal pre-emption challenges to SB 1818. (*Farmers Bros. Coffee v. Workers' Comp. Appeals Bd.* (2005) 133 Cal.App.4th 533, 540 [holding that Labor Code § 1171.5 "expressly declared immigration status irrelevant to the issue of liability to pay compensation to an injured employee", and rejecting argument that equal coverage of undocumented workers conflicted with *Hoffman*]; *Reyes v. Van Elk, Ltd.* (2007) 148 Cal.App.4th 604, 615, 618 [upholding Labor Code § 1171.5 against pre-emption argument, and noting that "[a]llowing employers to hire undocumented workers and pay them less than the wage mandated by statute is a strong incentive for the employers to do so, which in turn encourages illegal immigration."])

[25] (*Hernandez v. Paicius,* (2003) 109 Cal.App.4th 452, 460 [finding trial court abused its discretion in permitting defense counsel "to portray plaintiff as an illegal alien"](disapproved on other grounds *People v. Freeman* (2010) 47 Cal.4th 933).

[26] A true and correct copy of this committee bill analysis of SB 1818 is available online at http://www.leginfo.ca.gov/pub/01-02/bill/sen/sb_1801-1850/sb_1818_cfa_20020514_164726_sen_comm.html (last visited April 8, 2013). A committee analyses may be used as an aid to discerning the Legislature's intent in enacting legislation. (*See, e.g., Sullivan v. Oracle Corp.* (2011) 51 Cal.4th 1191, 1197 n.3 [examining Assembly and Senate committee analyses of Labor Code § 1171.5].)

In this case, the trial court's ruling will allow Marotto to circumvent SB 1818's prohibition against inquiry into immigration status. Though it protected Mr. Mejia from direct inquiries into his immigration status, it undermined that protection by ordering Mr. Mejia to answer questions about his SSN. To give full effect to SB 1818's purpose of ensuring that "[a]ll protections, rights, and remedies available under state law" apply equally "to all individuals regardless of immigration status," Labor Code § 1171.5, this court should construe SB 1818 broadly, and should grant the writ sought by Mr. Mejia. (See, e.g., *Murphy v. Kenneth Cole Productions* (2007) 20 Cal.4th 1094, 1103 ["statutes governing conditions of employment are to be construed broadly in favor of protecting employees."]).

In addition, the California Supreme Court recently saw fit to broadly construe Labor Code § 1171.5. (*Sullivan v. Oracle Corp.,* (2011) 51 Cal.4th 1191, 1197 n.3 ["Section 1171.5 . . . cannot reasonably be read as speaking only to undocumented workers, given that it was drafted and codified as a general preamble to the wage law and broadly refers to 'all individuals' employed in the state."].) " Had the Legislature intended that SB 1818 allow the denial of civil rights protections to individuals who had presented false documents to obtain their jobs, it would have said so. (*Sullivan, supra,* 51 Cal.4th at 1197 ["The Legislature knows how to create exceptions . . . when that is its intent."].)

Furthermore, the Legislature could not have intended to limit SB 1818's protections only to a person's immigration status and exclude inquiries into a person's use of false SSNs when many undocumented workers (quite unsurprisingly) have necessarily obtained their employment by using invalid SSN information. In order to comply with federal law, employers must review employment authorization documents for each new worker hired; as a result, undocumented workers would only be able to obtain employment by tendering false documents.[27] In its bill analysis, the Senate Committee on Labor and Industrial Relations specifically noted that the *Hoffman* majority had decried a situation in which undocumented workers could recover wages "earned in a job that was obtained by criminal fraud."[28] (Sen. Comm. on Labor and Industrial Relations, Rep. on Sen. Bill No. 1818, *supra* at 3.). The Committee's analysis, however, also noted that the "[d]issenting justices [in *Hoffman*] argued that the ruling may encourage employers to hire illegal immigrants and disregard labor laws without fear of penalty." (*Ibid.*) When it enacted SB 1818, the Legislature was well aware – and in fact *intended*, for compelling public policy reasons – that a worker's SSN information should also be protected from discovery in addition to a person's immigration status.

---

[27] *See, e.g.*, Eduardo Porter, "Illegal Immigrants are Bolstering Social Security With Billions," New York Times (Apr. 5, 2005), http://www.nytimes.com/2005/04/05/business/05immigration.html?pagewanted=print&position= (last visited Feb. 28, 2012) ("Since 1986, when the Immigration Reform and Control Act set penalties for employers who knowingly hire illegal immigrants, most such workers have been forced to buy fake ID's to get a job."). It would be difficult to argue that the Legislature was somehow oblivious to this commonly-understood fact when it enacted SB 1818.

[28] The worker who was fired by the employer in *Hoffman* had used another person's birth certificate to obtain his employment there. (535 U.S. at 141.)

SB 1818's legislative history demonstrates that the Legislature was deeply apprehensive about *Hoffman*'s possible negative impacts on the vitality of state laws ensuring fair and nondiscriminatory employment conditions for all workers. Accordingly, the trial court's interpretation cannot stand. It is impossible to sensibly read into SB 1818's broad language a *sub silentio* carve-out that would allow discovery into a worker's use of invalid documents. To do so would exclude from coverage precisely those workers the Legislature sought to protect from *Hoffman*'s potential consequences.

3. *Courts frequently include SSN information in protective orders based on immigration status.*

Courts in California and throughout the country have included SSN information within protective orders that disallow discovery into a plaintiff's immigration status.[29] Courts have recognized that discovery into a plaintiff's SSN information can lead to the discovery of his immigration status and have denied discovery of SSN information on that basis.

In *EEOC v. Kovacevich "5" Farms*, (E.D.Cal. June 4, 2007) 2007 WL 1599772 *1, for example, the district court, in a Title VII case, denied a defendant employer's discovery request for every SSN used by each of the plaintiff class members. The court based its order on the fact that discovery into plaintiffs' SSN would provide a "backdoor to eliciting Plaintiffs' immigration status," noting that:

> [g]enerally, the Ninth Circuit and other federal courts do not allow defendants in employment-discrimination actions to question plaintiffs directly about their immigration status or *to seek the disclosure of Social Security numbers or similar information that could lead to the discovery of plaintiffs' immigration status*, even when a protective order has been entered and the defendants purportedly have requested the information solely to obtain additional material relevant to their defense.

(*Id*. at *4 [emphasis added, citations omitted]). The *Kovacevich* court found that compelled disclosure of information related to plaintiffs' immigration status—including SSN information—would chill *all* immigrant workers from bringing workplace claims because

---

[29] (See *Baca v. Brother's Fried Chicken* (E.D.La., May 13, 2009, No. 09-3134-MLCF-SS) 2009 WL 1349783, *2 [granting a protective order limiting inquiries with an *in terrorem* effect, including immigration status and social security numbers]*; Bailon v. Seok Am #1 Corp*. (W.D. Wash., Dec. 9, 2009, No. C09–05483JRC) 2009 WL 4884340, *5 [disallowing defendant to "seek information in discovery relating to plaintiff's immigration status, including . . social security numbers"]; *Castillo v. Hernandez* (W.D. Tex., Apr. 20, 2011, No. EP–10–CV–247–KC) 2011 WL 1528762 *1, *10 [issuing a protective order that includes social security cards and "documents or information whose disclosure would be solely for the purpose of revealing Plaintiffs' immigration status"]; *Galaviz-Zamora v. Brady Farms, Inc.* (W.D.Mich. 2005) 230 F.R.D. 499, 503 [granting immigration-based protective order that includes "all identification documents and information regarding . . . social security cards"]; *Uto v. Job Site Services Inc.* (E.D.N.Y. 2010) 269 F.R.D. 209, 212 [granting a protective order on "discovery requests that seek [plaintiffs'] social security numbers or directly or indirectly inquire into plaintiffs' immigration status"]).

undocumented workers would be fearful of prosecution and removal from the United States based on disclosure of their immigration status, while documented immigrants would likely fear retaliation and the implication of family and friends who may not be documented. (*Id*. [citing *Rivera*, *supra*, 364 F.3d at 1064-1065]). The court further recognized that a protective order would not provide adequate relief to an immigrant plaintiff who was retaliated against by an employer and who was imprisoned or deported as a result. (*Id*. [*citing Rivera*, *supra*, 364 F.3d at 1064-1066]). Finally, the court noted that the Ninth Circuit "found that a plaintiff's immigration status generally was irrelevant to the issue of liability in most employment cases, and questions directed toward discovery of an immigrant's legal right to work in the United States were not only burdensome, but prejudicial." (*Id*. [citations omitted]).

Federal courts across the country have similarly denied employers' attempts to discover employees' SSN information out of a recognition that such discovery is a pretext for or likely to lead to the discovery of plaintiffs' immigration status. (See *Cazorla v. Koch Foods of Mississippi* (S.D.Miss.2012) 287 F.R.D. 388 [finding that protective orders have "not been limited to specific inquiries about immigration status; rather, courts have recognized that discovery of social security numbers . . . is likely to lead to discovery of immigration status and have limited discovery accordingly]; *Garcia-Andrade v. Madra's Café Corp.*, (E.D.Mich., Aug. 3, 2005, No. 04-71024) 2005 WL 2430195, *2 [granting a protective order encompassing both direct questions about immigration status and "also questions or requests that seek to elicit information closely bearing upon these areas or that could lead to the discovery of the Plaintiff's immigration status," including SSN information]; *Rengifo v. Erevos Enterprises*, (S.D.N.Y. Mar. 20, 2007, No. 06 Civ. 4266(SHS)(RLE)) 2007 WL 894376, *3 [noting that "[a] party's attempt to discover tax identification numbers . . . appears to be a back door attempt to learn of immigration status"]; *Sandoval v. American Building Maintenance Industries*, (D.Minn.2007) 267 F.R.D. 257, 276 [recognizing that "courts have rejected a party's attempt to discover information regarding a claimant's use of social security numbers that may serve as a 'back door' effort to learn of a plaintiff's immigration status"]).

These cases call into question the trial court's finding that discovery inquiries into plaintiff's SSN do not "implicate Plaintiff's immigration status." [Ruling, at 1]. By ordering Mr. Mejia to respond to Marotto's inquiries about his SSN, the court furthers the employer's "back door attempt to learn of [his] immigration status." (See *Rengifo*, *supra*, 2007 WL 894376 at *3).

C. Plaintiff's SSN Information Is Not Relevant to this Class Action for Unpaid Wages and Any Purported Interest Defendants Have in Determining A Worker's "Credibility" Is Outweighed By The Chilling Effect On Workers From Asserting Their Workplace Rights

Discovery of Mr. Mejia's SSN information is impermissible because it would constitute an unacceptable burden on the public interest due to its chilling effects and the resulting prejudice to Mr. Mejia outweighs any potential relevance the information may have for defendants. Even absent SB 1818, there is no question that the California Civil Code

requires courts to "limit the scope of discovery if it determines that the burden, expense, or intrusiveness of that discovery clearly outweighs the likelihood that the information sought will lead to the discovery of admissible evidence." Civil Code § 2017.020(a). Thus, the lower court erred in both concluding that inquiry into Mr. Mejia's SSN information is relevant to his adequacy to serve as a class representative and in failing to weigh the undue burden such inquiry imposes on private enforcement of workplace rights.

1. *Inquiry into SSN Information is Irrelevant to Adequacy as a Class Representative*.

Class certification requires the fulfillment of three factors: "(1) predominant common interests of law or fact; (2) class representatives with claims or defenses typical of the class; and (3) class representatives who can adequately represent the class." (*Lockheed Martin Corp. v. Superior Court of San Bernadino County*, (2003) 29 Cal. 4th 1096, 1105). When examining the adequacy of a class representative, courts may view credibility as a "relevant consideration," "because an untrustworthy plaintiff could reduce the likelihood of prevailing on the class claims." (*Harris v. Vector Marketing Corp.*, (N.D. Cal. 2010) 753 F. Supp. 2d 996). However, a plaintiff is considered inadequate "only when attacks on the credibility of the representative are so sharp as to jeopardize the interests of absent class members." (*Ibid.*) "For an assault on the class representative's credibility to succeed, the party mounting the assault must demonstrate that there exists admissible evidence so severely undermining plaintiffs' credibility that a fact finder might reasonably focus on plaintiffs' credibility, to the detriment of the absent class members' claims." (*Dubin v. Miller*, (D. Colo. 1990) 132 F.R.D. 269, 272).

Despite the lower court's vague assertion that such information relates to "credibility," neither the use of false documentation to obtain employment nor an actual criminal conviction for so doing would render Mr. Mejia an inadequate class representative. (Cf. *E.E.O.C. v. First Wireless Group, Inc.* (E.D.N.Y. 2004) 225 F.R.D. 404, 406 [observing that the plaintiff's immigration status was, at best, related to credibility, but not relevant to the subject matter of the litigation, and upholding the trial court's protective order]). Whether or not the plaintiffs are authorized to work in this country and whether they have used false SSNs has no bearing on their rights to recover unpaid wages. In many cases involving low-wage immigrant workers, it is entirely possible that virtually the whole workforce, and indeed, an entire class that seeks remedy for violation of workplace laws, may lack authorization to live and work in the United States. In such cases, an individual plaintiff's lack of authorization and false use of a SSN would have no detrimental impact on absent class members, and in fact, may be a representative feature of the class itself. (See, e.g. *Six Mexican Workers v. Arizona Citrus Growers*, (9th Cir. 1990) 904 F.2d 1301, 1303 [approving class of "1,349 undocumented Mexican workers" who filed suit for employer's failure to comply with Farm Labor Contractor Registration Act]; *Montelongo v. Meese*, (5th Cir. 1986) 803 F.2d 1341, 1352 n.17 [barring inquiry into immigration status of putative class members and restructuring class to allow undocumented worker to represent larger class of migrant farmworkers]).

Moreover, courts have rejected arguments that a worker's immigration status is relevant to whether the worker may serve as class representative in the absence of the

employer showing an actual conflict between the named plaintiff and putative class members. (*David v. Signal Intern*, *supra*, 257 F.R.D. at 125). As held by other courts, "undocumented individuals have been allowed to represent classes of deportable aliens." (*Martinez v. Mecca Farms, Inc*., (S.D. Fla. 2002) 213 F.R.D. 601, 606 [citing *McNary v. Haitian Refugee Center, Inc*., 498 U.S. 479 (1991)]. *See also Int'l Molders' and Allied Workers' Local Union No. 164 v. Nelson*, (D.C. Cal. 1983) 102 F.R.D. 457 [finding alien plaintiff adequate as class representative in case challenging legality of immigration workplace raids]).

Defendants argue that a worker's potentially false use of a SSN suggests lack of credibility, and would render him inadequate to serve as a class representative. However, like a worker's immigration status, use of a false SSN is irrelevant to a plaintiff's adequacy to serve as class representative. (*See Galiviz-Zamora v. Brady Farms, Inc. supra,* 230 F.R.D. 499 [denying defendant's request to compel named plaintiff's SSN information in order to determine adequacy of class representation, reasoning that "[w]hile a witness' credibility is arguably always at issue, [it] does not mean that *unlimited* exploration on the subject is permitted."].) When considering the adequacy of a class representative, "the fact that plaintiffs entered the United States without inspection and used false documentation to obtain employment is, again, an unfair attack," is "baseless," and could "preclude judicial review" of matters relevant to an entire class of plaintiffs. (*Walters v. Reno*, (W.D. Wash. Mar. 13, 1996, No. C94-1204C) 1996 WL 897662 [upheld in *Walters v. Reno*, (9th Cir. 1998) 145 F.3d 1032, 1046]; *see also Perez-Farias v. Global Horizons, Inc.*, (E.D. Wash. Jul. 28, 2006, No. CV-05-3061) 2006 WL 2129295 *4 [declining to limit class of agricultural workers strictly to those with matching SSNs]; *Galaviz-Zamora*, *supra,* 230 F.R.D. at 502 [prohibiting discovery of immigrant workers' SSN information, and finding unpersuasive defendants' argument that such information was relevant to workers' credibility for purposes of class certification].)

Relying solely on *Jaimez v. Daiohs USA, Inc.*, (2010) 181 Cal. App. 4th 1286, 1296, the lower court concluded that a plaintiff's potential violation of federal law for submission of false documents to secure work could prohibit a plaintiff from representing the putative class. However, *Jaimez* is clearly inapposite to this case. In *Jaimez*, the court did not consider the merits of class certification or adequacy of a class representative on the potential basis of a false SSN. Instead, the *Jaimez* court addressed the adequacy of a class representative whose lack of credibility potentially jeopardized the interests of other class members. The *Jaimez* court concluded that the named plaintiff was an unfit class representative not only because he had "lied on his First Choice employment application about his felony conviction and incarceration," but also because he had "admitted his view that it is acceptable to lie in order to obtain or maintain employment, questions surrounded his purported falsification of time records and other documents (notably manifests), and his declaration may be contradicted by his deposition testimony." (*Id.* at 451.) Such admissions and inconsistency in testimony reasonably give rise to the suggestion of a "severe lack of credibility" sufficient for a fact finder to "reasonably focus on plaintiffs' credibility, to the detriment of the absent class members' claims." *Dubin*, *supra*, 132 F.R.D. at 272.

Here, defendants have not established any relevant grounds to challenge Mr. Mejia's credibility. Moreover, even if a plaintiff had been convicted for document-related offenses, a criminal record, as the lower court suggests, would not necessarily render a plaintiff an

inadequate class representative. As one court put it, "obviously, a felony record is not per se disqualifying as a class representative. . . . incarcerated felons have long served as class plaintiffs in numerous cases." *Haywood v. Barnes*, (E.D. N.C. 1986) 109 F.R.D. 568, 579 [citing *Jones v. Diamond*, (5th Cir. 1975) 519 F.2d 1090, 1100]); *Wood v. Capital One Auto Finance, Inc.*, (E.D. Wis., 2006, No. 06-CV-7), 2006 WL 6627680 ["a felony conviction does not necessarily preclude a person from serving as a class representative") (citing *Turner v. Glickman*, (7th Cir. 2000) 207 F.3d 419]).

Because use of a false SSN is not relevant to determining a worker's adequacy to serve as a class representative in a wage and hour suit, it has no probative value. This court should reverse the lower court's erroneous order, and allow Mr. Mejia to proceed as class representative without requiring that he answer intrusive questions about SSN information, which have the effect of intimidating him and others from asserting his workplace rights.

2. *The same* in terrorem *effect that results when employers are allowed to inquire into a worker's immigration status applies when employers are allowed to inquire into a plaintiff's SSN information.*

Even if Mr. Mejia's use of a false SSN was relevant to credibility, courts in California have recognized that allowing discovery into a plaintiff's SSN would result in the same *in terrorem* effect as discovery into his immigration status. On that basis, California courts have refused to allow defendants to inquire into SSNs. In *Flores v. Albertsons, Inc.*, (C.D.Cal. Apr. 9, 2002) 2002 WL 1163623 (*Flores I*), a class action wage and hour case, the employer sought to compel the production of documents related to the plaintiffs' immigration status. The court denied the defendants' request because such discovery would result in an *in terrorem* effect that could cause the plaintiff to withdraw from the case. The court noted that "[i]t is entirely likely that any undocumented class member forced to produce documents related to his or her immigration status will withdraw from the suit rather than produce such documents and face . . . potential deportation." (*Id*. at *6).

In the same case, the court subsequently clarified that its prior order disallowing discovery into plaintiffs' immigration status was intended to encompass plaintiffs' SSN information, since compelled disclosure of SSN information would result in the same *in terrorem* effect as compelled disclosure of immigration status. In analyzing its prior order, the court found that "[a]lthough SSN's were not explicitly discussed, implicit in the Order was the goal of protecting certain *types* of information from disclosure in this litigation." (*Flores v. Albertson's Inc.*, *supra,* 2004 WL 3639290 *2 (*Flores II*)). The court further explained that the purpose of the prior order "was to afford protection to the types of information which, if disclosed, would have an *in terrorem* effect upon the plaintiffs" and that "SSN's are a prime example" of this type of information. (*Id*. at *2-*3).

The court reasoned that "[a] SSN (particularly if a false number) is a highly sensitive piece of information and could readily be used to determine a plaintiff's immigration status." (*Id*. at *3). In light of this possibility, the court recognized that the compelled disclosure of any SSN used by a plaintiff could chill him from further pursuing his claim out of fear that it

would lead to disclosure of his immigration status.[30] Notably, the court premised its analysis on the assumption that "many of the SSN's used [by plaintiffs] were false". (*Id*. at *1 n.1). However, the court found that "the legitimacy of the numbers used by plaintiffs is irrelevant to the outcome of" plaintiffs' motion to protect SSN information from disclosure. (*Id*.)

Other courts have similarly recognized the profound chilling effect that would result from compelled disclosure of a plaintiff's SSN information. In *Cabrera v. Ekema*, *supra,* 695 N.W.2d 78, the Michigan Court of Appeals found that a trial court, in a wage claim case, had abused its discretion by compelling disclosure of plaintiffs' SSNs. The court found that the discovery of plaintiffs' SSNs was not relevant to the determination of the employer's liability for unpaid wages. (*Id*. at 81). Moreover, the court recognized the chilling effect of the employer's discovery requests for SSN information, finding that such requests were "made for the improper purpose of intimidating plaintiffs to withdraw their lawsuit and forego their legal rights to recover unpaid wages for work already performed." (*Id*. at 83; see also *Castillo v. Hernandez*, *supra,* 2011 WL 1528762 at *4 [finding that an employer was either using its inquiry about plaintiffs' SSNs as "a pretext to inquire into Plaintiffs' immigration status or using it to indicate to Plaintiffs that their immigration status could and would be used as leverage against them in this case."]).

To the extent that class actions have the beneficial effect of discouraging and deterring future harm, *see, e.g., Burgess v. Superior Court* (1992) 2 Cal.4th 1064, 1081, it would be against public policy to chill immigrant workers, among the most vulnerable in the labor market, from bringing meritorious actions for unpaid wages on behalf of a class of workers. Yet that would be a likely consequence of permitting the irrelevant and invasive discovery being sought in this matter by Marotto – discovery that the Legislature sought to limit in its swift enactment of SB 1818. Granting employers the right to inquire into workers' SSN information, much like inquiries into immigration status, would allow them to implicitly raise the threat of deportation and criminal prosecution every time a worker reports a violation of state wage laws. Such an anomalous result should be avoided.

III. CONCLUSION

As discussed above, the trial court erred in permitting inquiries into a worker's SSN. In doing so, the trial court departed from well-established authority recognizing the chilling effect of an employer's inquiry into SSNs on the ability of workers to enforce their legal rights. The trial court failed to consider that unscrupulous employers seeking to intimidate workers from pursuing their workplace rights will often use an immigrant worker's allegedly invalid SSN as a pretext to inquire into his immigration status and thereby use his immigration status against him during litigation. Moreover, the trial court erred in assuming use of a false

---

[30] While the trial court cited to the *Flores I* decision as a basis to disallow the defendant's discovery into plaintiff's immigration status, the trial court failed to acknowledge the *Flores* court's subsequent clarification, in *Flores II*, that its protection of immigration status was intended to encompass questions about plaintiffs' Social Security numbers.

SSN would be relevant to credibility issues. For the foregoing reasons, we urge this Court to grant the writ of mandate.

Respectfully submitted,

Eunice Hyunhye Cho, Bar No. 266417
NATIONAL EMPLOYMENT LAW PROJECT
405 14th St. Suite 1400
Oakland, CA 94612

By: /s/ Eunice Hyunhye Cho *w/permission*
EUNICE HYUNHYE CHO

Joshua Stehlik, Bar No. 220241
NATIONAL IMMIGRATION LAW CENTER
3435 Wilshire Blvd., Suite 2850
Los Angeles, CA 90010

By: /s/ Joshua Stehlik
JOSHUA STEHLIK

Marsha Chien, Bar No. 275238
THE LEGAL AID SOCIETY – EMPLOYMENT LAW CENTER
180 Montgomery Street, Suite 600
San Francisco, CA 94104

By: /s/ Marsha Chien *w/permission*
MARSHA CHIEN

Counsel for Amicus Curiae