

SHOW ME THE GREEN: CIVIL RICO ACTIONS AGAINST EMPLOYERS WHO KNOWINGLY HIRE UNDOCUMENTED WORKERS

I. INTRODUCTION

Since the advent of federal laws restricting immigration into the United States,¹ Congressional policy has, with few exceptions,² focused on restricting the influx of foreign workers in order to protect the American workforce.³ Despite nearly a century and a half of experimentation with these laws, the perpetual problem of undocumented workers persists in large part because “[t]he prospect of better job opportunities in the United States . . . than in their native countries remains a powerful lure for many immigrants.”⁴ Notably, for over two decades, federal immigration law has expressly prohibited employers from hiring workers who lack proper documentation.⁵ However, inadequate enforcement of immigration laws has enabled the widespread hiring of undocumented workers in low-wage, labor-intensive sectors of the U.S. economy to continue.⁶ The “insatiable”

1. Prior to the late nineteenth century, immigration into the United States remained unrestricted. See PETER H. SCHUCK & ROGERS M. SMITH, CITIZENSHIP WITHOUT CONSENT: ILLEGAL ALIENS IN THE AMERICAN POLITY 92 (1985).

The Alien Act of 1798, 1 Stat. 570 (1798), had authorized the president to expel from the United States any alien that he deemed dangerous, but the law was severely criticized and expired in 1800. Occasional state efforts to restrict immigration during the first half of the nineteenth century were invalidated by the Supreme Court as intrusions on the federal power to regulate foreign commerce. E.g., *The Passenger Cases*, 48 U.S. 283 (1849); *Chy Lung v. Freeman*, 92 U.S. 275 (1875). In 1875, the first federal exclusion legislation was adopted; it barred convicts and prostitutes. 18 Stat. 477 (1875).

Id. at 155 n.3.

2. Beginning in 1942, in response to the U.S. agricultural labor shortage caused by World War II, the United States entered into a bilateral agreement with Mexico to import cheap contract labor. Under the Bracero Program, spanning a period of twenty-two years, five million Mexican workers entered the United States as “braceros.” See KITTY CALAVITA, INSIDE THE STATE: THE BRACERO PROGRAM, IMMIGRATION, AND THE I.N.S. (1992), for a detailed analysis of the Bracero Program, including its relevance to the undocumented worker problem of today.

3. See VERNON M. BRIGGS, JR., IMMIGRATION POLICY AND THE AMERICAN LABOR FORCE (1984). See *infra* Part II.A.

4. Report: *Undocumented Immigrant Population Surges*, available at http://www.usatoday.com/news/washington/2005-03-21-undocumented-immigrants_x.htm (posted on Mar. 21, 2005) [hereinafter *Report*] (citing Pew Hispanic Center director Roberto Suro discussing the main reason frequently offered by other researchers to explain the “ongoing demand”).

5. Immigration and Nationality Act (INA), 8 U.S.C. § 1324a (2000).

6. See JEFFREY S. PASSEL, PEW HISPANIC CTR., UNAUTHORIZED MIGRANTS: NUMBERS AND CHARACTERISTICS (June 14, 2005), <http://pewhispanic.org/files/reports/46.pdf>.

demand for low-cost labor,⁷ coupled with the economic incentives to obtain employment at wages higher than those typically available in lesser-developed countries of origin,⁸ are often cited as the main contributors to the ongoing problem of illegal immigration.⁹

In economic terms, the hiring of undocumented workers produces financial gain for employers when it reduces labor costs.¹⁰ Given their precarious status under current U.S. law,¹¹ undocumented workers are more willing to suffer exploitative work conditions¹²—which most often include rampant violations of the federal minimum wage and overtime pay requirements of the Fair Labor Standards Act (FLSA)¹³—than their documented counterparts. As a result, employers in labor-intensive industries who consistently remain in noncompliance with federal immigration law are able to gain an unfair advantage over business competitors by keeping labor costs artificially low.¹⁴ Similarly, the routine

7. Jorge A. Vargas, *Consular Protection to Illegal Migratory Workers and Mexican Undocumented Minors: Two Sensitive Issues Addressed by the Thirteenth Annual Meeting of the United States-Mexico Binational Commission*, 6 J. TRANSNAT'L L. & POL'Y 143, 157–58 (1996) (“[T]here is a need for cheap and permanent labor in the U.S. at certain times of the year and in specific areas of the economy This chronic and insatiable U.S. demand for cheap and unprotected labor serves as the most powerful magnet in attracting Mexican migratory workers”).

8. The difference in wages can be staggering. In 2004, for example, the median hourly wage in Mexico—which is the country of origin for most undocumented workers in the United States—was a mere \$1.86 (21 pesos) compared to a \$9.00 median hourly wage for Mexican-born workers in the United States. [The U.S. figure is not limited to only undocumented workers]. *How the Influx is Changing the U.S.*, TIME, Feb. 6, 2006, at 38 (citing Pew Hispanic Center, National Immigration Law Center, National Conference of State Legislatures, and INEGI (Instituto Nacional de Estadística, Geografica e Informática)).

9. *Id.*; see *supra* note 4 and accompanying text.

10. See Howard F. Chang, *Migration as International Trade: The Economic Gains from the Liberalized Movement of Labor*, 3 UCLA J. INT'L L. & FOREIGN AFF. 371, 379 (1998).

11. One of the grounds for which a noncitizen may be ordered removed is being present in the United States without being admitted. 8 U.S.C. § 1227(a)(1)(A) (2000); 8 U.S.C. § 1182(a)(6)(A)(i) (2000).

12. See Lora Jo Foo, *The Vulnerable and Exploitable Immigrant Workforce and the Need for Strengthening Worker Protective Legislation*, 103 YALE L.J. 2179 (1994).

13. Fair Labor Standards Act (FLSA) of 1938, 29 U.S.C. §§ 206–207 (2000) (establishing that certain employers must pay employees not less than \$5.15 an hour and requiring that employers pay employees at a rate not less than one and one-half times the employee's regular rate of pay for hours worked in excess of forty hours in a workweek).

The FLSA may be enforced in any of three ways: (1) through civil actions brought by the Secretary of Labor on behalf of aggrieved employees to recover unpaid minimum wages, overtime compensation, and an equal amount in liquidated damages. 29 U.S.C. § 216(c) (2000). Additionally, the Secretary of Labor has the authority to pursue civil penalties of up to \$1,000 per violation for repeated or willful violations. *Id.* § 216(e); (2) through civil actions brought by the aggrieved employee. *Id.* § 216(b); or (3) through criminal actions brought by the Department of Justice. *Id.* § 216(a). See also Steven Greenhouse, *Among Janitors, Labor Violations Go With the Job*, N.Y. TIMES, July 13, 2005, at A1.

14. By paying undocumented workers less than the federal minimum wage, employers

hiring of undocumented workers in low-wage sectors has been accused of depressing the wages of fellow employees who are legally authorized to be employed in the United States (legally authorized workers), including both citizens and noncitizens alike.¹⁵ An emergent line of cases, based on a private cause of action against employers who illegally hire undocumented workers, attempts to remedy the foregoing injuries and indicates the potential for improved employer compliance with federal law.

This Note examines the potential for increased privatization in the enforcement of federal immigration law through civil suits brought under the Racketeer Influenced and Corrupt Organizations Act (RICO).¹⁶ Part II provides a brief overview of federal law governing undocumented workers and examines the emergent line of civil RICO cases, predicated on immigration offenses. Part III analyzes the elements of civil RICO's statutory standing provision, and this Note determines that under particular factual circumstances, undocumented workers would satisfy proximate standard causation compelled by the Supreme Court. Part IV argues that granting undocumented workers standing to sue under civil RICO will further the legislative policy of preserving jobs for American workers.

II. HISTORY

A. Employment-Based Immigration Law

1. Labor Exclusion Grounds

Beginning in the late nineteenth century, when Congress enacted federal laws restricting entry into the United States, contract labor became one of the first categorical grounds for exclusion. During this era, organized labor lobbied vigorously for legislation to protect American workers.¹⁷ As a result, Congress enacted the Chinese Exclusion Act of 1882 to protect domestic labor from competition from foreign workers for jobs.¹⁸ Three years later in 1885, Congress enacted the Alien Contract

artificially reduce their costs giving them an advantage over business competitors who pay their workers the prevailing market wage or at least the statutory minimum wage.

15. *See DeCanas v. Bica*, 424 U.S. 351, 356–57 (1976) (recognizing that the “acceptance by illegal aliens of jobs on substandard terms as to wages and working conditions can seriously depress wage scales and working conditions of citizens and legally admitted aliens”); *see also infra* Part II.D.2.

16. Racketeer Influenced and Corrupt Organizations Act (RICO), 18 U.S.C. § 1962(c) (2000).

17. *See BRIGGS, supra* note 3, at 27.

18. Chinese Exclusion Act of 1882, ch. 126, 22 Stat. 58 (repealed 1943). The law barred the entry of Chinese immigrants for ten years and was extended at ten-year intervals. *See BRIGGS, supra* note 3, at 27.

Laws, which prohibited the importation of foreign contract labor.¹⁹ Its purpose was to protect domestic labor “by curtailing the practice of employers importing large numbers of foreign workers in order to force domestic workers to work at reduced wages.”²⁰

2. Labor Certification

The Immigration and Nationality Act of 1952 (INA),²¹ restructured and codified immigration law. The INA replaced the previous contract labor provision with a labor certification requirement.²² Under the INA, for certain employment-based immigration, the law requires the granting of labor certification by the Secretary of Labor certifying that there is a lack of available workers,²³ and that “the employment of such alien will not adversely affect the wages and working conditions of workers in the United States similarly employed.”²⁴ The INA evinced a continuing legislative intent to protect domestic labor.²⁵

3. Immigration Reform

In 1986, after years of “heated congressional and public debate,”²⁶ Congress passed the Immigration Reform and Control Act (IRCA),²⁷ which added section 274A to the INA.²⁸ With IRCA, Congress focused primarily on decreasing the employment opportunities for undocumented workers in the United States,²⁹ anticipating a subsequent reduction in illegal immigration.³⁰ For the first time, IRCA made it illegal for an

19. Alien Contract Labor Law of 1885, ch. 164, 23 Stat. 332. See Briggs, *supra* note 3, at 27.

20. STAFF OF H. COMM. ON THE JUDICIARY, 100TH CONG., GROUNDS FOR EXCLUSION OF ALIENS UNDER THE IMMIGRATION AND NATIONALITY ACT 8 (Comm. Print 1988) [hereinafter GROUNDS FOR EXCLUSION].

21. INA, Pub. L. No. 82-414, 66 Stat. 163 (codified as amended at 8 U.S.C. §§ 1101–1524 (2000)).

22. 8 U.S.C. § 1182(a)(5)(A)(i) (2000).

23. *Id.* § 1182(a)(5)(A)(i)(I).

24. *Id.* § 1182(a)(5)(A)(i)(II).

25. H.R. REP. NO. 1365, at 50–51 (1952) (discussing INA’s “safeguards for American labor”).

26. Linda S. Bosniak, *Exclusion and Membership: The Dual Identity of the Undocumented Worker Under United States Law*, 1988 WIS. L. REV. 955, 956 (1988).

27. Immigration Reform and Control Act (IRCA), Pub. L. No. 99-603, 100 Stat. 3359 (codified in scattered sections of 8 U.S.C.).

28. IRCA, Pub. L. No. 99-603, § 101, 100 Stat. 3359, 3360–63 (codified at 8 U.S.C. § 1324a-b (2000)).

29. IRCA also created a large amnesty program in a companion attempt to reduce the number of undocumented residents. 8 U.S.C. § 1255a(a)(2)(a) (1988).

30. H.R. REP. NO. 99-682, at 45–62 (1986), reprinted in 1986 U.S.C.C.A.N. 5649, 5660 (“[A]s long as job opportunities are available to undocumented aliens, the intense pressure to surreptitiously

employer to hire an undocumented worker.³¹ Under section 274A, an employer who knowingly hires or continues to employ undocumented workers is liable for civil fines³² and also may face criminal prosecution.³³ The Supreme Court has noted that IRCA “forcefully” made combating the employment of undocumented workers central to the “policy of immigration law.”³⁴ Congress gave contour to its cornerstone policy of reducing employment opportunities for undocumented workers by introducing an “employment verification system,”³⁵ which denies employment to a noncitizen who (a) is not lawfully present in the United States or (b) is not lawfully authorized to work in the United States.³⁶ Under the “IRCA regime,”³⁷ it is likewise illegal for workers to submit fraudulent documents to employers for the purpose of verifying their authorization to work in the United States.³⁸

A decade later, in 1996, Congress strengthened IRCA’s cornerstone policy by enacting section 203 of the Illegal Immigration Reform and Immigrant Responsibility Act (IIRIRA), which amended section 274 of the INA.³⁹ The hiring offense of section 274 makes it a criminal offense

enter this country or to violate status once admitted as a nonimmigrant in order to obtain employment will continue.”).

31. 8 U.S.C. § 1324a(a)(1)(A) (2000). Under INA § 274A(a)(1)(A), “[i]t is unlawful for a person or other entity—to hire, or to recruit or refer for a fee, for employment in the United States an alien knowing the alien is an unauthorized alien.” *See also* Bosniak, *supra* note 26, at 979.

[U]ntil the implementation of employer sanctions, immigration law directly regulated border and entry only; the ‘private’ relationships that the undocumented person might form with any other social member once she has entered the country were not the object of exclusionary regulation. Indeed, the undocumented alien was usually permitted to avail herself of the courts in order to enforce her bargains.

Id. (internal citations omitted); *Sure-Tan, Inc. v. NLRB*, 467 U.S. 883, 892–93 (1984) (reasoning that Congress had not “made it a separate criminal offense” for employers to hire an undocumented worker, or for an undocumented worker “to accept employment after entering this country illegally,” and therefore finding “no reason to conclude that application of the [National Labor Relations Act] to employment practices affecting such [undocumented workers] would necessarily conflict with the [then-existing] terms of the INA.”).

32. 8 U.S.C. § 1324a(e)(4)(A) (2000).

33. *Id.* § 1324a(f)(1).

34. *INS v. Nat'l Ctr. for Immigrants' Rights, Inc.*, 502 U.S. 183, 194 n.8 (1991). “We have often recognized that a ‘primary purpose in restricting immigration is to preserve jobs for American workers.’” *Id.* at 194 (quoting *Sure-Tan*, 467 U.S. at 893).

35. 8 U.S.C. § 1324a(b) (2000).

36. *Id.* § 1324a(h)(3).

37. *Hoffman Plastic Compounds, Inc. v. NLRB*, 535 U.S. 137, 148 (2002).

38. 8 U.S.C. § 1324c(a)(1)-(3) (2000). Noncitizens are prohibited from using “any forged, counterfeit, altered, or falsely made document” or “any document lawfully issued to or with respect to a person other than the possessor” in order to obtain employment. Violators are subject to civil and criminal sanctions. 18 U.S.C. § 1546(b) (2000).

39. Illegal Immigration Reform and Immigrant Responsibility Act, Pub. L. No. 104-208, 110 Stat. 3009 (codified at 8 U.S.C. § 1324(a)(3)(A)-(B) (2000)).

for an employer to knowingly hire within any twelve-month period at least ten undocumented workers who have been brought into the United States in violation of section 274.⁴⁰

However, Congress's attempts to effectuate broad immigration policy reform by targeting employers have fallen markedly short of achieving either any reduction in the hiring of undocumented workers,⁴¹ or any corresponding decrease in illegal immigration.⁴² Although a precise figure of undocumented residents in the United States is virtually impossible to ascertain, a report released in March 2005 speculated that the total undocumented population had reached nearly eleven million,⁴³ compared to an estimated three to five million undocumented residents prior to the enactment of IRCA.⁴⁴ In addition, the report revealed an estimated annual increase of approximately 500,000 undocumented residents in the United States during recent years.⁴⁵ Furthermore, after IRCA made the act of knowingly employing undocumented workers a punishable offense, employers in sectors typically accused of employing undocumented workers designated workers as "independent subcontractors" to perform work that previously had been performed by "employees."⁴⁶ Some

40. The hiring offense of Section 274 criminalizes:

(3)(A) Any person who, during any 12-month period, knowingly hires for employment at least 10 individuals with actual knowledge that the individuals are aliens described in subparagraph (B) . . . (B) An alien described in this subparagraph is an alien who—(i) is an unauthorized alien (as defined in section 274A(h)(3), and (ii) has been brought into the United States in violation of this subsection.

INA Section 274(a)(3)(A)-(B) (codified at 8 U.S.C. § 1324(a)(3)(A)-(B) (2000).

41. Maria Echaveste, Keynote Address at the Bernard and Audre Rapoport Center for Human Rights and Justice Inaugural Conference: Working Borders: Linking Debates About Insourcing and Outsourcing of Capital and Labor (Feb. 10–11, 2005), in 40 TEX. INT'L L.J. 691, 705 (2005) (arguing that employer sanctions under IRCA fail due to the United States's inadequate system of fines and comparing the minimal fines levied in the few cases that have been brought against U.S. employers for hiring undocumented workers with European countries where employers are sanctioned tens of thousands of dollars for each undocumented worker).

42. See Report, *supra* note 4.

43. See Report, *supra* note 4.

44. Bosniak, *supra* note 26, at 960 n.14 (citing Jeffrey Passel, *Estimating the Number of Undocumented Aliens*, U.S. BUREAU OF LABOR STATISTICS: MONTHLY LAB. REV., Sept. 1986, at 33).

45. See Report, *supra* note 4. The illegal immigrant population has had "a net increase of roughly 485,000 per year between 2000 and 2004."

46. See *Flores v. Albertsons, Inc.*, No. 0100515, 2002 WL 1163623 (C.D. Cal. Apr. 9, 2002), for an example of a suit involving a cleaning services company that contracted with four grocery store chains to provide nighttime janitorial services and designated the janitors (mostly undocumented workers) as "independent contractors." See also Jonathan P. Hiatt & Lee W. Jackson, *Union Survival Strategies for the Twenty-first Century*, 12 LAB. LAW. 165, 177 (1996):

For example, by taking money from taxicab drivers rather than giving money to them, taxicab companies have succeeded in virtually eliminating employees from the taxicab industry and transforming almost all cab drivers into independent contractors. The trucking industry has

employers also began associating with labor subcontractors, intending to circumvent federal immigration law while providing insulation from potential liability.⁴⁷

B. Hoffman Plastic Compounds, Inc. v. NLRB and its Aftermath

In a landmark case decided in 2002, the Supreme Court in *Hoffman Plastic Compounds, Inc. v. NLRB*⁴⁸ refused to enforce the National Labor Relations Board's (NLRB) award of backpay to an undocumented worker who was terminated for supporting a workplace campaign to organize a union.⁴⁹ During his testimony at an administrative hearing to determine the amount of backpay owed under the NLRB's ruling,⁵⁰ Jose Castro revealed that "he was born in Mexico and that he had never been legally admitted to, or authorized to work in, the United States."⁵¹ Castro admitted that he had obtained his job at the Hoffman plant by fraudulently submitting legal documents belonging to a natural-born U.S. citizen.⁵² The Supreme Court held that federal immigration policy, as expressed by IRCA, prohibited the award of "backpay to an [undocumented worker] for years of work not performed, for wages that could not lawfully have been earned, and for a job obtained in the first instance by a criminal fraud."⁵³

followed a similar course. This trend has gone so far that one Seattle cleaning contractor, after submitting the lowest bid to clean downtown office buildings, proceeded to sell 'franchises' for the right to clean floors of downtown office buildings for \$4,000 to \$7,000 a floor—transforming low-wage janitors, mostly immigrants from Central America and Asia, into 'independent contractors.'

47. However, courts have been willing to allow workers to sue employers under a "joint employer doctrine," if an employment relationship is found to exist, by applying a multi-factor "economic realities" test. See, e.g., Shirley Lung, *Exploiting the Joint Employer Doctrine: Providing a Break for Sweatshop Garment Workers*, 34 LOY. U. CHI. L.J. 291 (2003).

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

49. *Id.* at 151 n.1. The NLRA prohibits "discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization . . ." 29 U.S.C. § 158(a)(3) (2000).

50. *Hoffman Plastic*, 535 U.S. at 141. In December 1988, a union-organizing campaign began at the Hoffman Plastic production plant where Castro worked. In January 1989, Hoffman Plastic laid off Castro and three other employees for supporting the organizing activities. In January 1992, the NLRB found that Hoffman Plastic had unlawfully terminated the employees in violation of the NLRA. In June 1993, the compliance hearing before an Administrative Law Judge was held to determine the amount of backpay owed to each of the four employees. Castro revealed his undocumented status at that hearing. *Id.* at 140–41.

51. *Id.* at 141; see generally 8 U.S.C. § 1324a(h)(3) (2000) (defining unauthorized alien).

52. *Hoffman Plastic*, 535 U.S. at 141.

53. *Id.* at 149.

[I]t is impossible for an undocumented alien to obtain employment in the United States without some party directly contravening explicit congressional policies. Either the undocumented alien tenders fraudulent identification, which subverts the cornerstone of

However, in the aftermath of the Supreme Court's decision, multiple persuasive sources of legal authority have agreed that the narrow holding in *Hoffman Plastic* does not preclude undocumented workers from recovering wages owed under the FLSA⁵⁴ for work already performed. Lower federal courts have continued to hold that undocumented workers remain equally entitled to protection under the minimum wage and overtime pay provisions of the FLSA. These courts have recognized a vital distinction between precluding undocumented workers from recovering backpay for work that *would have* been performed and allowing undocumented workers to recover wages owed for work *actually* performed.⁵⁵ Moreover, the U.S. Department of Labor (DOL), the agency charged with administering the FLSA, has stated that “[t]he Supreme Court's decision [in *Hoffman Plastic*] does not mean that undocumented workers do not have rights under other U.S. labor laws,”⁵⁶ and that the DOL “will continue to enforce the FLSA . . . without regard to whether an employee is documented or undocumented.”⁵⁷ Further, at the request of the Mexican government shortly after the Supreme Court's opinion in *Hoffman Plastic*, the Inter-American Court of Human Rights issued an unanimous advisory opinion ruling that international principles of nondiscrimination and equal protection prohibited discriminating against undocumented workers with respect to the terms and conditions of employment.⁵⁸ Although the court recognized the sovereign right of

IRCA's enforcement mechanism, or the employer knowingly hires the undocumented alien in direct contradiction of its IRCA obligations.

Id. at 148.

54. FLSA, 29 U.S.C. §§ 206–207 (2000).

55. See, e.g., *Patel v. Quality Inn S.*, 846 F.2d 700 (11th Cir. 1988) (holding that an undocumented janitor who had continued working after his visa expired was entitled to sue employer for backpay for work performed); *Liu v. Donna Karan Int'l, Inc.*, 207 F. Supp. 2d 191 (S.D.N.Y. 2002) (denying employer's request to discover plaintiffs' immigration status); *Flores v. Albertsons, Inc.*, No. 0100515, 2002 WL 1163623 (C.D. Cal. Apr. 9, 2002) (denying discovery of plaintiffs' immigration status, noting that “the protections of the FLSA are available to citizens and undocumented workers alike”); cf. *Rivera v. NIBCO, Inc.*, 364 F.3d 1057, 1067 (9th Cir. 2004) (expressing doubt that *Hoffman Plastic* precludes awarding backpay to undocumented workers under any federal statute); *Del Ray Tortilleria, Inc. v. NLRB*, 976 F.2d 1115, 1122 n.7 (7th Cir. 1992) (distinguishing undocumented workers seeking recovery for work already performed from work they would have performed).

56. U.S. DEPARTMENT OF LABOR, EMPLOYMENT STANDARDS ADMINISTRATION, WAGE AND HOUR DIVISION, FACT SHEET #48: APPLICATION OF U.S. LABOR LAWS TO IMMIGRANT WORKERS: EFFECT OF *HOFFMAN PLASTIC* DECISION ON LAWS ENFORCED BY THE WAGE AND HOUR DIVISION, available at <http://www.dol.gov/esa/regs/compliance/whd/whdfs48.htm> (last visited Oct. 16, 2006). See also *Chevron U.S.A., Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837 (1984) (articulating principle of deference that courts should accord reasonable administrative agency interpretations of statutes).

57. FACT SHEET #48, *supra* note 56.

58. Juridical Condition and Rights of the Undocumented Migrants, Advisory Opinion OC-18/03,

governments to deny employment to undocumented workers, it held that once an employment relationship is formed, undocumented workers are entitled to equal human rights protection in the workplace.⁵⁹

C. Racketeer Influenced and Corrupt Organizations Act (RICO)

Congress enacted the Racketeer Influenced and Corrupt Organizations Act (RICO), a broad civil and criminal statute, as part of the Organized Crime Control Act of 1970.⁶⁰ Originally, RICO's key purpose was to serve as a government tool for controlling organized crime, but since its inception, civil RICO has been liberally construed according to its express admonition, to provide private plaintiffs with a remedy against defendants whose activities extend far beyond conventional notions of "organized crime."⁶¹

To adequately state a RICO enterprise claim under section 1962(c), a plaintiff must plead: "(1) conduct (2) of an enterprise (3) through a pattern (4) of racketeering activity."⁶² Section 1961(4) of RICO defines "enterprise" as including "any individual, partnership, corporation, association, or other legal entity, and any union or group of individuals associated in fact although not a legal entity."⁶³ Satisfying the third

Inter-Am. Ct. H.R. (Sept. 17, 2003), available at http://www.corteidh.or.cr/docs/opiniones/seviea_18_ing.pdf (last visited Sept. 19, 2006) [hereinafter Advisory Opinion OC-18/03]. The broad scope of the Inter-American Human Rights Court's advisory jurisdiction is provided by Article 64 of the American Convention on Human Rights: "The member states of the Organization may consult the Court regarding the interpretation of this Convention or of other treaties concerning the protection of human rights in the American states." BUERGENTHAL ET AL., INTERNATIONAL HUMAN RIGHTS IN A NUTSHELL 268 (3d ed. 2002). See also Thomas Buergenthal, *The Advisory Practice of the Inter-American Human Rights Court*, 79 AM. J. INT'L L. 1 (1985).

59. Advisory Opinion OC-18/03. See also Sarah H. Cleveland, *Legal Status and Rights of Undocumented Workers. Advisory Opinion OC-18/03 in International Decisions* (David D. Caron ed.), 99 AMER. J. INT'L L. 460, 460 (2005) ("In other words, states may not further their immigration policies by denying basic workplace protections to undocumented employees.").

60. Organized Crime Control Act of 1970, Pub. L. No. 91-452, § 904(a), 84 Stat. 922, 942 (1970) (codified at 18 U.S.C. §§ 1961–1968 (2000)). Under section 1962(c), it is illegal "for any person employed by or associated with any enterprise engaged in, or the activities of which affect, interstate or foreign commerce, to conduct or participate, directly or indirectly, in the conduct of such enterprise's affairs through a pattern of racketeering activity . . ." 18 U.S.C. § 1962(c).

61. See, e.g., United States v. Turkette, 452 U.S. 576, 587 (1981) (legislative intent shows RICO's breadth). See also Sedima, S.P.R.L. v. Imrex Co., Inc., 473 U.S. 479, 500 (1985) (recognizing that "in its private civil version, RICO is evolving into something quite different from the original conception of its enactors").

62. Sedima S.P.R.L. v. Imrex Co., 473 U.S. 479, 496 (1985) (internal citation omitted) (setting forth the RICO elements that apply to both civil and criminal claims).

63. 18 U.S.C. § 1961(4) (2000). See also Reves v. Ernst & Young, 507 U.S. 170, 185 (1993) (holding that "one must participate in the operation or management of the enterprise itself [to be subject to liability under section 1962(c)]"); United States v. Turkette, 452 U.S. 576, 583 (1981) ("The

element “requires at least two acts of racketeering activity.”⁶⁴ Finally, “racketeering activity” is defined by an exhaustive list of predicate offenses for which the defendant may be indictable,⁶⁵ regardless of whether a criminal conviction is actually obtained.⁶⁶

In addition to establishing the “irreducible constitutional minimum of standing” necessary to invoke federal jurisdiction,⁶⁷ plaintiffs may sue under civil RICO only if they also satisfy the statutory standing requirements set forth in section 1964(c),⁶⁸ regardless of the merit of the claims. The civil RICO standing provision, granting a private cause of action, states that “[a]ny person injured in his business or property by reason of a violation of section 1962 . . . may sue [to] . . . recover [treble damages] . . .”⁶⁹

The Supreme Court in *Holmes v. Securities Investor*,⁷⁰ interpreted the clause “by reason of” in section 1964(c) to require a RICO plaintiff to show that the defendant’s RICO violation was the proximate cause of the plaintiff’s injury, as well as the “but for” cause.⁷¹ Because section 1964(c) was modeled directly after the federal antitrust provisions granting standing,⁷² *Holmes* therefore similarly construed section 1964(c).⁷³

enterprise is an entity, for present purposes a group of persons associated together for a common purpose of engaging in a course of conduct.”).

64. 18 U.S.C. § 1961(5) (2000). “[P]attern of racketeering activity’ requires at least two acts of racketeering activity, one of which occurred after the effective date of this chapter and the last of which occurred within ten years (excluding any period of imprisonment) after the commission of a prior act of racketeering activity.”

65. *Id.* § 1961(A)–(F). See also *Sedima*, 473 U.S. at 481.

66. *Sedima*, 473 U.S. at 488–89.

67. *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 (1992) (explaining that “the core component of standing is an essential and unchanging part of the case-or-controversy requirement of Article III [of the Constitution]”). Constitutional standing consists of the following three elements:

First, the plaintiff must have suffered an injury in fact—an invasion of a legally protected interest which is (a) concrete and particularized, and (b) actual or imminent, not conjectural or hypothetical. Second, there must be a causal connection between the injury and the conduct complained of—the injury has to be fairly . . . trace[able] to the challenged action of the defendant, and not . . . th[e] result [of] the independent action of some third party not before the court. Third, it must be likely, as to merely speculative, that the injury will be redressed by a favorable decision.

Id. at 560–61 (citations and internal quotations omitted).

68. 18 U.S.C. § 1964(c) (2000). See *Sedima*, 473 U.S. at 496–97.

69. *Id.* The entire provision reads: “[a]ny person injured in his business or property by reason of a violation of section 1962 of this chapter may sue therefor in any appropriate United States district court and shall recover threefold the damages he sustains and the cost of the suit, including a reasonable attorney’s fee . . .” *Id.*

70. *Holmes v. Sec. Investor Prot. Corp.*, 503 U.S. 258 (1992).

71. *Id.* at 265–68.

72. The Clayton Act provides:

[A]ny person who shall be injured in his business or property by reason of anything forbidden

Holmes articulated the following three justifications underlying the “directness requirement:”⁷⁴

First, the less direct an injury is, the more difficult it becomes to ascertain the amount of a plaintiff’s damages attributable to the violation, as distinct from other, independent, factors. Second, quite apart from problems of proving factual causation, recognizing claims of the indirectly injured would force courts to adopt complicated rules apportioning damages among plaintiffs removed at different levels of injury from the violative acts, to obviate the risk of multiple recoveries. And, finally, the need to grapple with these problems is simply unjustified by the general interest in deterring injurious conduct, since directly injured victims can generally be counted on to vindicate the law as private attorneys general, without any of the problems attendant upon suits by plaintiffs injured more remotely.⁷⁵

In 2006, the Supreme Court decided *Anza v. Ideal Steel Supply Corp.*⁷⁶ under the *Holmes* analysis and instructed that “[w]hen a court evaluates a RICO claim for proximate causation, the central question it must ask is

in the antitrust laws may sue therefor in any district court of the United States in the district in which the defendant resides or is found or has an agent, without respect to the amount in controversy, and shall recover threefold the damages by him sustained, and the cost of suit, including a reasonable attorney’s fee.

15 U.S.C. § 15(a) (2000). See *Holmes v. Sec. Investor Prot. Corp.*, 503 U.S. 258, 267 (1992) (citing *Associated Gen. Contractors of Cal., Inc. v. Cal. Council of Carpenters*, 459 U.S. 519, 529–30 (1983)).

73. See *Associated Gen. Contractors*, 459 U.S. at 533–36. Both the Clayton Act and the Sherman Act have been interpreted to incorporate common-law principles of proximate causation, and it must be assumed that when Congress enacted § 1964(c) it intended the words to have the same meaning that the courts had already given the antitrust statutes. *Id.*

We may fairly credit the 91st Congress, which enacted RICO, with knowing the interpretation federal courts had given the words earlier Congresses had used first in § 7 of the Sherman Act, and later in the Clayton Act’s § 4. It used the same words, and we can only assume it intended them to have the same meaning that courts had already given them. Proximate cause is thus required.

Holmes, 503 U.S. at 268 (internal citation omitted).

74. *Holmes*, 503 U.S. at 265–68. If only factual causation was required, a plaintiff would be able to recover by the mere “showing that the defendant violated § 1962, the plaintiff was injured, and the defendant’s violation was a ‘but for’ cause of plaintiff’s injury.” *Id.* at 265–66. “This construction is hardly compelled, however, and the very unlikelihood that Congress meant to allow all factually injured plaintiffs to recover persuades us that RICO should not get such an expansive reading.” *Id.* at 265. See also *id.* at 268–69 (citing 1 J.G. SUTHERLAND, LAW OF DAMAGES 55–56 (1882)); *Associated Gen. Contractors*, 459 U.S. at 534 (quoting *S. Pac. Co. v. Darnell-Taenzer Lumber Co.*, 245 U.S. 531, 533 (1918) (*Holmes*, J.) (“The general tendency of the law, in regard to damages at least, is not to go beyond the first step.”)).

75. *Holmes*, 503 U.S. at 269–70.

76. *Anza v. Ideal Steel Supply Corp.*, No. 04-433, 126 S. Ct. 1991 (2006).

whether the alleged violation led directly to the plaintiff's injuries.”⁷⁷ In *Anza*, Ideal, a steel supply company, brought a civil RICO suit against a business competitor, National, alleging that National violated section 1962(c) by failing to charge customers state sales tax, which allowed National to gain a competitive advantage by lowering its prices.⁷⁸ The RICO predicate offenses alleged were mail and wire fraud,⁷⁹ and the injury claimed was Ideal's loss of sales.⁸⁰ Under the *Holmes* analysis,⁸¹ the Supreme Court held that the “attenuation” between the section 1962(c) violation of not charging the requisite state sales tax and the alleged injury of loss of market share was too great to allow recovery under RICO.⁸²

In 1996, Congress expanded RICO's statutory definitions of predicate acts that constitute indictable “racketeering activity” to include “any act which is indictable under the Immigration and Nationality Act, section 274 (relating to bringing in and harboring certain aliens), . . . if . . . committed for the purpose of financial gain.”⁸³ Congress added the immigration-related offenses to RICO's list of predicate acts “to give [f]ederal law enforcement officials additional means with which to combat organized immigration crime.”⁸⁴ Of particular concern to Congress was a noted increase in alien smuggling and that because groups “in this country, with ties to others abroad . . . [had] developed to prey upon illegal immigrants who want to come to the United States.”⁸⁵

To date, less than half of the federal courts of appeals have decided civil RICO suits predicated on immigration violations. Every case to come

77. *Id.* at 1997.

78. *Id.* at 1995.

79. 18 U.S.C. §§ 1341, 1343 (2000).

80. *Anza*, 126 S. Ct. at 1995, 1997.

81. *See supra* note 75 and accompanying text.

82. *See supra* note 133.

83. Antiterrorism and Effective Death Penalty Act of 1996, Pub. L. No. 104-132, § 433, 110 Stat. 1214 (codified at 18 U.S.C. § 1961(1)(F) (2000)). 18 U.S.C. § 1961(1)(F) (2000). The definition fully states:

[A]ny act which is indictable under the Immigration and Nationality Act, section 274 (relating to bringing in and harboring certain aliens), section 277 (relating to aiding or assisting certain aliens to enter the United States), or section 278 (relating to importation of alien for immoral purposes) if the act indictable under such section of such Act was committed for the purpose of financial gain.

Id. This Note focuses solely on employers' violation of section 274 as the alleged predicate offense. *See* 8 U.S.C. § 1324(a) (2000).

84. H.R. Rep. No. 104-22, at 5 (1995). The Committee on the Judiciary “noted with concern the development and increase of organized alien smuggling rings. This new form of organized crime preys upon those with the most laudable intentions—the desire to make a better life in the United States.” *Id.* at 7.

85. 141 CONG. REC. H1588 (daily ed. Feb. 10, 1995) (statement of Rep. McCollum).

before a court of appeals thus far has been brought against employers by either business competitors or legally authorized workers.⁸⁶ The foregoing cases decided whether the plaintiffs had sufficiently alleged a RICO enterprise claim to overcome the defendants' motion to dismiss pursuant to Federal Rule of Civil Procedure 12(b)(6).⁸⁷ In RICO cases, “[a]t the pleading stage, general factual allegations of injury resulting from the defendant's conduct may suffice, for on a motion to dismiss [courts] presume that general allegations embrace those specific facts that are necessary to support the claim.”⁸⁸

D. Civil RICO Suits Predicated on Immigration Offenses

1. Business Competitors as Plaintiffs

A civil RICO suit predicated on an immigration offense first reached a court of appeals in 2001.⁸⁹ In *Commercial Cleaning Services, L.L.C. v. Colin Service Systems, Inc.*,⁹⁰ Commercial, a small cleaning company, brought a putative class-action lawsuit against Colin, a larger business competitor. Commercial alleged that Colin was part of an association-in-fact enterprise,⁹¹ and “engaged in a pattern of racketeering activity by hiring undocumented [workers in violation of section 274].”⁹² Commercial alleged that the “illegal immigrant hiring scheme” enabled Colin to underbid its competitors for labor contracts by allowing Colin to pay undocumented workers “well below the prevailing wage for [legally

86. See *infra* Part II.D.1–2; See also *Williams v. Mohawk Indus., Inc.*, 411 F.3d 1252 (11th Cir. 2005), cert. granted sub. nom. *Mohawk Indus., Inc. v. Williams*, 126 S. Ct. 830 (2005), cert. dismissed, 126 S. Ct. 2016 (2006) and remanded to *Williams v. Mohawk Indus. Inc.*, 465 F.3d 1277 (11th Cir. 2006) (holding legally authorized workers had standing to sue under RICO); *Trollinger v. Tyson Foods, Inc.*, 370 F.3d 602 (6th Cir. 2004) (holding legally authorized workers had standing to sue under RICO); *Baker v. IBP, Inc.*, 357 F.3d 685 (7th Cir. 2004) (dismissing action brought by a class of legally authorized workers on the grounds that the employees' union was a necessary party to the lawsuit); *Mendoza v. Zirkle Fruit Co.*, 301 F.3d 1163 (9th Cir. 2002) (holding legally authorized workers had standing to sue under RICO); *Commercial Cleaning Servs., L.L.C. v. Colin Serv. Sys., Inc.*, 271 F.3d 374 (2d Cir. 2001) (holding business competitors had standing to sue under RICO).

87. FED. R. CIV. P. 12(b)(6) (“failure to state a claim upon which relief can be granted”).

88. See *Nat'l Org. for Women v. Scheidler*, 510 U.S. 249, 256 (1994) (quoting *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 561 (1992)).

89. *Mendoza*, 301 F.3d at 1170 (characterizing the Second Circuit in *Commercial Cleaning* as the only circuit to have considered a RICO suit based on the predicate act of violating section 274).

90. *Commercial Cleaning*, 271 F.3d at 374.

91. *Id.* at 378–79. The complaint asserted that the association-in-fact enterprise was comprised of entities that included “employment placement services, labor contractors, newspapers in which Colin advertises for laborers, and various immigrant networks that assist fellow illegal immigrants in obtaining employment, housing and illegal work permits. *Id.* at 379.

92. *Id.*; 8 U.S.C. § 1324(a) (2000).

authorized workers].⁹³ Commercial claimed that as a result, Colin's direct competitors lost contracts in a "highly competitive price-sensitive market."⁹⁴ On appeal, the Second Circuit vacated and remanded the district court's dismissal of the complaint under Rule 12(b)(6).⁹⁵ The district court dismissed for lack of "standing to bring suit because [the plaintiff's] injury did not bear a 'direct relation' to [the defendant's] racketeering activity as required by *[Holmes]*."⁹⁶ The Second Circuit held that the plaintiff indeed had standing to sue under RICO because the small company had claimed a direct injury that resulted from the defendant's ability to underbid its competitors on labor contracts to supply cleaning services.⁹⁷ The Second Circuit reasoned that the alleged injury was direct, rather than merely derivative of an injury to a third party,⁹⁸ because "the theory of [the plaintiff's] claim is that [the defendant] undertook the illegal immigrant hiring scheme in order to undercut its business rivals."⁹⁹

In light of the Supreme Court's recent decision in *Anza*, plaintiffs who are business competitors may have greater difficulty alleging proximate cause because "[a] RICO plaintiff cannot circumvent the proximate cause requirement simply by claiming that the defendant's aim was to increase market share at a competitor's expense."¹⁰⁰ However, *Commercial Cleaning* is distinguishable from *Anza*, in that the injury was a result of head-to-head bidding for labor contracts,¹⁰¹ and unlike in *Anza* the government was not a more direct victim.¹⁰²

2. Legally Authorized Workers as Plaintiffs

*Mendoza v. Zirkle Fruit Co.*¹⁰³ is the first in a line of wage-related civil RICO suits brought by legally authorized workers alleging that their

93. *Id.* at 382.

94. *Id.*

95. FED. R. CIV. P. 12(b)(6).

96. *Id. See infra* Part III.C.

97. *Commercial Cleaning*, 271 F.3d at 384.

98. "In a series of cases beginning in the antitrust context and later extended to RICO, the Supreme Court clarified that potential plaintiffs who have suffered 'passed-on' injury—that is, injury derived from a third party's direct injury—lack statutory standing." *Mendoza v. Zirkle Fruit Co.*, 301 F.3d 1163, 1169 (9th Cir. 2002) (citing with approval *Holmes v. Sec. Investor Prot. Corp.*, 503 U.S. 258, 268 (1992); *Associated Gen. Contractors of Cal. v. Cal. Council of Carpenters*, 459 U.S. 519 (1983); *Ill. Brick Co. v. Illinois*, 431 U.S. 720 (1977)).

99. *Commercial Cleaning*, 271 F.3d at 384.

100. *Anza v. Ideal Steel Supply Corp.*, No. 04-433, 126 S. Ct. 1991.

101. Compare *id.* at 1998 with *Commercial Cleaning*, 271 F.3d at 382–83.

102. Compare *Anza*, 126 S. Ct. at 1998 with *Commercial Cleaning*, 271 F.3d at 384–85.

103. *Mendoza*, 301 F.3d at 1163.

current or former employer illegally hired undocumented workers in violation of section 274. Citing *Commercial Cleaning* with approval, the Ninth Circuit held that a purported class of legally authorized workers had standing under RICO to sue their employer, “whom they allege depressed their salaries by conspiring to hire undocumented workers at below market wages.”¹⁰⁴ The plaintiffs alleged that the defendants knowingly hired undocumented workers who were willing to accept below-market wages to work in the defendants’ labor-intensive fruit orchards and packing houses,¹⁰⁵ and alleged an injury to their property in the form of lost wages.¹⁰⁶ Rejecting the defendant’s argument that in order to allege an injury the plaintiffs have to show a “property right” in the lost wages,¹⁰⁷ the Ninth Circuit concluded that what is required is merely “a legal entitlement to business relations unhampered by schemes prohibited by the RICO predicate statutes.”¹⁰⁸ In determining whether the plaintiffs had statutory standing the Ninth Circuit applied “three nonexhaustive factors in considering causation,”¹⁰⁹ based on the *Holmes* policy justifications.¹¹⁰ The Ninth Circuit concluded that the defendant’s alleged “scheme aims to gain an illegal commercial advantage” in the employer’s relationship with the plaintiffs through “disproportionate bargaining power in employment contracts.”¹¹¹ The Ninth Circuit further concluded that the plaintiffs’ alleged injury was a “direct injury,” rather than a “passed-on” injury caused, both proximately as well as factually, by the employer’s scheme.¹¹²

Conversely, the Seventh Circuit subsequently dismissed a similar employee class action lawsuit. In *Baker v. IBP, Inc.*,¹¹³ the plaintiffs

104. *Mendoza*, 301 F.3d at 1166.

105. *Id.* at 1166–67.

106. *Id.*

107. *Id.* at 1168 n.4 (rejecting employer’s argument that plaintiffs have to show a “property right,” by showing either promises or contracts for higher wages, on the grounds that RICO does not implicate procedural due process).

108. *Id.*

109. *Id.* at 1169. The three nonexhaustive causation factors focused on by the Ninth Circuit include:

(1) whether there are more direct victims of the alleged wrongful conduct who can be counted on to vindicate the law as private attorneys general; (2) whether it will be difficult to ascertain the amount of the plaintiff’s damages attributable to defendant’s wrongful conduct; and (3) whether the courts will have to adopt complicated rules apportioning damages to obviate the risk of multiple recoveries.

Id.

110. See *infra* Parts III.C.1–3.

111. *Mendoza*, 301 F.3d at 1170.

112. *Id.* See *supra* note 98 and accompanying text.

113. *Baker v. IBP, Inc.*, 357 F.3d 685 (7th Cir. 2004).

alleged that their employer was involved in a conspiracy with recruiters and a Chinese aid group, and that the alleged enterprise “violated RICO by employing undocumented, illegal workers in an effort to drive down employee wages.”¹¹⁴ Although the action was ultimately dismissed on the grounds that the employees’ union was an indispensable party to the lawsuit,¹¹⁵ the Seventh Circuit also noted alternative defects with the plaintiffs’ complaint. First, the court observed a failure to satisfy RICO’s “enterprise” element under section 1962(c).¹¹⁶ Second, without fully deciding the issue, the Seventh Circuit in dicta observed “the difficulty of establishing that unlawful hiring of aliens caused a diminution in their wages.”¹¹⁷ The Seventh Circuit expressed possible future disagreement with the Ninth Circuit’s conclusion in *Mendoza* that the “injury workers suffer when wages are depressed by competition from [undocumented workers] is similar to the kind of injuries redressed under the antitrust laws.”¹¹⁸ Although reserving resolution of the issue for a future case, the Seventh Circuit cautioned that the plaintiffs’ theory that the defendant “pays lower wages than some competitors” is an effect that “would be very hard to attribute to particular violations of [section 274].”¹¹⁹

In *Trollinger v. Tyson Foods, Inc.*,¹²⁰ a group of former hourly legally authorized workers brought a putative class action lawsuit against their

114. Williams v. Mohawk Indus., Inc., 411 F.3d 1252, 1259 (11th Cir. 2005), *cert. granted sub. nom.* Mohawk Indus., Inc. v. Williams, 126 S. Ct. 830 (2005), *cert. dismissed*, 126 S. Ct. 2016 (2006), and remanded to Williams v. Mohawk Indus., Inc., 465 F.3d 1277 (11th Cir. 2006) (noting conflict with the Seventh Circuit’s holding in *Baker*).

115. Baker, 357 F.3d at 690. The Seventh Circuit reasoned that because the lawsuit “is at its core about the adequacy of the wages,” and because the union’s representation “is supposed to be ‘exclusive’ with respect to wages,” under § 9 of the NLRA the suit could not be permitted to proceed without the union as a party. *Id.* at 690–91.

116. *Id.* at 691–92 (“IBP wants to pay lower wages; the recruiters want to be paid more for services rendered (though IBP would like to pay them less); the Chinese Mutual Aid Association wants to assist members of its ethnic group. These are divergent goals.”). The Seventh Circuit deemed the enterprise element unsatisfied because the “association in fact enterprise” did not share a common purpose. But even if an “enterprise” was found to exist, the *Baker* court also highlighted the fact that the defendant neither operated nor managed that enterprise, and without a distinction between the defendant and the “enterprise,” RICO is not violated. *Id.* at 691–92 (citing *Sedima, S.P.R.L. v. Imrex Co.*, 473 U.S. 479, 496–97 (1985)).

117. *Id.* at 692.

118. *Id.* The *Baker* court noted that although “[a]n increased supply of labor logically affects, not just the wages at [the defendant’s] plant, but wages throughout the region (if not the country) . . . [w]orkers can change employers ([leaving the defendant’s employ] for higher pay elsewhere), and this process should cause equilibration throughout the labor market.” *Id.*

119. *Id.* (posing the following hypothetical for consideration: “[s]uppose that plaintiffs believed that [the defendant] has violated the Fair Labor Standards Act by failing to calculate other workers’ overtime premium; could plaintiffs obtain damages from [the defendant] even though it had paid *them* all that the FLSA requires?”).

120. *Trollinger v. Tyson Foods, Inc.*, 370 F.3d 602 (2004).

former employer.¹²¹ The plaintiffs alleged that their employer “violated RICO by engaging in a scheme with several employment agencies to depress the wages of [the plaintiffs]” by hiring undocumented workers willing to work for far below-market wages.¹²² The complaint alleged that as a result of this scheme, more than half of the employees at a number of facilities were undocumented workers, thereby enabling the employer to pay its legally authorized workers significantly less than the prevailing wage rate amongst other employers of unskilled labor in the surrounding areas.¹²³ The district court granted the employer’s motion to dismiss for failure to state a claim under Federal Rule of Civil Procedure 12(b)(6)¹²⁴ for lack of statutory standing on the grounds that any injury they suffered was derivative of an injury to their union.¹²⁵ The Sixth Circuit reversed the district court’s dismissal of the claim, holding that “this complaint does not describe an injury that can be characterized as exclusively derivative.”¹²⁶

In *Williams v. Mohawk Industries*,¹²⁷ current and former hourly employees filed a class action suit against their employer, similarly alleging that the defendant’s “widespread and knowing employment and harboring of illegal workers allowed [it] to reduce labor costs by depressing wages for its legal hourly employees . . . in violation of [section 1962(c)].”¹²⁸ According to the plaintiffs’ complaint, “[the employer] and third-party temp agencies/recruiters have conspired to violate federal immigration laws, destroy documentation, and harbor illegal workers.”¹²⁹ The Eleventh Circuit held that the plaintiffs’ complaint

121. *Id.* at 605.

122. *Id.* at 605–06. The plaintiffs’ complaint alleged that the defendant, along with several individuals, conspired to smuggle undocumented workers into the United States and employ them at the defendant’s processing plants. *Id.* at 606.

123. *Id.*

124. FED. R. CIV. P. 12(b)(6).

125. *Trollinger*, at 607.

126. *Id.* at 616.

127. *Williams v. Mohawk Indus., Inc.*, 411 F.3d 1252 (11th Cir. 2005), cert. granted sub. nom. *Mohawk Indus., Inc. v. Williams*, No. 05-465, 126 S. Ct. 830 (2005), cert. dismissed, 126 S. Ct. 2016 (2006), and remanded to *Williams v. Mohawk Indus., Inc.*, 465 F.3d 1277 (11th Cir. 2006).

128. *Id.* at 1255.

129. *Id.* at 1258. The plaintiffs’ complaint the following: Mohawk employees and recruiters routinely traveled to the U.S.-Mexican border to recruit undocumented aliens who have unlawfully crossed the border into the United States and transported them to seek employment at the defendant’s facilities; Mohawk offered financial incentives to employees and recruiters for finding undocumented workers “that Mohawk eventually employs and harbors;” “Mohawk knowingly or recklessly accept[ed] fraudulent documentation from the illegal aliens;” and Mohawk “concealed its efforts to hire and harbor illegal aliens by destroying documents and helping their undocumented workers in evading detection by law enforcement officials.” *Id.* at 1255.

did state a claim under RICO.¹³⁰ The Supreme Court denied certiorari on the question of “whether plaintiffs state proximately caused injuries to business or property by alleging that the hourly wages they voluntarily accepted were too low,” but granted certiorari to decide “whether a defendant corporation and its agents can constitute an ‘enterprise’ under [RICO].”¹³¹ In June 2006, the Supreme Court dismissed the writ of certiorari as improvidently granted,¹³² vacated the judgment, and remanded the case to the Eleventh Circuit for further consideration with respect to the Court’s opinion in *Anza v. Ideal Steel Supply Corp.*, decided the same day.¹³³

On remand from the Supreme Court, the Eleventh Circuit in *Mohawk Industries*¹³⁴ held that under the facts of the case, the plaintiffs’ complaint satisfied the direct relationship requirement set forth in *Holmes* and *Anza* to withstand the defendant’s motion to dismiss.¹³⁵ The Eleventh Circuit noted that the complaint sufficiently alleged that “Mohawk’s widespread scheme of knowingly hiring and harboring illegal workers has the purpose and direct result of depressing the wages paid to the plaintiffs.”¹³⁶

130. The Eleventh Circuit split with the Seventh Circuit’s stricter requirements for establishing an “enterprise” articulated in *Baker*, because “all that is required is that the enterprise have a common purpose.” *Id.* at 1259.

[In the Eleventh Circuit,] there has never been any requirement that the ‘common purpose’ of the enterprise be the sole purpose of each and every member of the enterprise. In fact, it may often be the case that different members of a RICO enterprise will enjoy different benefits from the commission of predicate acts. This fact, however, is insufficient to defeat a civil RICO claim.

Id. The limited scope of this Note focuses solely on alleging proximate cause at the pleading stage and does not purport to address the enterprise requirement under § 1962(c), which may be an obstacle to recovery if a case is permitted to proceed.

131. *Mohawk Indus., Inc. v. Williams*, No. 05-465, 126 S. Ct. 830 (2005) (granting certiorari on the sole question of “whether a defendant corporation and its agents can constitute an ‘enterprise’ under [RICO], in light of the settled rule that a RICO defendant must ‘conduct’ or ‘participate in’ the affairs of some larger enterprise and not just its own affairs”). Questions Presented, *Mohawk Indus., Inc. v. Williams*, No. 05-465, 126 S. Ct. 830 (2005), available at <http://www.supremecourtus.gov/qp/05-00465qp.pdf> (last visited Aug. 22, 2006).

132. *Mohawk Indus., Inc. v. Williams*, No. 05-465, 126 S. Ct. 2016 (2006).

133. *Anza v. Ideal Steel Supply Corp.*, No. 04-433, 126 S. Ct. 1991 (2006) (holding that a business competitor cannot maintain civil RICO action against another competitor predicated on failure to pay state sales tax due to lack of proximate cause under *Holmes* analysis).

134. *Mohawk Indus., Inc.*, No. 04-13740, 2006 WL 2742005 (11th Cir. Sept. 27, 2006).

135. *Id.* at *11.

136. *Id.* at 1289.

3. Undocumented Workers as Plaintiffs

The precise question of whether RICO permits undocumented workers to bring civil suits against employers, predicated on immigration offenses, has yet to reach a court of appeals. Relying on the persuasive authority of the foregoing line of cases, undocumented workers recently brought a civil RICO suit against their former employer in a federal district court.¹³⁷ In *Zavala v. Wal-Mart*,¹³⁸ a putative class of undocumented workers who were hired by contractors to work as janitors in various Wal-Mart stores brought a RICO enterprise claim against the nation's largest private employer.¹³⁹ The undocumented workers instigated the lawsuit after federal immigration officials coordinated a large-scale raid of Wal-Mart stores in October 2003,¹⁴⁰ during which most of the *Zavala* plaintiffs were arrested.¹⁴¹ Against this backdrop of facts garnering a large amount of attention in the popular media, the *Zavala* plaintiffs alleged that Wal-Mart formed an association-in-fact enterprise with its maintenance contractors for "the purpose of profiting from a systematic violation of immigration and labor, wage and hour laws."¹⁴² The district judge dismissed the RICO enterprise count without prejudice for failure to demonstrate a factual basis for the RICO predicate act, allowing the plaintiffs to amend their complaint.¹⁴³ Specifically, the district court noted that the allegations of

137. See Wal-Mart Janitors, http://www.walmartjanitors.com/wmj94.pl?wsi=0&websys_screen=public_casedevelopments (last visited Feb. 24, 2006) (site sponsored by attorneys for plaintiffs to encourage additional undocumented workers to join the class).

138. *Zavala v. Wal-Mart Stores, Inc.*, 393 F. Supp. 2d 295 (D.N.J. 2005).

139. *Id.* at 300 (citing Brief for Defendant at 2, *Zavala v. Wal-Mart Stores, Inc.*, 393 F. Supp. 2d 295 (D.N.J. 2005) (No. 03-5309)).

140. *Id.* As part of the so-called "Operation Rollback," on October 23, 2003, federal immigration officials from the United States Immigration and Customs Enforcement (ICE) raided sixty-one Wal-Mart stores in twenty-one states, arresting a total of 245 undocumented workers, including twelve of the named plaintiffs in *Zavala*, for alleged immigration violations. Charles Toutant, *Immigration Affidavit Buys Wal-Mart Suit*, 124 N.Y. L.J. 5 (2005). See also Stephanie Armour & Donna Leinwand, *Wal-Mart Cleaners Arrested in Sweep*, http://www.usatoday.com/money/industries/retail/2003-10-23-walmart-arrests_x.htm (updated Oct. 24, 2003).

141. Michael Maiello, *It's not Over for Wal-Mart*, FORBES, available at http://www.forbes.com/management/2005/03/18/cz_mm_0318wmt.html (posted Mar. 18, 2005). On March 18, 2005, Wal-Mart agreed to pay an \$11 million civil settlement to the government. In return, federal prosecutors agreed not to bring criminal charges against Wal-Mart for years of employing undocumented workers. Tom Mars, Wal-Mart's general counsel, said the money will be used to set up a training program for federal agents to discover small companies employing undocumented workers, like the subcontractors Wal-Mart had hired to provide janitorial services. *Id.* Of the *Zavala* plaintiffs who were arrested, most have been granted deferred action status from removal by ICE. Second Amended Complaint at 3-14, *Zavala v. Wal-Mart Stores, Inc.*, No. 03-5309, 2005 WL 3522044 (D.N.J. Nov. 21, 2005).

142. *Zavala*, 393 F. Supp. 2d at 302 (citing 18 U.S.C. § 1962(c) (2000)).

143. *Id.* at 303.

the predicate act of hiring undocumented workers in violation of section 274(a)(3)(A) was insufficient to state a claim because the plaintiffs failed to allege that Wal-Mart had actual knowledge that the undocumented workers were brought into the United States in violation of section 274(a)(3).¹⁴⁴

The undocumented plaintiffs subsequently filed a second amended complaint, alleging proximate causation in that the “[S]ystematic violation of immigration law . . . was the necessary means through which plaintiffs were denied proper compensation. . . .”¹⁴⁵ The second amended complaint did not reassert hiring violation as a predicate act.¹⁴⁶

On August 28, 2006, the district court granted Wal-Mart’s motion to dismiss the RICO enterprise claim pursuant to Rule 12(b)(6) for failure to “plead adequately that the predicate acts of immigration violations . . . proximately caused their injuries[.]”¹⁴⁷ Analyzing the case under *Anza*, the court reasoned that “the predicate acts of transporting, harboring and encouraging aliens are ‘entirely distinct’ from the immediate cause of Plaintiffs’ injuries (underpayment of wages)”¹⁴⁸ and held that “the path from wrongdoing to injury is too indirect to meet the proximate cause requirement.”¹⁴⁹ Notably, however, the court recognized that “[a] causal inference that links hiring of illegal immigrants to wage levels might be reasonable and direct”¹⁵⁰

III. ANALYSIS

Congress mandates that RICO “be liberally construed to effectuate its remedial purposes.”¹⁵¹ However, the Supreme Court has interpreted this to mean that a RICO plaintiff only has standing under § 1964(c) by alleging

144. *Id.* at 308–09. In order to allege section 274(a)(3) as a RICO predicate act, plaintiffs must allege that the undocumented workers were “brought into the country by an employer for the purpose of illegal employment” and also that the employer had “knowledge of how the [undocumented workers] had been brought into the United States” in violation of this employment provision. *System Mgmt., Inc. v. Loiselle*, 91 F. Supp. 2d 401, 408 (D. Mass. 2000). The court in *Loiselle* distinguishes section 274 from section 274A, which prohibits the “[u]nlawful employment of aliens,” but is not a RICO predicate act. *Id.* at 408–09.

145. Second Amended Complaint at 57, *Zavala v. Wal-Mart Stores, Inc.*, No. 03-5309, 2005 WL 3522044 (D.N.J. Nov. 21, 2005).

146. *Id.*; *Zavala v. Wal-Mart Stores, Inc.*, 447 F. Supp. 2d 379, 388 (D.N.J. 2006).

147. *Zavala v. Wal-Mart Stores, Inc.*, 447 F. Supp. 2d at 389.

148. *Id.* at 387.

149. *Id.* at 386.

150. *Id.* at 388 (distinguishing cases in which “the plaintiffs had alleged that *hiring* of illegal immigrants proximately caused injury by depressing wages”).

151. Organized Crime Control Act of 1970, Pub. L. No. 91-452, § 904(a), 84 Stat. 922, 947 (1970) (codified at 18 U.S.C. § 1961).

"some direct relation between the injury asserted and the injurious conduct alleged;"¹⁵² in other words, a RICO plaintiff must claim that "the alleged violation led directly to the plaintiff's injuries."¹⁵³ Depending on the factual circumstances, undocumented workers should have standing to pursue employers to recover damages under § 1964(c) by showing a direct relationship between the claimed injury of the underpayment of wages and the employers' alleged predicate immigration offense of hiring.¹⁵⁴

A. Employers' Violation of § 1962(c)

In *Commercial Cleaning, Mendoza, Trollinger, and Williams*, the courts of appeals permitted the plaintiffs to pursue, beyond the Rule 12(b)(6) stage, civil RICO actions predicated on the immigration offense of knowingly hiring undocumented workers in violation of section 274. The *Zavala* court distinguished the predicate immigration violation of hiring from other offenses proscribed by section 274 involving transporting, harboring, and encouraging of undocumented workers.¹⁵⁵

Plaintiffs suing employers based on the predicate offense of hiring in violation of section 274(a)(3) must sufficiently plead the following two elements: (1) that the employer committed the act of knowingly hiring undocumented workers, and (2) that the employer had actual knowledge that the undocumented workers it hired were brought into the United States in violation of section 274.¹⁵⁶ Although courts may allow plaintiffs to replead their complaint if the section 274(a)(3) claim lacks the second element,¹⁵⁷ courts appear to require that the employer had knowledge that the undocumented workers were brought into the United States "for the purpose of illegal employment."¹⁵⁸

152. *Holmes v. Sec. Investor Prot. Corp.*, 503 U.S. 258, 268 (1992).

153. *Anza v. Ideal Steel Supply Corp.*, 126 S. Ct. 1991, 1997 (2006).

154. This analysis proceeds on the assumption that the hypothetical plaintiff class of undocumented worker has sufficiently alleged the employer's substantive violation of § 1962, through the conduct of an enterprise in a scheme of knowingly hiring undocumented workers. The following section focuses on whether this putative class may sufficiently show proximate cause between the section 274 predicate offense and the injury alleged, which is necessary to satisfy the statutory standing requirements of § 1964(c).

155. *Zavala v. Wal-Mart Stores, Inc.*, 447 F. Supp. 2d at 388.

156. *Sys. Mgmt., Inc. v. Loiselle*, 91 F. Supp. 2d 401, 408 (D. Mass. 2000).

157. See *Commercial Cleaning Servs., L.L.C. v. Colin Serv. Sys., Inc.*, 271 F.3d 374, 387 (2d Cir. 2001); *Zavala v. Wal-Mart Stores, Inc.*, 393 F. Supp. 2d 295, 316 (D.N.J. 2005).

158. *Loiselle*, 91 F. Supp. 2d at 408.

B. Injury to Business or Property

Section 1964(c) requires that RICO plaintiffs show an injury to business or property.¹⁵⁹ Undocumented workers who have been denied federally mandated minimum standards for work already performed suffer an injury in the form of wages owed, and under current law they are permitted to sue to recover wages.¹⁶⁰

Although the argument was not formally addressed by the court in the *Zavala* opinion, in support of its motion to dismiss, Wal-Mart had argued that the undocumented workers lacked RICO standing “because the plaintiffs were not harmed by, but in fact benefited from, the alleged [immigration offenses].”¹⁶¹ Wal-Mart further argued that the plaintiffs voluntarily participated in the alleged RICO offenses, thereby severing the alleged “but for” causal chain,¹⁶² and asserted the affirmative defense of *in pari delicto*.¹⁶³ Although the law is unclear as to whether the doctrine is available as an affirmative defense to preclude plaintiffs’ claims in the RICO context,¹⁶⁴ the Supreme Court has held in the antitrust and securities law contexts that *in pari delicto* does not bar recovery when plaintiffs are merely passive participants in the violation and are not equally culpable.¹⁶⁵ Courts are unlikely to hold, particularly at the pleading stage, that undocumented workers, whose “laudable intentions,”¹⁶⁶ have been

159. 18 U.S.C. § 1964(c) (2000).

160. *See supra* Part II.B.

161. *Zavala*, 393 F. Supp. 2d at 302–03.

162. Memorandum of Defendant in Support of Its Motion to Dismiss at 29–30, *Zavala v. Wal-Mart Stores, Inc.*, No. 03-5309, 2006 WL 381605 (D.N.J. Jan. 20, 2006).

163. The *in pari delicto* doctrine provides that “a plaintiff who has participated in wrongdoing may not recover damages resulting from the wrongdoing.” BLACK’S LAW DICTIONARY 794 (8th ed. 2004). This common law defense derives from the Latin phrase *in pari delicto potior est condition defendantis*, meaning “[i]n a case of equal or mutual fault . . . the position of the [defending] party . . . is the better one.” Bateman Eichler, Hill Richards, Inc. v. Berner, 472 U.S. 299, 306 (1985). The policy that the doctrine of *in pari delicto* advances is that “courts should not lend their good offices to mediating disputes among wrongdoers” and “denying judicial relief to an admitted wrongdoer is an effective means of deterring illegality.” *Id.* Reply Memorandum of Defendant in Further Support of Its Motion to Dismiss at 11–14, *Zavala v. Wal-Mart Stores, Inc.*, No. 03-5309, 2006 WL 1732979 (D.N.J. May 5, 2006).

164. Official Comm. of Unsecured Creditors of PSA, Inc. v. Edwards, 437 F.3d 1145 (11th Cir. 2006), *petition for cert. filed*, No. 05-1335 (U.S. Apr. 14, 2006). *Edwards*, 437 F.3d at 1156. The court barred the plaintiff’s complaint because he was an active participant in the pattern of racketeering activity (Ponzi Scheme) and the application of the doctrine furthers the policy of RICO. *Id.*

165. *See* Bateman Eichler, 472 U.S. at 299 (holding *in pari delicto* does not bar recovery under securities law where plaintiffs were not equally culpable); *Perma Life Mufflers, Inc. v. Int’l Parts Corp.*, 392 U.S. 134 (1968) (holding *in pari delicto* defense does not apply to the passive involvement of antitrust participants who acquiesced to questionable terms of agreements to obtain business).

166. *See supra* note 84.

“prey[ed] upon,”¹⁶⁷ are equally culpable in an illegal immigrant hiring scheme.¹⁶⁸ Furthermore, although the participation of undocumented workers may help enable an employer’s hiring violation, section 274 itself does not impose penalties on undocumented workers.

C. Direct Relation Between Claimed Injury and Alleged Predicate Offense

To have standing to sue under section 1964(c), a plaintiff must show that the injury was proximately caused by the defendant’s predicate offense.¹⁶⁹ The Supreme Court in *Holmes* emphasized the difficulty of formulating a bright-line test to govern the result in every case to determine whether a plaintiff’s injury is sufficiently “direct” to permit standing under civil RICO, due to the “infinite variety of claims that may arise.”¹⁷⁰ Instead, the Supreme Court articulated several policy justifications, borrowed from the antitrust context, for limiting recovery only to plaintiffs who allege a direct injury.¹⁷¹ The *Holmes* proximate cause analysis has guided lower federal courts,¹⁷² and was recently supported by the Supreme Court’s recent decision in *Anza*.

167. See *id.* and *supra* note 86.

168. In *Jane Doe I v. Reddy*, 02-05570, 2003 WL 23893010 (N.D. Cal. Aug. 4, 2003), undocumented workers brought suit under civil RICO, predicated on immigration offenses. The plaintiffs alleged that the defendants forced them to work without pay. The plaintiffs also alleged that the “defendants stole their personal property.” *Id.* at *2. The defendants in *Jane Doe I* argued a motion to dismiss under the doctrine of *in pari delicto*. *Id.* at *6. The defendants argued that “because the plaintiffs were complicit in the immigration violations,” they could not recover damages under RICO, pointing to the purpose behind RICO of seeing that “innocent parties who are the victims of organized crime have a right to obtain proper redress.” *Id.* (quoting 116 CONG. REC. H35346–47 (Oct. 7, 1970)). The district court denied the defendants’ motion, explaining that the court could not at that infant stage of litigation determine that the plaintiffs, who according to their complaint “were vulnerable and powerless,” were “equally” at fault for the immigration violations. *Id.* The court held that the “plaintiffs adequately pled an ‘injury to business or property.’” *Id.* at *2. However, the court declined to decide on the merits of the defendants’ argument, and instead left the opportunity to perhaps decide that the plaintiffs were in fact equally at fault after further fact-finding. *Id.* at *6.

169. *Holmes v. Sec. Investor Prot. Corp.*, 503 U.S. 258, 268 (1992). See also *Associated Gen. Contractors of Cal., Inc. v. Cal. Council of Carpenters*, 459 U.S. 519, 520–21 (1982) (holding that unions lacked standing to sue a contractors’ association for an illegal conspiracy to sue non-union subcontractors because the conspiracy would be a direct injury to the union subcontractors, rather than the unions); *Ill. Brick Co. v. Illinois*, 431 U.S. 720, 724 (1977) (holding that government consumers lacked standing to sue based on the theory that high prices were passed on to them as a result of defendant’s illegal price-fixing scheme).

170. *Holmes*, 503 U.S. at 272, 274 n.20 (quoting *Associated Gen. Contractors*, 459 U.S. at 536).

171. *Id.* at 269.

172. See, e.g., *Mendoza v. Zirkle Fruit Co.*, 301 F.3d 1163 (9th Cir. 2002); *Commercial Cleaning Servs., L.L.C. v. Colin Serv. Sys., Inc.*, 271 F.3d 374 (2d Cir. 2001).

1. Determining Damages Attributable to the Defendant's RICO Violation

One policy justification for the direct relationship requirement concerns “the difficulty that can arise when a court attempts to ascertain the damages caused by some remote action.”¹⁷³ For undocumented workers alleging injury in the form of underpaid minimum wages and overtime premiums, a calculation of damages attributable to the scheme to hire undocumented workers would be quite simple due to the lack of potential intervening factors.

In *Anza*, the Supreme Court reasoned that National “could have lowered its prices for any number of reasons unconnected to the asserted pattern of fraud.”¹⁷⁴ The Supreme Court suggested that National “may have received a cash flow from some other source or concluded that the additional sales would justify a smaller profit margin. Its lowering of prices in no sense required it to defraud the state tax authority.”¹⁷⁵ Furthermore, the Supreme Court reasoned that “Ideal’s lost sales could have resulted from factors other than [National’s] alleged acts of fraud.”¹⁷⁶ The court in *Zavala* attempted to apply analogous reasoning by asserting that “Wal-Mart may have underpaid wages for reasons other than the workers’ immigration status, and the workers might have worked for low wages for reasons other than their immigration status.”¹⁷⁷ Unlike the attempt to recover speculative damages allegedly resulting from lost sales that could be attributable to a number of business or market factors unrelated to the fraud in *Anza*, the *Zavala* court could not persuasively articulate similar factors that could contribute to the injury in this vastly different context. Unlike in *Anza*, an employer’s underpayment of wages to undocumented workers is a purpose and direct result of its illegal hiring scheme. Otherwise, it is unlikely that employers would assume the risks of illegally hiring undocumented workers.

However, employers may argue that the injury in the form of wages owed was not caused by reason of the hiring of the undocumented workers

173. *Anza v. Ideal Steel Supply Corp.*, No. 04-443, 126 S. Ct. 1991, 1997 (2006) (citing *Holmes*, 503 U.S. at 269).

174. *Id.*

175. *Id.*

176. *Id.*

177. *Zavala v. Wal-Mart Stores, Inc.*, No. 03-5309, 2006 WL 2468513, *7 (D.N.J. Aug. 28, 2006). The Seventh Circuit questioned in dicta whether a depression of wages for legally authorized workers would be attributable to an employer’s hiring of undocumented workers, recognizing the possibility of intervening factors to interfere with the legally authorized workers receiving higher pay. *Baker v. IBP, Inc.*, 357 F.3d 685, 692 (7th Cir. 2004).

per se, but rather by the employer's violation of the FLSA,¹⁷⁸ an offense not included among RICO's exhaustive list of predicate acts.¹⁷⁹ The Second Circuit rejected an analogous argument in *Commercial Cleaning*, however, reasoning that the intended purpose of the predicate offense, the hiring of undocumented workers, is "to take advantage of [the undocumented workers'] diminished bargaining position, so as to employ a cheaper labor force and compete unfairly on the basis of lower costs."¹⁸⁰ An employer's violation of the FLSA, although relevant in determining damages, is not the direct cause of the injury, but rather the motivation behind the employer's implementation of the illegal hiring scheme.

2. Difficulty of Apportioning Damages Among Injured Parties

Another relevant consideration acknowledges the "appreciable risk of duplicative recoveries."¹⁸¹ However, the direct injury that undocumented workers allege would be entirely separate from a likewise direct injury that could legally authorized workers or business competitors could allege.¹⁸² Recovery by more than one of the aforementioned plaintiffs would not result in the overcompensation of any particular plaintiff, which was the Supreme Court's concern. The Second Circuit in *Commercial Cleaning* correctly stated that "if a defendant's illegal acts caused direct injury to more than one category of plaintiffs, the defendant may well be obligated to compensate different plaintiffs for different injuries."¹⁸³

178. In a recent case of first impression, a district court held as a matter of law that the FLSA preempted the plaintiffs' RICO claim against an employer for the underpayment of minimum wages and overtime pay. *Choimbul v. Fairfield Resorts, Inc.*, 2006 WL 2631791 (E.D. Va. Sept. 11, 2006). The *Choimbul* court noted that the plaintiffs' RICO claim was essentially premised on alleged violations of the FLSA and reasoned that but for the proscriptions of the FLSA, the defendant's conduct would not constitute a fraudulent scheme. *Id.* at *7. Future courts may find persuasive the *Choimbul* plaintiffs' argument "that RICO is not preempted by the FLSA because it is complimentary to and in furtherance of the FLSA." *Id.* at *6. Regardless, *Choimbul* is distinguishable in that the alleged RICO predicate acts consisted of mail fraud, wire fraud, and money laundering, which required the proscriptions of the FLSA to make illegal. *Id.* at *4. On the contrary, violations of section 274 constitute "racketeering activity" independent of the proscriptions of the FLSA.

179. 18 U.S.C. § 1961(1)(A)-(F) (2000). Cf. *Commercial Cleaning*, 271 F.3d at 383. The defendant argued that the plaintiff's alleged injury was caused by low wages paid to defendant's workers, rather than by their immigration status. *Id.*

180. *Commercial Cleaning*, 271 F.3d at 383.

181. *Anza v. Ideal Steel Supply Corp.*, No. 04-443, 126 S. Ct. 1991, 1997–98 (2006) (citing *Holmes*, 503 U.S. 269).

182. Legally authorized workers have alleged a similar type of injury in the form of wages, lower than the prevailing market wage, but have not alleged receiving wages lower than those required by the FLSA.

183. *Commercial Cleaning*, 271 F.2d at 383–84 ("It does not follow that any plaintiff will have been twice benefited, which was the concern in *Holmes*.").

3. Ability of More Direct Parties to Vindicate Aims of the Statute

Finally, “[t]he requirement of a direct causal connection is especially warranted where the immediate victims of an alleged RICO violation can be expected to vindicate the laws by pursuing their own claims.”¹⁸⁴ In *Anza*, the Supreme Court concluded that the direct victim of National’s fraud was the State.¹⁸⁵ Undocumented workers are the proper plaintiffs to seek recovery for the underpayment of wages; indeed, no other party could seek recovery for such injury.¹⁸⁶

The Ninth Circuit in *Mendoza* granted deference to the Supreme Court’s holding in *Hoffman Plastic* by incorporating it as a “factor” in its analysis to determine whether undocumented workers could bring civil RICO suits against employers, although nevertheless correctly recognizing that, with regard to this particular issue, *Hoffman Plastic* is not dispositive.¹⁸⁷ However, by expressly heeding the Supreme Court’s example in *Hoffman Plastic*, the Ninth Circuit thereafter concluded “that the undocumented workers cannot ‘be counted on to bring suit for the law’s vindication.’”¹⁸⁸ The Ninth Circuit justified its holding that the *Mendoza* plaintiffs, legally authorized workers, had standing to sue employers under civil RICO by reasoning that “the fact that RICO specifically provides that illegal hiring is a predicate offense indicates that Congress contemplated the enforcement of the immigration laws through lawsuits like this one.”¹⁸⁹

The Ninth Circuit was misguided in concluding that undocumented workers cannot be “counted on to bring suit” against employers based on predicate acts of immigration offenses.¹⁹⁰ However, the ability of undocumented workers to bring suit should not preclude other victims

184. *Anza*, 126 S. Ct. at 1998 (citing *Holmes*, 503 U.S. at 269–70); *see also Holmes*, 503 U.S. at 270 (citing *Assoc. Gen. Contractors*, 459 U.S. at 545) (“[T]he existence of an identifiable class of persons whose self-interest would normally motivate them to vindicate the public interest in [RICO] enforcement diminishes the justification for allowing a more remote party . . . to perform the office of a private attorney general.”).

185. *Anza*, 126 S. Ct. at 1998.

186. As the Seventh Circuit previously observed, no other parties would be entitled to recover damages for an employer’s failure to pay statutorily-mandated minimum wages and overtime premiums, other than the worker who was injured by such violation. *Baker v. IBP, Inc.*, 357 F.3d 685, 692 (7th Cir. 2004). *See supra* note 121.

187. *Mendoza v. Zirkle Fruit Co.*, 301 F.3d 1163, 1170 (9th Cir. 2002). *See supra* Part II.B.

188. *Mendoza*, 301 F.3d at 1170 (quoting *Holmes*, 503 U.S. at 273).

189. *Id.*

190. *See supra* Part II.B.

from also bringing suit based on the same predicate acts if they are able to allege a sufficiently direct injury.¹⁹¹

IV. PROPOSAL

Granting undocumented workers standing to sue employers under civil RICO will likely have an increased deterrent effect on employers who routinely hire undocumented workers who have been brought into the United States in violation of federal immigration law. Congress's inclusion of section 274, but not section 274A, within RICO's 1996 amended definitions indicates that the expansion of this enforcement tool is targeted at the most egregious offenders. Claims under civil RICO would also target employers who have conspired with labor subcontractors and other groups to circumvent the proscriptions of section 274A. Extending to undocumented workers the right to sue under RICO will lead to increased private enforcement of immigration law as employers are confronted with the potential liability of paying treble damages in class action lawsuits. A reduction in the prospects for financial gain from hiring undocumented workers will likely result in a lessened demand for undocumented labor in the United States and will further the longstanding congressional policy of preserving jobs for American workers.

Undocumented workers should be permitted to recover from employers under civil RICO, not instead of but in addition to other direct victims, because one injury is not merely derivative of the other. Under factual circumstances similar to those in *Williams*, undocumented workers could sufficiently allege proximate cause to bring a civil RICO action against employers, predicated on the section 274 illegal hiring offense. Although *Williams* recognized that the employer's predicate acts had the purpose and direct result of depressing the wages paid to legally authorized workers, the broader purpose of the illegal hiring scheme was to reduce labor costs. By those terms, the scheme directly resulted in injury to both legally authorized and undocumented workers.

But, given the substantial disincentives for undocumented workers to reveal their illegal status by bringing suit,¹⁹² the currently underutilized

191. See *supra* Part IV.C.

192. Among the disincentives that undocumented workers face are the fear of being fired, blacklisted, or ultimately ordered removed. Other crucial factors also prevent undocumented workers from bringing suit in court, including language barriers, lack of understanding of the law, and lack of access to legal aid. *But cf.* JENNIFER GORDON, SUBURBAN SWEATSHOPS: THE FIGHT FOR IMMIGRANT RIGHTS (2005) (recounting her experience with the Workplace Project, an immigrant workers' center on Long Island, New York, involving the legal activism of undocumented workers in campaigning to

option the FLSA provides for civil actions,¹⁹³ and the dismissal of the plaintiffs' claims in *Zavala*, it may be unlikely that future civil RICO actions will be brought against employers by undocumented workers.

However, as seen in *Zavala*, undocumented workers may sometimes bring suit regardless of the potential negative consequences. Although most of the *Zavala* plaintiffs had been granted deferred action status, perhaps the most willing plaintiffs may be undocumented residents against whom deportation proceedings have been initiated.¹⁹⁴ Undocumented workers who could allege sufficient proximate cause under *Anza* to withstand the employer's motion to dismiss would likely be the most deserving victims of an illegal hiring scheme and would likely have the least to risk by bringing suit.

Federal courts should grant undocumented workers standing, not only to have their injuries vindicated, but also because as a policy reason it would likely facilitate future compliance with immigration law. Should this issue reach the Supreme Court, the Court should use the opportunity to limit its holding in *Hoffman Plastic* by distinguishing between backpay for work that would have been performed versus recovery for work already performed. The Supreme Court should uphold the right of undocumented workers to sue to recover unpaid wages in accordance with principles of international law, the DOL's agency interpretation, and the federal courts that have permitted undocumented workers to recover wages for work performed post-*Hoffman Plastic*.¹⁹⁵

recoup unpaid wages and for safe working conditions); Bosniak, *supra* note 26, at 997 (arguing that some undocumented workers are more concerned with losing their jobs and intend to return to the United States shortly if ordered removed).

193. The remedy for treble damages that RICO accords offers a greater economic incentive for undocumented workers to bring suit against employers than does the lower remedy recoverable under the FLSA. Also, RICO class actions are brought under Rule 23 of the Federal Rules of Civil Procedure, whereas class actions under the FLSA have an opt-in, rather than opt-out, mechanism for joining the class, which will more likely favor a transient workforce. Granting undocumented workers standing to sue likely would encourage employers to reach out-of-court settlements with the plaintiffs to avoid paying treble damages as well as costs of litigation and attorneys' fees. See Maiello, *supra* note 141. "That leaves Wal-Mart in a bit of dilemma. They'll be under some amount of pressure to do the right thing and settle with the people, because they don't like being called racketeers." *Id.* (quoting plaintiffs' attorney in *Zavala*).

194. See U.S. Department of Homeland Security, Yearbook of Immigration Statistics: 2003, <http://www.uscis.gov/graphics/shared/statistics/yearbook/YrBk03En.htm>.

195. See *supra* Part II.B.

V. CONCLUSION

Congress's expansion of the RICO Act's list of predicate offenses to include certain immigration violations, relating to the hiring of undocumented workers, demonstrates a continued commitment—a decade after the enactment of IRCA—to reducing employment opportunities for undocumented workers as a primary method for curbing illegal immigration. Moreover, it reflects the broader longstanding congressional commitment to the protection of American workers through a restrictive immigration policy, a goal which will be furthered by granting undocumented workers standing to bring suit against employers under civil RICO.¹⁹⁶

The foregoing line of civil RICO immigration cases, which encourage collective action, has created an opening for "private attorneys general" to supplant weak government enforcement of federal immigration law. Extending this private cause of action to undocumented workers will force employers to consider *ex ante* the potential liability of paying treble damages in a class action lawsuit in its cost-benefit calculus of whether to knowingly hire undocumented workers at terms that are in noncompliance with minimum wage and overtime pay requirements.¹⁹⁷ By directly combating the employment stimulus commonly accorded with eliciting illegal immigration, civil RICO offers a potentially potent weapon for curtailing a problem which thus far has remained unabated.

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196. See *supra* Part II.A.

197. See *supra* Part I.

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