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

In economic terms, the hiring of undocumented workers produces financial gain for employers when it reduces labor costs. Given their precarious status under current U.S. law, undocumented workers are more willing to suffer exploitative work conditions—which most often include rampant violations of the federal minimum wage and overtime pay requirements of the Fair Labor Standards Act (FLSA)—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.

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, Geografía e Informática)).

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


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. 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). 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. As a result, Congress enacted the Chinese Exclusion Act of 1882 to protect domestic labor from competition from foreign workers for jobs. Three years later in 1885, Congress enacted the Alien Contract

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.


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. 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.”

2. Labor Certification

The Immigration and Nationality Act of 1952 (INA), restructured and codified immigration law. The INA replaced the previous contract labor provision with a labor certification requirement. 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, and that “the employment of such alien will not adversely affect the wages and working conditions of workers in the United States similarly employed.” The INA evinced a continuing legislative intent to protect domestic labor.

3. Immigration Reform

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

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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].
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”).
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 (”As long as job opportunities are available to undocumented aliens, the intense pressure to surreptitiously
employer to hire an undocumented worker. Under section 274A, an employer who knowingly hires or continues to employ undocumented workers is liable for civil fines and also may face criminal prosecution. The Supreme Court has noted that IRCA “forcefully” made combating the employment of undocumented workers central to the “policy of immigration law.” Congress gave contour to its cornerstone policy of reducing employment opportunities for undocumented workers by introducing an “employment verification system,” 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. Under the “IRCA regime,” 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.

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. The hiring offense of section 274 makes it a criminal offense to enter this country or to violate status once admitted as a nonimmigrant in order to obtain employment on an unauthorized alien.” See also Bosniak, supra note 26, at 979. 

[Until 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.”). 

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.


33. Id. § 1324a(e)(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).


36. Id. § 1324a(b)(3).


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).

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.  

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, or any
corresponding decrease in illegal immigration. 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, compared
to an estimated three to five million undocumented residents prior to the
enactment of IRCA. In addition, the report revealed an estimated annual
increase of approximately 500,000 undocumented residents in the United
States during recent years. 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.”

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.
41. Maria Echaveste, Keynote Address at the Bernard and Audre Rapoport Center for Human
    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
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.”
    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

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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).


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.


53. *Id.* at 149.

[It] 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 FLSA 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. 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,” and that the DOL “will continue to enforce the FLSA . . . without regard to whether an employee is documented or undocumented.”

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. 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.

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 1163625 (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).


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

In addition to establishing the “irreducible constitutional minimum of standing” necessary to invoke federal jurisdiction, plaintiffs may sue under civil RICO only if they also satisfy the statutory standing requirements set forth in section 1964(c), 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] . . . .”

The Supreme Court in *Holmes v. Securities Investor*, 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. Because section 1964(c) was modeled directly after the federal antitrust provisions granting standing, *Holmes* therefore similarly construed section 1964(c).

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(1)(A)–(F). See also *Sedima*, 473 U.S. at 481.


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).


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 treble damages he sustains and the cost of the suit, including a reasonable attorney’s fee . . . .”


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
whether the alleged violation led directly to the plaintiff’s injuries.” 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. The RICO predicate offenses alleged were mail and wire fraud, and the injury claimed was Ideal’s loss of sales. Under the Holmes analysis, 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.

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.” Congress added the immigration-related offenses to RICO’s list of predicate acts “to give federal law enforcement officials additional means with which to combat organized immigration crime.”

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.
81. See supra note 75 and accompanying text.
82. See supra note 133.
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.
before a court of appeals thus far has been brought against employers by either business competitors or legally authorized workers. 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). In RICO cases, “at 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.”

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. In Commercial Cleaning Services, L.L.C. v. Colin Service Systems, Inc., 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, and “engaged in a pattern of racketeering activity by hiring undocumented [workers in violation of section 274].” 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”).
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.
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
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.” 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, and alleged an injury to their property in the form of lost wages. Rejecting the defendant’s argument that in order to allege an injury the plaintiffs have to show a “‘property right’ in the lost wages,” 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.” In determining whether the plaintiffs had statutory standing the Ninth Circuit applied “three nonexhaustive factors in considering causation,” based on the Holmes policy justifications. 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.” 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.

Conversely, the Seventh Circuit subsequently dismissed a similar employee class action lawsuit. In Baker v. IBP, Inc., 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.
110. See infra Parts III.C.1–3.
111. Mendoza, 301 F.3d at 1170.
112. Id. See supra note 98 and accompanying text.
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.”\textsuperscript{114} Although the action was ultimately dismissed on the grounds that the employees’ union was an indispensable party to the lawsuit,\textsuperscript{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).\textsuperscript{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.”\textsuperscript{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.”\textsuperscript{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].”\textsuperscript{119}

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


\textsuperscript{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.

\textsuperscript{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)).

\textsuperscript{117} Id. at 692.

\textsuperscript{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.

\textsuperscript{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?”).

\textsuperscript{120} Trollinger v. Tyson Foods, Inc., 370 F.3d 602 (2004).
former employer. 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. 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. 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) for lack of statutory standing on the grounds that any injury they suffered was derivative of an injury to their union. 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.”

In Williams v. Mohawk Industries, 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)].” 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.” The Eleventh Circuit held that the plaintiffs’ complaint

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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.
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. 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].” In June 2006, the Supreme Court dismissed the writ of certiorari as improvidently granted, 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.

On remand from the Supreme Court, the Eleventh Circuit in Mohawk Industries 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. 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.”

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.


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. In *Zavala v. Wal-Mart*, 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. The undocumented workers instigated the lawsuit after federal immigration officials coordinated a large-scale raid of Wal-Mart stores in October 2003, during which most of the *Zavala* plaintiffs were arrested. 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.” 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. Specifically, the district court noted that the allegations of


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)).


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).


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).\footnote{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. \textit{Id.} at 408–09.}

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. . . .”\footnote{Second Amended Complaint at 57, Zavala v. Wal-Mart Stores, Inc., No. 03-5309, 2005 WL 3522044 (D.N.J. Nov. 21, 2005).} The second amended complaint did not reassert hiring violation as a predicate act.\footnote{\textit{Id.}}

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[.]”\footnote{Zavala v. Wal-Mart Stores, Inc., 447 F. Supp. 2d at 389.} Analyzing the case under \textit{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)”\footnote{\textit{Id.} at 387.} and held that “the path from wrongdoing to injury is too indirect to meet the proximate cause requirement.”\footnote{\textit{Id.} at 386 (distinguishing cases in which “the plaintiffs had alleged that hiring of illegal immigrants proximately caused injury by depressing wages”).} Notably, however, the court recognized that “[a] causal inference that links hiring of illegal immigrants to wage levels might be reasonable and direct . . . .”\footnote{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).}

III. ANALYSIS

Congress mandates that RICO “be liberally construed to effectuate its remedial purposes.”\footnote{http://openscholarship.wustl.edu/law_lawreview/vol84/iss3/5} However, the Supreme Court has interpreted this to mean that a RICO plaintiff only has standing under § 1964(c) by alleging
“some direct relation between the injury asserted and the injurious conduct
alleged;”\textsuperscript{152} in other words, a RICO plaintiff must claim that “the alleged
violation led directly to the plaintiff’s injuries.”\textsuperscript{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.\textsuperscript{154}

\textbf{A. Employers’ Violation of § 1962(c)}

In \textit{Commercial Cleaning, Mendoza, Trollinger,} and \textit{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 \textit{Zavala} court distinguished the predicate immigration violation of
hiring from other offenses proscribed by section 274 involving
transporting, harboring, and encouraging of undocumented workers.\textsuperscript{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.\textsuperscript{156} Although courts may allow plaintiffs
to replead their complaint if the section 274(a)(3) claim lacks the second
element,\textsuperscript{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.”\textsuperscript{158}

\textsuperscript{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).
\textsuperscript{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

160. See supra Part II.B.
161. Zavala, 393 F. Supp. 2d at 302–03.
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 petitor est condition defendentis, 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,” are equally culpable in an illegal immigrant hiring scheme. 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. 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.” Instead, the Supreme Court articulated several policy justifications, borrowed from the antitrust context, for limiting recovery only to plaintiffs who allege a direct injury. The Holmes proximate cause analysis has guided lower federal courts, 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.


171. Id. at 269.

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.

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\(^{174}\) *Id*.

\(^{175}\) *Id*.

\(^{176}\) *Id*.

per se, but rather by the employer’s violation of the FLSA, an offense not included among RICO’s exhaustive list of predicate acts. 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.” 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.” 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. 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.”

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. Choimbol v. Fairfield Resorts, Inc., 2006 WL 2631791 (E.D. Va. Sept. 11, 2006). The Choimbol 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 Choimbol 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, Choimbol 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.


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


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.”).
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, 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. 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.

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).


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.  

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 \textit{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. 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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\footnotesize
196. \textit{See supra} Part II.A.
197. \textit{See supra} Part I.

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