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SUPREME COURT OF NEW JERSEY

DOCKET NO. 089632

SERGIO LOPEZ, Plaintiff-Petitioner, v. MARMIC L.L.C., and MIKE RUANE, individually, Defendants-Respondents.	CIVIL ACTION On Appeal From: Superior Court of New Jersey Appellate Division Docket No. A-2391-22 SAT BELOW: Hon. Lisa A. Firko, J.A.D. Hon. Christine M. Vanek, J.A.D.

BRIEF OF AMICUS CURIAE
SETON HALL UNIVERSITY SCHOOL OF LAW CENTER FOR SOCIAL JUSTICE
In Support of Plaintiff-Petitioner

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STATEMENT OF INTEREST OF AMICUS CURIAE

Seton Hall University School of Law's Center for Social Justice (CSJ) respectfully submits this amicus brief to inform the Court about important issues affecting New Jersey wage earners and undocumented workers. The CSJ urges the Court to recognize that undocumented workers in barter arrangements are covered by New Jersey wage laws, including the Wage and Hour Law (WHL).

Seton Hall University School of Law is dedicated to providing a quality legal education while fostering personal and social values of integrity, loyalty, and engagement with the needs of its community. Its commitment to service and to aiding the public interest is demonstrated most notably through its support of the CSJ, which houses the law school's clinical programs.[1] The CSJ is both a state-certified legal services program and a clinical legal education program in which law students and professors work together on issues of public interest affecting the poor, minority groups, and other disempowered members of society. The CSJ provides free legal representation for hundreds of indigent citizens of New Jersey and neighboring states each year. It regularly provides pro bono and amicus representation to immigrants and workers.

[1] The CSJ expresses its gratitude to law students Alejandra Aguirre, Emmeline Anderson, Elizabeth Lesso, and Myron Minn-Thu-Aye. Each is a Seton Hall Law student enrolled in the CSJ's Impact Litigation Clinic. These students drafted this amicus brief under Professor Romberg's supervision.

PRELIMINARY STATEMENT

This court should reverse the Appellate Division and hold that Plaintiff-Petitioner Sergio Lopez is an employee under the New Jersey Wage and Hour Law (WHL), and that neither compensation via a barter agreement nor immigration status removes Lopez from this classification and the WHL's protections.

Point I explains that the WHL defines an employee broadly as an individual permitted to work regardless of whether or how they are paid, including whether they are paid through barter. Point I.A explains how the WHL defines an employee as any individual permitted or suffered to work by an employer. Thus, Lopez was Marmic's employee under the WHL because Marmic permitted Lopez to perform building superintendent services on its behalf for its tenants.

Point I.B explains that the WHL's wage protections apply even when employees are compensated through nonmonetary means. The WHL's definition of wages includes the fair value of food and lodging, meaning that compensation need not be in cash to fall within the WHL's scope. Lopez's arrangement with Marmic, which involved lodging rather than cash, therefore qualifies as employment under the WHL. Although some casual or minimal barter

arrangements may fall outside the WHL's coverage, Lopez's three-and-a-half years of ongoing service cannot be considered casual.

Point I.C explains that if an employer permits an individual to work, that individual is an employee under the WHL unless the employer meets its burden to prove the individual is instead an independent contractor via the "ABC test." Because Lopez performed superintendent services in Marmic's buildings as part of the usual course of Marmic's landlord business, Marmic cannot (and did not even attempt to) meet its burden to prove that Lopez was not its employee.

Point II explains that immigration status is similarly wholly irrelevant to whether a worker is an employee under the WHL. As explained in Point II.A, the trial court (and Appellate Division) first erred by directly using immigration status to bar Lopez's recovery under the WHL. This denial was based on an erroneous construction of federal law, which precludes only recovery of "backpay" in the form of wages for work that a worker was prevented from performing due to unlawful interference by an employer. This is entirely distinct from wages for work that a worker actually performs. New Jersey wage statutes expressly and unambiguously protect undocumented workers' right to recover wages for work they actually perform, thus the direct use of immigration status to deny Lopez recovery was improper.

Point II.B explains how the trial court additionally erred by indirectly using immigration status to bar Lopez's recovery. The trial court impermissibly admitted into evidence a one-time instance of Lopez presenting an invalid social security number: a prior instance of conduct that plainly violates New Jersey Rule of Evidence 608. Further, the court used that instance as a basis to conclude that Lopez failed to meet his Mt. Clemens burden, a conclusion premised both on inadmissible evidence and a misunderstanding of the requisite certainty necessary for a plaintiff under Mt. Clemens.

Point II.C then explains the practical, adverse consequences that stem from the indirect use of immigration status in WHL claims. Admitting evidence of immigration status at trial—or even allowing discovery into immigration status—presents two significant problems: First, such evidence is highly likely to have an unduly prejudicial effect on fact-finding. Second, knowledge that immigration status will be exposed during litigation is likely to dissuade undocumented immigrants from pursing wage and hour claims. This undermines not only their rights but also federal and state immigration policy. If employers can exploit undocumented workers without consequence, they will likely be incentivized to hire undocumented workers at the expense of documented workers.

Point III explains that on remand, the trial court should reconsider whether Lopez met his initial Mt. Clemens burden without the prior specific instance of conduct impermissibly tainting his credibility. If the trial court concludes that the record as it stands is insufficient to determine whether Lopez met his burden, it may re-open evidence to allow Lopez to present further evidence regarding his hours worked and allow Marmic the opportunity to present evidence rebutting Lopez's evidence. Lastly, on remand the trial court should give Marmic the opportunity to meet its burden in establishing that it is entitled to an offset of wages owed for the lodging it provided to Lopez.

LEGAL ARGUMENT

POINT I

Individuals that an Employer Permits to Work Are Employees Under the Wage and Hour Law (WHL) Regardless of Whether They Are Compensated Nonmonetarily Through Barter.

New Jersey's Wage and Hour Law (WHL) defines employees broadly to reach those permitted to work without regard to whether or how they are paid, including whether they are paid through barter. As Point I.A explains, the WHL defines an employee as any individual permitted or suffered to work by an employer. N.J.S.A. 34:11-56a1(f)-(h). The WHL presumes that any person permitted to work by an employer is an employee. See Hargrove v. Sleepy's,

LLC, 220 N.J. 289, 314, 316 (2015). Lopez was therefore an employee under the WHL because Marmic permitted him to perform building superintendent services on its behalf.

As Point I.B explains, if a person is permitted to work and compensated nonmonetarily, like Lopez was compensated through lodging, that does not remove them from classification as an employee under the WHL. Indeed, the WHL defines wages to include "the fair value of any food or lodgings supplied by an employer to an employee." N.J.S.A. 34:11-56a1(d). Moreover, even if an individual were permitted to work but received no compensation, monetary or nonmonetary, that individual would still be an employee. Thus, compensation through nonmonetary wages—what the Appellate Division characterized as a barter arrangement—cannot possibly remove someone from employee status under the WHL.

Thus, a barter arrangement that provides nonmonetary compensation—here, lodging in the form of an apartment—in exchange for an individual's services does not remove that individual from the WHL's minimum wage and overtime protections. And even assuming there might be some exception for casual, nonrecurring work, Lopez's regular work for Marmic over three-and-a-half years was far from casual, so the fact that Marmic provided Lopez with lodging did not alter Lopez's status as an employee under the WHL.

As Point I.C explains, if an individual is permitted to provide services to an employer, that individual is an employee entitled to the WHL's wage and hour protections unless the employer meets its burden to prove the individual is an independent contractor via the "ABC test." Hargrove, 220 N.J. at 314, 316. Because Marmic cannot (and did not even attempt to) meet its burden to prove that Lopez was anything other than its employee, its inability to satisfy the ABC test reinforces the conclusion that Lopez was not an independent contractor and was instead an employee.

A. Under the WHL, an employee is any individual permitted to work by an employer, a definition intended to protect workers broadly, however they are compensated.

The WHL applies to work performed by building superintendents like Lopez, however they are compensated. The statute defines an employee as "any individual employed by an employer," specifying that to "'[e]mploy' includes to suffer or to permit to work." N.J.S.A. 34:11-56a1(f), (h); Hargrove, 220 N.J. at 304. Marmic permitted Lopez to work for three-and-a-half years as a building superintendent for Marmic's rental properties, and Lopez is thus entitled to WHL minimum wage and overtime protections for that work; employment under the WHL is determined by Marmic's permitting Lopez to perform work on its behalf, regardless of whether or how Marmic compensated him.

Any doubt that might possibly exist about the broad scope of the WHL's reach, regardless of compensation, is resolved by the fact that the WHL is a remedial statute that is to be construed broadly to protect workers such as Lopez:

> The WHL declares that it is "[t]he public policy of this State to establish a minimum wage level for workers in order to safeguard their health, efficiency, and general well-being and to protect them as well as their employers from the effects of serious and unfair competition resulting from wage levels detrimental to their health, efficiency and well-being."
>
> [Hargrove, 220 N.J. at 304 (quoting N.J.S.A. 34:11-56a).]

"As a remedial statute, the WPL should be liberally construed." Ibid. The WHL's language is sweeping, and its remedial scope makes its applicability to Lopez even clearer.

Lopez's status as an employee under the WHL is all the more plain because he would enjoy that same status under the federal Fair Labor Standards Act (FLSA), which parallels the WHL. The FLSA imposes minimum wage and overtime requirements at the federal level under a very broad definition of employee that reaches Lopez, and as explained below, the WHL's definition is at least as expansive as that of the FLSA. See Hargrove, 220 N.J. at 313.

Like the WHL, the FLSA defines employees as those who are "suffer[ed] or permit[ted] to work." 29 U.S.C. § 203(g). The Supreme Court has construed the FLSA to "define[] 'work' as 'physical or mental exertion (whether

burdensome or not) controlled or required by the employer and pursued necessarily and primarily for the benefit of the employer and his business.'" Integrity Staffing Sols., Inc. v. Busk, 574 U.S. 27, 31 (2014) (quoting Tenn. Coal, Iron & R. Co. v. Muscoda Local No. 123, 321 U.S. 590, 598 (1944)).

Courts have recognized that "[c]onsistent with the FLSA's 'remedial and humanitarian' purpose, Congress adopted definitions of 'employee' and 'employer' that brought a broad swath of workers under the statute's coverage." Johnson v. NCAA, 108 F.4th 163, 175-76 (3d Cir. 2024) (quoting Tenn. Coal, Iron & R. Co., 321 U.S. at 597) (citation omitted); see also United States v. Rosenwasser, 323 U.S. 360, 362 (1945) ("A broader or more comprehensive coverage of employees . . . would be difficult to frame."); Hargrove, 220 N.J. at 310 ("FLSA contains the broadest definition of employee among the statutes falling into the classification of social legislation.").

Even "work that is not requested by an employer, but is nevertheless 'suffered or permitted,' is compensable work time" under the FLSA and New York state minimum-wage laws. Keun-Jae Moon v. Joon Gab Kwon, 248 F. Supp. 2d 201, 228 (S.D.N.Y. 2002) (citing 29 C.F.R. § 785.11). "[I]f an employer does not want an employee to perform work, then 'it is the duty of management to exercise its control and see to it that the work is not performed . . . . It cannot sit back and accept the benefits without compensating for them.'"

Ibid. (quoting 29 C.F.R. § 785.13). Marmic permitted Lopez to engage in physical exertion as a building superintendent serving its commercial and residential tenants, on Marmic's behalf and primarily for its benefit, thus satisfying the FLSA's definition of employment.

The WHL uses language parallel to the FLSA, and the WHL definition of employee "may cast a wider net than the FLSA." Hargrove, 220 N.J. at 314. As with the FLSA, under the WHL, any person permitted to work by an employer is presumptively an employee, see id. at 305—unless proof of some other status affirmatively dictates otherwise. Marmic permitted Lopez to work as a building superintendent in Marmic's rental properties, providing services on Marmic's behalf to its commercial and residential tenants. Lopez was therefore presumptively an employee under the WHL unless Marmic has some basis to demonstrate otherwise. As explained below, Marmic cannot demonstrate that Lopez was anything other than an employee because a barter arrangement is irrelevant to whether Lopez was an employee, see Point I.B, and because he was not an independent contractor, see Point I.C.

B. The WHL's protections extend to barter employment agreements.

The WHL's definition of wages encompasses "the fair value of any food or lodgings supplied by an employer to an employee." N.J.S.A. 34:11-56a1(d); see also 29 U.S.C. § 203(m) (defining wage to include "the reasonable cost . . .

to the employer of furnishing such employee with board, lodging, or other facilities"). Therefore, a barter arrangement—i.e., an employment agreement in which the employee is paid in whole or in part with nonmonetary compensation, such as the lodging provided here—does not in any way preclude an employment relationship.

Moreover, while some barter arrangements that are casual and nonrecurring, involving only de minimis work, may arguably fall outside the scope of WHL employment, that is because those arrangements are casual or de minimis, not because they are barter arrangements. Because Lopez's work for Marmic was neither casual nor de minimis, his barter arrangement falls within the WHL's definition of employment and does not remove him from WHL's wage and hour protections for employees.

1. The WHL covers barter arrangements given its broad definition of wages to include nonmonetary compensation and its broad, remedial purpose to protect all workers.

The WHL, like its federal FLSA counterpart, was intended to be liberally construed to protect all workers, including those compensated through barter arrangements. "The WHL is designed to 'protect employees from unfair wages and excessive hours'" and "should be construed liberally to effectuate its purpose." Hargrove, 220 N.J. at 304 (quoting *In re* Raymour & Flanigan Furniture, 405 N.J. Super. 367, 376 (App. Div. 2001)). Given the broad,

remedial construction appropriate under the WHL, if there were any statutory ambiguity about the WHL's applicability to barter arrangements, any doubt should be resolved in favor of coverage.

The WHL, however, is not even ambiguous, overtly defining wages to cover barter employment agreements in which an employee is compensated nonmonetarily. Specifically, wages under the WHL encompass not only "moneys due an employee from an employer for services rendered," but the definition expressly "includ[es] the fair value of any food or lodgings supplied by an employer to an employee." N.J.S.A 34:11-57a1(d); cf. 29 U.S.C. § 203(m) (defining wage under the FLSA to include "the reasonable cost . . . to the employer of furnishing such employee with board, lodging, or other facilities").

Thus, wages under the WHL encompass nonmonetary payment. The Appellate Division characterized Marmic's payment to Lopez in the form of lodging as a "barter" arrangement, apparently because Marmic compensated Lopez for his work by providing him lodging and (after the first two weeks) not paying him any money. Such a nonmonetary, barter arrangement is entitled to the same protections as any employment relationship under the WHL in which wages are in part or whole in monetary form. The distinction between monetary and nonmonetary wages makes no difference under the WHL: There is nothing unlawful or improper about an employment agreement in which compensation

is nonmonetary. The WHL simply requires that the value of the compensation be at least minimum wage, and that overtime hours beyond 40 hours per week are compensated at time-and-a-half, however that compensation is provided.

Though case law under the WHL itself on this issue is limited, case law under both New Jersey's Workers' Compensation Act and under the FLSA provide compelling evidence that WHL wages encompass nonmonetary payments. The Workers' Compensation Act (WCA), N.J.S.A. 34:15-1 to -147, protects employees, which "includes all natural persons . . . who perform service for an employer for financial consideration." N.J.S.A. 34:15-36. Eligibility under the WCA, unlike under the WHL, requires financial consideration, but even under the WCA the financial consideration need not be monetary.

"Financial consideration, under the WCA need not be in the traditional form of a wage. For instance, free board and lodging or a rent-free apartment have been held to constitute consideration given in return for services rendered." Walrond v. County of Somerset, 382 N.J. Super. 227, 239 (App. Div. 2006) (citing Britten v. Berger, 18 N.J. Misc. 215, 217, 12 A.2d 875 (Dept. Labor 1940) (finding workers' compensation to be available when someone was "hir[ed] as janitor and superintendent for which services he was to get the free use of a basement apartment together with gas, heat and lights [thereby resulting in] the relation of employer and employee")); see also Simpson v. Vetty, 3 N.J.

Misc. 9 (Dept. Labor 1925) (finding that the injured petitioner, who was provided services in exchange for board and lodging, was an employee).

Similarly, abundant case law exists under the FLSA that workers who are compensated nonmonetarily are nonetheless employees entitled to wage-and-hour protections. As stated in Point I.A, the FLSA is the WHL's federal counterpart and courts have repeatedly found that wages under the FLSA encompass lodging and other in-kind, nonmonetary payments received in exchange for work. The Supreme Court held that a religious foundation whose associates worked in exchange for food, clothing, shelter—but no money—nonetheless received wages and were thus covered by the FLSA. Tony & Susan Alamo Foundation v. Secretary of Labor, 471 U.S. 290 (1985). The Court further found that the "associates [were] 'employees' within the meaning of the Act, because they work[ed] in contemplation of compensation" in the form of food, clothing, and shelter, and were thus entitled to minimum-wage and overtime protections just as if they had been paid monetarily. Id. at 306.

WHL employment is defined by the employer's suffering or permitting an employee to work, regardless of how—or whether—the employer compensates the employee. Thus, even if someone permitted to work is not compensated at all, monetarily or otherwise, they are nonetheless an employee entitled to minimum-wage and overtime protections under the FLSA, unless they fit into

the narrow "exception for individuals who volunteer their services to public agencies . . . ." Brown v. N.Y.C. Dep't of Educ., 755 F.3d 154, 161 (2d Cir. 2014); Todaro v. Township of Union, 40 F. Supp. 2d 226, 229 (D.N.J. 1999) (recognizing "a 'volunteer' to be 'an individual who performs hours of service for a public agency for civic, charitable, or humanitarian reasons, without promise, expectation or receipt of compensation for services rendered . . . .'") (quoting 29 C.F.R. § 553.101(a)).[2] Thus, the fact that Marmic provided Lopez with lodging, thereby creating what the Appellate Division characterized as a barter arrangement, does nothing whatsoever to undermine the existence of employment under the WHL.[3]

[2] See also Brown, 755 F.3d at 161, citing Walling v. Portland Terminal Co., 330 U.S. 148, 152 (1947), as suggesting a conceivable non-statutory exception for individuals "who [worked] without promise or expectation of compensation, but solely for . . . personal purpose or pleasure"; Tony & Susan Alamo Found., 471 U.S., at 303 n.25, 306 n.32 (reading voluntary exception to FLSA extremely narrowly as applied to non-public entities, even charitable non-profits).

[3] Though nonmonetary payments—such as lodging—can qualify as wages under the WHL, the WHL does not spell out what conditions an employer must meet to credit lodging against wages owed. Indeed, as explained in Point III, amicus respectfully suggests that this Court should note that on remand it is by no means clear that Marmic's provision of lodging qualifies as compensation for Lopez under the WHL that counts even partially toward satisfying its minimum wage obligations.

2. Employment agreements, barter or otherwise, are not employment relationships if they are de minimis or casual because they arise by chance or are non-recurring.

While New Jersey courts have not considered the question under the WHL, exceptions to employment relationships exist under the WCA for casual work that arises by chance or is non-recurring. Even assuming similar exceptions to employment might exist under the WHL, which is doubtful because the WHL does not contain the WCA's specific statutory exemptions, they are entirely inapplicable to Lopez's prolonged and recurring work for Marmic as a building superintendent.

The WCA excludes from coverage casual employment, defined as "employment, the occasion for which arises by chance or is purely accidental; or if not in connection with any business of the employer, as employment not regular, periodic or recurring." N.J.S.A. 34:15-36. "Overlapping between casual employees and independent contractors is common, and it is not unusual that a petitioner falls into either or both unprotected classes." Berkeyheiser v. Woolf, 71 N.J. Super. 171, 176 (App. Div. 1961).

This Court has rejected the existence of a casual employment relationship where the plaintiff was hired to move bowling alley parts, even when the injury occurred on the first and only day of work so might possibly have been thought of as not regular or recurring employment. Thompson v. G. Correale & Sons,

Inc., 130 N.J.L. 431 (1943). The Court explained that the work was not by chance or accident, and even though the job was expected to last only one day, the formal hiring established an employment relationship entitling the plaintiff to workers' compensation. Ibid.

The WHL does not contain the statutory exception for casual work present under the WCA. And even assuming some similar principle might apply by analogy, which it should not, the WCA criterion is not satisfied here. If there were any question about whether Lopez's work for Marmic was somehow an informal or casual arrangement involving only minimal labor or casual work in exchange for in-kind benefits, thus falling outside the WHL's protections, the WCA parallel forecloses any such argument. Lopez's employment was not casual and recurred for three-and-a-half years.

In sum, wages under the WHL include nonmonetary compensation such as lodging, thus Lopez's barter arrangement with Marmic falls within the WHL's protections. Marmic permitted Lopez to provide superintendent services for three-and-a-half years on its behalf, Lopez, 2024 N.J. Super. Unpub. LEXIS 1282, at *4, and was thus his employer. The fact that Marmic compensated Lopez by providing lodging, rather than money (compensation it may or may not be entitled to claim as an offset, see Point III), does not alter the existence of an employment agreement.

C. Under the WHL, an individual permitted to provide services to an employer is an employee unless the employer proves that the individual satisfies all three parts of the ABC test and is thus an independent contractor.

Lopez is presumed to be an employee under the WHL because he was permitted to provide services to Marmic. See Hargrove, 220 N.J. at 304-05, 316. And if Marmic argues on remand that Lopez was somehow not an employee but instead an independent contractor because he also did superintendent-like work outside of his employment with Marmic, this Court should recognize that this possibility is precluded by the ABC test.

This Court held in Hargrove that "employment-status issues raised under the WPL or WHL—i.e., whether a person retained to provide services to an employer is an employee or independent contractor—are governed by the 'ABC' test." Hargrove, 220 N.J. at 316. Therefore, an employer can only rebut an individual's presumed employee status by demonstrating that the individual was an independent contractor rather than an employee, and it can only do so via the ABC test. Marmic cannot satisfy that standard.

Under the ABC test, an employer only rebuts an individual's presumed employee status if the employer proves each of the following criteria:

> (A) Such individual has been and will continue to be free from control or direction over the performance of such service, both under his contract of service and in fact;

> (B) Such service is either outside the usual course of business for which such service is performed, or that such service is performed outside of all the places of business of the enterprise for which such service is performed; and
> (C) Such individual is customarily engaged in an independently established trade, occupation, profession, or business.
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> [N.J.S.A. 43:21-19(i)(6).]

"The failure to satisfy any one of the three criteria results in an 'employment' classification." Carpet Remnant Warehouse, Inc. v. N.J. Dep't of Labor, 125 N.J. 567, 581 (1991). Although the FLSA distinguishes between employees and independent contractors through an "economic realities" test that examines a worker's dependence on an employer, "the 'ABC' test operates to provide more predictability and may cast a wider net than the FLSA 'economic realities' standard." Hargrove, 220 N.J. at 314. Even assuming that Marmic could satisfy Part (A) of the ABC test, which is unlikely,[4] Marmic plainly cannot satisfy Parts (B) or (C) of the ABC test.

[4] As to Part (A) of the ABC test, workers are free from an employer's control if they "are not subject to dismissal for failure to perform a given amount of work or to follow recommended methods of performance." Carpet Remnant Warehouse, Inc., 125 N.J. at 591 (1991) (citations omitted). Here, it is undisputed that Marmic dismissed Lopez because it believed he failed to perform his agreed-upon work, thus demonstrating that he was subject to dismissal for what Marmic asserts was a failure to perform (rather than retaliation for Lopez's having filed this lawsuit). See Trial Tr. 15:3-7 (Aug. 22, 2018). Moreover, there is good reason to believe that Marmic reserved the right

To satisfy Part (B), an employer must prove that the individual's services are provided either outside the employer's usual course of business or outside the employer's places of business. Hargrove, 220 N.J. at 305. For example, a person who solicited customers on behalf of an insurance agent worked in the agent's "usual course of business." William H. Goldberg & Co. v. Div. of Emp. Sec., 21 N.J. 107, 109–10, 114 (1956). An employer's places of business are the "locations where the enterprise has a physical plant or conducts an integral part of its business." Carpet Remnant Warehouse, Inc., 125 N.J. at 592. For instance, a carpet seller's places of business excluded consumers' residences where its carpets were installed. Ibid.

In this case, Lopez performed his work within Marmic's buildings to make those spaces usable and habitable for Marmic's commercial and residential tenants, work that was performed both within Marmic's places of business and in the usual course of Marmic's business. Thus, Marmic cannot show that Lopez did not satisfy Part (B) of the ABC test, thereby establishing his status as an employee.

To prove Part (C) of the ABC test, an employer must show that the individual's "enterprise . . . is stable and lasting—one that will survive the

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to control Lopez's work. See, e.g., Hargrove, 220 N.J. at 305, Phila. Newspapers, Inc. v. Bd. of Rev., 397 N.J. Super. 309, 322 (App. Div. 2007).

termination of the relationship." Hargrove, 220 N.J. at 305 (quoting Gilchrist v. Div. of Emp. Sec., 48 N.J. Super. 147, 158 (App. Div. 1957)). Part (C) is "obvious[ly]" satisfied if, "when the working relationship ends, the worker is fully unemployed." East Bay Drywall, LLC v. Dep't of Labor & Workforce Dev., 251 N.J. 477, 497 (2021). Otherwise, the individual's "ability to maintain an independent business" depends on several factors, including the following:

> [T]he duration and strength of the [individual's] business[], the number of customers and their respective volume of business, the number of employees, and the extent of the [individual's] tools, equipment, vehicles, and similar resources. . . . [And] the amount of remuneration [the individual] received from other [employers].
>
> [Carpet Remnant Warehouse, Inc., 125 N.J. at 592-93.]

Lopez worked for Marmic for three-and-a-half years, and during that time he provided superintendent services in the entirety of Marmic's two buildings, for both its commercial and residential tenants. Though he also did odd jobs for various other residents of the neighborhood in addition to his employment by Marmic, Marmic was not simply one of Lopez's "customers." Lopez had no employees assisting him with his work for Marmic. See Transcript of Trial 35:15-17 (Aug. 18, 2022) (hereinafter "Trial Tr."). He did not own all of the equipment he needed as a building superintendent. See Trial Tr. 35:18-21. Lopez described the only work he did in addition to his employment by Marmic as "tiny jobs," Trial Tr. 38:2, ones that were minor and not recurring. Thus, the

factors in Carpet Remnant Warehouse, Inc. strongly suggest that Lopez did not have an independently established business as a building superintendent and does not satisfy Part (C) of the ABC test. Because Marmic would be unable to show that Lopez satisfies all parts of the ABC test, and likely satisfies none of them, Lopez was Marmic's employee and is protected by the WHL.

POINT II

Workers Are Employees Covered Under the WHL, Regardless of their Immigration Status.

As explained above, a barter agreement does not alter employment status. Immigration status is also wholly irrelevant to whether a worker is an employee under the WHL. As explained in Point II.A, the trial court (and Appellate Division) erred by misapplying federal law and misconstruing Supreme Court precedent to hold that undocumented workers may not assert wage claims for hours actually worked. The court thereby improperly directly used immigration status to deny Lopez recovery under the WHL, in contravention of New Jersey employment law.

As explained in Point II.B, the trial court less obviously erred by indirectly using Lopez's immigration status to deny recovery: the court impermissibly admitted evidence of Lopez's prior instance of using an invalid social security number in applying for his job with Marmic as a basis to conclude that Lopez

had the general character trait of lacking credibility, a conclusion that violates New Jersey Rule of Evidence 608. The trial court's improper conclusion that Lopez lacked credibility resulted in its conclusion that Lopez had not met his burden under the governing Mt. Clemens standard to raise a fair inference as to the number of hours he worked, thus improperly mandating dismissal of his WHL claim.

Point II.C then explains the significant practical adverse effects that stem from such indirect use of immigration status in a WHL claim: a court's use of—or an employer's attempt to conduct discovery into—a worker's immigration status (1) has an improper and highly prejudicial effect on fact-finding in such claims, and (2) improperly deters undocumented workers from protecting their right to be compensated for hours they have worked, thereby undermining their rights and federal and state labor and immigration policy.

A. The trial court erred by directly using Lopez's immigration status to bar recovery under the WHL.

The trial court erroneously found that Lopez was not entitled to relief under the WHL because he was undocumented and was thus not legally entitled to receive compensation for hours actually worked. This direct use of immigration status to deny recovery is improper because (1) compensation for work already performed, contrary to the trial court's and Appellate Division's analysis, is not barred by Hoffman Plastic Compounds, Inc. v. NLRB, 535 U.S.

137 (2002), or by the Immigration Reform and Control Act (IRCA), 8 U.S.C. § 1324a, and (2) the WHL—and New Jersey's other wage statutes[5]—expressly and unambiguously apply to and protect the wage and hour rights of undocumented workers.

1. Hoffman and IRCA do not preclude recovery under the WHL because they do not bar undocumented workers' wage and hour claims for work already performed.

The trial court and Appellate Division erred in holding that Hoffman construes IRCA to bar undocumented workers' claims for hours they have already worked.[6] Because Hoffman's obvious inapplicability is reviewed in briefing by other amici, this brief addresses it only briefly. Hoffman's narrow holding is that undocumented status precludes recovery of backpay in the form

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[5] New Jersey has three statutes that protect employee wages: the Wage and Hour Law (WHL), N.J.S.A. 34:11-56a to –56a41; the Wage Payment Law (WPL), N.J.S.A. 34:11-4-1 to –4.15; and the Wage Collection Law (WCL), N.J.S.A. 34:11-57 to –67.2. This brief focuses on the WHL, the statute most plainly implicated in Lopez's claims, but the same principles apply under all the wage statutes. See Hargrove, 220 N.J. at 312-13 (observing the "long-standing practice of treating both [WHL and WPL] schemes in tandem," and holding that such "[s]tatutes addressing similar concerns should resolve similar issues . . . by the same standard.").

[6] The trial court overtly reasoned that Lopez's undocumented status barred his claim. Ruane, on behalf of Marmic, told Lopez, "you're undocumented, you don't -- you don't have a valid social security number . . . . And if he fixes the problem he would get paid. Which he knew throughout the two [sic] and a half years he worked for Mr. Ruane and he never fixed the problem. He now turns around and says he's titled to wages when he knows -- knew full well he wasn't qualified to earn those -- be paid those wages legally because he -- he was an undocumented alien." Trial Ct. Dec. Tr. 21:22-25; 22:1-6.

of recovery of wages for work that a worker did not perform because they were prevented from performing that work due to unlawful conduct by the employer, such as unlawful discharge. See Hoffman, 535 U.S. at 149. Hoffman's holding is wholly inapplicable to the recovery of wages for work already performed (as numerous cases cited by the Appellate Division recognized).

Indeed, New Jersey courts have recognized that "Hoffman has not been expanded beyond its specific focus." Crespo v. Evergo Corp., 366 N.J. Super. 391, 398 (App. Div. 2004) (collecting cases holding that Hoffman did not preclude wage claims for relief other than backpay, such as minimum wage and overtime claims). Virtually every court that has considered the issue has concluded that Hoffman does not bar recovery for unpaid minimum wages or overtime for work already performed under either the federal Fair Labor Standards Act or state analogs such as the WHL.[7]

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[7] See, e.g., Serrano v. Underground Utils. Corp., 407 N.J. Super. 253, 270-72 (App. Div. 2009) ("undocumented workers can recover damages arising out of statutory violations for 'work already performed'"); Zeng Liu v. Donna Karan Int'l, Inc., 207 F. Supp. 2d 191, 192 (S.D.N.Y. 2002) ("Courts have distinguished between awards of post-termination back pay for work not actually performed and awards of unpaid wages pursuant to the Fair Labor Standards Act" for work that was performed, the latter of which are recoverable); see also Fact Sheet #48: Application of Application of U.S. Labor Laws to Immigrant Workers: Effect of Hoffman Plastics decision on laws enforced by the Wage and Hour Division, U.S. Dep't of Lab. (July 2008), https://www.dol.gov/agencies/whd/fact-sheets/48-hoffman-plastics (distinguishing between pay for time an employee "would have worked," which is not

The trial court and Appellate Division similarly erred in holding that IRCA, even apart from Hoffman, statutorily precludes undocumented workers from recovering minimum wages and overtime under the WHL for work already performed. IRCA has no applicability to wage claims for work already performed. It applies only to the legality of employing undocumented immigrants; it does not govern labor practices such as minimum wage and overtime claims stemming from such employment that in fact occurred. Hoffman, 535 U.S. at 147, 152 (affirming agency authority to enforce remedies other than backpay for work not performed); see also Fernandez-Lopez v. Jose Cervino, Inc., 288 N.J. Super. 14, 19-20 (App. Div. 1996) (distinguishing between work that is itself illegal and thus recovery is impermissible, even for work that was actually performed, as opposed to work that is legal but the individual is prohibited from performing it, as to which recovery is permissible). Labor practices are regulated by the FLSA and state analogs, which remain applicable to claims for unpaid wages by undocumented workers post-Hoffman.

2. New Jersey Wage statutes expressly require employers to pay undocumented workers for work performed.

Because Hoffman and IRCA do not impose a bar under federal law to recovery for work already performed, the only question before this Court is

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recoverable for those who are not legally authorized to work, as opposed to pay for hours "actually worked," which is recoverable).

whether undocumented workers are protected under the WHL and New Jersey's other wage statutes. The answer to that question is unequivocally yes.

New Jersey's wage statutes do not contain any immigration status preconditions or exclusions. The WHL (similar to New Jersey's other wage statutes) broadly defines "employee" as "any individual employed by an employer" and defines "employ" as "to suffer or permit to work." N.J.S.A. 34:11-56a1(f), (h). This broad definition includes all categories of employee that are not expressly excluded by the legislature. Fernandez-Lopez, 288 N.J. Super. at 18, 21 (distinguishing between "longshoremen," who were expressly excluded by the legislature, and "undocumented aliens," who were not); see also Montoya v. Gateway Ins. Co., 168 N.J. Super. 100, 103 (App. Div. 1979) (noting that inclusive terms such as "person," as opposed to the exclusive term "citizen," are understood to apply regardless of citizenship or immigration status). And if there were any doubt, the WHL's status as a remedial statute that is to be "liberally construed" to effectuate its purpose of protecting employees, Hargrove, 220 N.J. at 304, makes its applicability to undocumented workers all the more plain.

Further, the New Jersey Department of Labor (NJDOL) has provided its interpretation that undocumented immigrants are covered by New Jersey's wage statutes. An agency's "interpretation of statutes within its scope of authority" is

entitled to "great deference." Hargrove, 220 N.J. at 301-02. The NJDOL, responsible for overseeing New Jersey labor laws, expressly states that those laws "protect[] all workers, regardless of immigration status." Protecting the Rights of Immigrant Workers in NJ, N.J. Dep't of Lab. & Workforce Dev., https://www.nj.gov/labor/myworkrights/worker-protections/immigrant_workers/rights.shtml.

Additionally, New Jersey has long recognized that undocumented workers are protected under a similar state statutory scheme: workers' compensation. Similar to New Jersey wage statutes, the Workers Compensation Act (WCA) defines "employee" broadly and inclusively and provides recovery for work already performed. See N.J.S.A. 34:15-36 (defining "employee" as "all natural persons"); Mendoza v. Monmouth Recycling Corp., 288 N.J. Super. 240, 247 (App. Div. 1996) (holding that workers' compensation provides relief for work "actually performed," and "injured illegal alien[s]"[8] are thus entitled to relief).

[8] The term "illegal alien" is outdated and largely recognized as dehumanizing. See, e.g., Kevin Johnson, *From 'Aliens' to 'Noncitizens'—the Biden Administration is Proposing to Change a Legal Term to Recognize the Humanity of Non-Americans* (Feb. 24, 2021), https://law.ucdavis.edu/faculty-blog/aliens-noncitizens-biden-administration-proposing-change-legal-term-recognize-humanity. It is used in this brief solely when quoting language where it appears in the original source. More accurate and respectful alternatives, such as "undocumented individual" or "noncitizen," are generally preferred in modern discourse. E.g., ibid.; N.J. Dep't of Child. & Fams., Off. of Diversity, Equity &

Other states almost universally agree that workers' compensation statutes apply to undocumented immigrants. E.g., Crespo, 366 N.J. Super. 391 at 398-99 (collecting cases); Design Kitchen & Baths v. Lagos, 882 A.2d 817 (Md. 2005) (same).

Moreover, reading New Jersey wage statutes to protect undocumented immigrants is not only fully consistent with IRCA and Hoffman, it actively furthers immigration and labor policy. As recognized in the workers' compensation context, "the public policy against illegal immigration may actually be subverted by refusing to grant undocumented aliens workers' compensation benefits." Fernandez-Lopez, 288 N.J. Super. at 20. Just as with workers' compensation, excluding undocumented immigrants from state wage laws would have the undesirable effect of encouraging employers to subvert statutory protections and exploit undocumented workers. See Mendoza, 288 N.J. Super. at 247. Employers, knowing they could exploit undocumented workers with no liability, would be incentivized to hire undocumented workers and underpay them, directly undermining IRCA's purpose, and harming both undocumented workers who are employed and underpaid, and documented

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Belonging, Words Matter 13 (2023), https://www.nj.gov/dcf/about/divisions/deb/Words-Matter.pdf.

workers who are not hired because the employer can instead exploit undocumented workers. See id.

B. The trial court erred by indirectly using Lopez's immigration status to deny recovery, improperly admitting evidence of his prior act in applying for his job with an invalid social security number to conclude, in violation of N.J.R.E. 608, that he lacks credibility and thus cannot prevail on his WHL claim.

Because a worker's immigration status is irrelevant to whether an employer owes WHL wages, that status is inadmissible and cannot be used as a direct bar to recovery. As explained below, immigration status similarly cannot be used as an indirect bar to recovery. But that is precisely what the trial court did here: It indirectly used Lopez's immigration status to deny his WHL claim by admitting evidence about the specific instance of Lopez's use of an invalid social security number in applying for his job with Marmic as a basis to conclude that Lopez had the character of lacking credibility, in direct violation of New Jersey Rule of Evidence 608. "Rule 608 explicitly excludes specific instances of conduct as a means of proving a character for untruthfulness, permitting only opinion or reputation evidence." State v. Scott, 229 N.J. 469, 483 (2017).

The trial court improperly utilized this proxy for immigration status to deny Lopez relief. The trial court not only admitted Lopez's specific instance of using an invalid social security number, it effectively found that prior act to establish Lopez's character trait of lacking credibility, and it relied on this lack

of credibility to preclude his ability to establish the factual basis necessary to assert a viable WHL claim. This was improper because Rule 608 bars introduction of "specific instances of a witness' conduct in order to attack or support the witness' character for truthfulness." N.J.R.E. 608(c). Moreover, this was improper because it indirectly relied on Lopez's immigration status to preclude his wage and hour claim.

1. Admitting a one-time instance of untruthful conduct to demonstrate a lack of credibility is barred by N.J.R.E. 608.

The trial court's consideration of Lopez's prior act of providing an invalid social security number when applying for his job with Marmic violates New Jersey Rules of Evidence 608 and 405. Under Rule 608, "extrinsic evidence is not admissible to prove specific instances of a witness' conduct in order to attack or support the witness' character for truthfulness." N.J.R.E. 608(c). In contrast to Federal Rule of Evidence 608, New Jersey's version of Rule 608 does not permit consideration of particular instances of prior untruthful conduct.[9]

This Court has recognized that New Jersey Rules of Evidence bar consideration of specific instances of conduct, such as Lopez's past act of submitting an invalid social security number in applying for employment with

[9] New Jersey's Rule 608 solely permits inquiry into specific prior instances of untruthful conduct if they involve "the witness's conviction of a crime," N.J.R.E. 609, or in criminal cases (and only in particular circumstances) N.J.R.E. 608(b), and none of these circumstances pertain here.

Marmic, to demonstrate character traits, such as Lopez's purported lack of credibility. "N.J.R.E. 405 provides that '[s]pecific instances of conduct not the subject of a conviction of a crime shall be inadmissible,'" and Rule "608 indicates that 'a trait of character cannot be proved by specific instances of conduct' unless the prior act was a 'false accusation against any person of a crime similar to the crime with which defendant is charged.'" Scott, 229 N.J. at 481. Moreover, even if such evidence of particular prior bad acts were for some reason admissible under Rules 405 and 608, such "relevant evidence may also be excluded on the ground that 'its probative value is substantially outweighed by the risk of . . . undue prejudice.'" Ibid. (quoting N.J.R.E. 403).

A majority of the members of this Court in Scott expressly recognized that New Jersey evidence rules bar introduction at trial of prior instances of false use of a social security number as suggestive of a character trait of lack of credibility. A concurrence to Scott by Chief Justice Rabner, joined by four other members of the Court, explained that under the version of Rule 608 in the federal courts and in the majority of state courts, someone testifying at trial "can be asked if he or she previously . . . used false social security numbers" to establish the witness's lack of credibility; in contrast, "in New Jersey, witnesses are shielded from that type of inquiry" under our narrower version of Rule

608. Scott, 229 N.J. at 492 (Rabner, C.J., concurring, joined by Patterson, Fernandez-Vina, Solomon, and Timpone, JJ.). Lopez was not shielded here.

No member of the Court disagreed that current New Jersey Rule 608 precludes introduction of the precise sort of evidence that the trial court admitted and placed great weight on here—a prior instance of the use of a false social security number as suggesting a general lack of credibility. The five concurring justices suggested that New Jersey's narrow version of Rule 608 be reconsidered, but that has not occurred. (Two justices believed the current rule strikes the appropriate balance; none questioned the operation of the current rule to bar what happened here.)

Thus, this Court has already specifically recognized that an inquiry at trial about a past instance of use of an invalid social security number as a basis to undercut credibility is barred by Rule 608. The trial court violated Rule 608 by considering Lopez's use o an invalid social security number in applying for his employment with Marmic as a basis to find that Lopez had the character trait of not being credible. Trial Court Transcript of Decision 20:5-15 (Mar. 3, 2023) (hereinafter "Trial Ct. Dec. Tr.").

Moreover, the concurrence carefully noted that use of such information—even if Rule 608 were amended to permit introduction of instances of prior untruthful conduct as a basis to suggest a propensity for untruthfulness—would

be subject to careful scrutiny for potential undue prejudice under Rule 403. Scott, 229 N.J. at 493. And in the context of a prior act of using an invalid social security number to apply for a job for which the employee is later underpaid, the prejudice of admitting any such evidence is highly prejudicial, as discussed in II.C.

2. Lopez's past use of an invalid social security number, and his purported lack of credibility, should not operate to preclude his ability to establish a just and reasonable basis for a wage and hour claim under the governing Mt. Clemens standard.

The trial court used its improper credibility determination, an indirect marker of Lopez's immigration status, to bar his WHL claim by finding that Lopez's lack of credibility precluded him from satisfying the governing standard of Anderson v. Mt. Clemens Pottery Co., 328 U.S. 680 (1946). Under Mt. Clemens, employees asserting wage and hour claims have the initial burden of presenting sufficient evidence to demonstrate that they have "in fact performed work for which [they were] improperly compensated." Id. at 687. Because employees—unlike their employers—are not required to keep records of their hours worked, the employee need only show "the amount and extent of that work as a just and reasonable inference." Ibid. Once an employee has made this modest showing, the burden shifts to the employer to rebut the initial reasonable inference presented by the employee by presenting evidence in the form of

records, which they are required to keep, that show the precise hours actually worked. Id. at 687-88.

The trial court's assessment of whether Lopez satisfied his burden under Mt. Clemens turned on its determination that Lopez lacked credibility because he had used an invalid social security number in applying for the job:

> [T]he Court is required to rely upon the veracity of the plaintiff to -- to make out the initial claim [under Mt. Clemens] in this particular case. And I don't find the -- that the plaintiff in this case to be credible or believable. He admitted that in fact to -- when he -- when he signed on and to -- and signed the W-4, he -- he lied. He basically knew that he was required to tell the truth and required to put down a valid social security number. He knew at the time he wrote the social security number that it wasn't valid.
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> [Trial Ct. Dec. Tr. 20:5-15.]

Under Mt. Clemens, the trial court held, "the testimony of the employee has to be credible. And I don't find in any way, shape or form that the plaintiff's testimony in this case is credible." Trial Ct. Dec. Tr. 25:11-14. (This purported lack of credibility seemingly resulted in "[t]he Court mak[ing] no findings of fact with regard to the amount claimed," Trial Ct. Dec. Tr. 14:17-18, thus requiring remand.)

In sum, the trial court improperly admitted Lopez's use of an invalid social security number in applying for his job. It improperly used that specific instance of untruthful conduct to conclude that Lopez had the character of not being

credible. And because Lopez had the character of not being credible, and because he knew he was an undocumented worker, the court improperly concluded he could not establish the hours he worked—even as a matter of just and reasonable inference, under the first step of Mt. Clemens.[10]

In addition to the errors arising from admitting evidence of Lopez's use of an invalid social security number, the trial court (and Appellate Division) also erred by misconstruing the nature of the certainty required under Mt. Clemens. The employee need not establish certainty as to the number of hours worked and damages thereby suffered, as the trial court believed; instead, they need only show with certainty that there was some amount of underpayment. Once they make that showing, they need not show with any exactitude the hours actually worked. Mt. Clemens, 328 U.S. at 688; see Keun-Jae Moon v. Joon Gab Kwon, 248 F. Supp. 201, 219 (S.D.N.Y. 2002) (holding that an employee met their

[10] The trial court also suggested that Lopez's credibility was undermined because when Lopez was cross-examined "by defense counsel regarding his signature on the form just below the paragraph indicating that if it was knowingly false, it was perjury," the trial court opined that Lopez "waffled and . . . attempted to not exactly answer the questions. Which the [trial court noted] is - - finding a basis of his lack of truth and veracity in his statements." Trial Ct. Dec. Tr. 20:20-25; 21-2. The trial transcript, however, shows multiple objections by Lopez's counsel (objecting to questions about what was in fact inadmissible evidence). But it shows not the slightest waffling or evasiveness by Lopez. Trial Tr. 44:22-25 to 48:1-12, Lopez was asked multiple questions about whether he knowingly submitted a false social security number in his job application; every answer was a candid, "Yes," twice with slight elaboration, and completely free of waffling.

burden when an employer largely failed to refute the employee's evidence). The trial court, however, erroneously required that Lopez's testimony about the number of hours he worked be certain: "[T]estimony from the plaintiff was clearly less than exact with regard to when he worked, for what amount of time he worked and -- and what days he worked." Trial Ct. Dec. Tr. 19:21-24.

Lopez's testimony at trial was more than enough to establish that there was at least some amount of undercompensating, and to establish a just and fair inference of the hours he worked. The trial court, however, ignored this evidence given its impermissible conclusion that Lopez was generally not credible. For example, Lopez directly testified that he worked short weeks and long weeks, stating that his hours "would vary, but . . . [t]he short week, [Lopez] would do around 37 hours and the long week would be around 60 hours." Trial Tr. 30:10-15. Lopez also further explained what his days and working hours were like on both short and long weeks, testifying that that schedule remained the same throughout his employment with Marmic. Trial Tr. 31:1-25; 32:1-6.

Ruane did not contest Lopez's testimony about his hours worked. Ruane only directly testified that he did not require or direct Lopez to work a certain number of hours every week and could not be sure of the hours Lopez worked, but he did not refute or challenge Lopez's own estimate of hours worked. "Ruane confirmed that all plaintiff's testimony at trial was accurate as far as --

concerning work duties and responsibilities plaintiff performed throughout his employment." Trial Ct. Dec. Tr. 13:25; 14:1. Thus, Lopez's uncontradicted testimony satisfied his initial burden under Mt. Clemens.

C. The trial court erred by indirectly using immigration status to bar recovery under New Jersey wage statutes in ways that undermine immigration and labor policy.

Even if evidence of immigration status—directly, or indirectly through evidence as to social security documentation—were somehow admissible despite the arguments in II.A and II.B, it should still be barred (except in highly unusual circumstances) because of the practical, adverse effect it has on litigation of wage and hour claims. Admitting evidence of a litigant's immigration status at trial—or even allowing inquiry into a litigant's immigration status during discovery—presents two significant problems.

First, any documents or facts revealing immigration status that are introduced at trial under the guise of credibility determinations carry a significant risk of undue prejudice and are thus inadmissible under Rule 403. Second, if undocumented workers know that their immigration status could be exposed during litigation, they will be discouraged from bringing litigation at the outset, undermining their own rights, and undercutting the policy that undocumented workers should be able to recover for hours actually worked so

that employers are not incentivized to hire them—rather than documented workers—because the employer can underpay and otherwise exploit them.

1. Evidence of immigration status carries a significant risk of undue prejudice.

As discussed in II.B, evidence of prior instances of using an invalid social security number in a job application is barred under Rule 608 as impermissible character evidence. Even beyond Rule 608, use of such evidence has the significant capacity to prejudice undocumented workers in contravention of federal and state labor and immigration policy. In wage and hour claims, any arguable, slight probative value of immigration status (direct or indirect) is substantially outweighed by the risk of undue prejudice and is thus barred under Rule 403.

As a threshold matter, evidence of immigration status is simply not relevant in claims for unpaid wages and overtime. As discussed in Part II.A, an individual's immigration status is wholly irrelevant to employment claims because undocumented workers are fully eligible to be paid for hours actually worked; their immigration status is therefore not a "fact of consequence to the determination of the action." Mendoza, 288 N.J. Super. at 247 (holding that a workers' compensation claim "has nothing to do with [] citizenship or immigration status"); Flores v. Amigon, 233 F. Supp. 2d 462, 464 (E.D.N.Y. 2002) (finding immigration status "not relevant" to FLSA claim).

Even if evidence of immigration status did have some slight relevance, any such relevance is exceedingly minimal and far outweighed by the risk of undue prejudice. Evidence, even if relevant, may nevertheless be excluded if "its probative value is substantially outweighed by the risk of undue prejudice." N.J.R.E. 403. Undue prejudice exists where the evidence "ha[s] a probable capacity to divert the minds of the jurors from a reasonable and fair evaluation of the issues." State v. Cole, 229 N.J. 430, 448 (2017).

Direct and indirect evidence of a worker's immigration status in a wage and hour claim has that prejudicial capacity. If introduced at trial, knowledge of an individual's "illegal status in this country is very likely to trigger negative sentiments" and impermissibly influence fact-finding. Serrano, 407 N.J. Super. at 274.

This risk of undue prejudice is paramount in any jury trial, but is also illustrated by the trial court's decision in this case. The trial court's finding that Lopez was not credible, and therefore failed to meet his burden to show unpaid wages, was based entirely on his past instance of using an invalid social security number. Trial Ct. Dec. Tr. 20:8-15; 25:11-17 ("I don't find the plaintiff in this case to be credible . . . . He admitted that when he signed the W-4 he lied. . . . He knew at the time he wrote the social security number that it wasn't valid.") (cleaned up). While the trial court recognized that it had a duty not to overtly

consider Lopez's immigration status as a factor, it did so indirectly by finding Lopez lacked credibility given his submission of an invalid social security number; Lopez stipulated to his not having work authorization, thus his use of an invalid social security number was not even arguably relevant in the proceeding. The trial court's view of undocumented workers may have colored its erroneous construction of evidence law, of Hoffman, and of Mt. Clemens, and given rise to a completely unwarranted finding of Lopez's general lack of credibility as to hours worked. (Employers, such as Marmic, who knowingly employ undocumented workers, and who do not keep the employment records the law obligates them to keep, have at least the same credibility gap as those workers.)

This conclusion that Lopez was not credible on any of his testimony relating to his wage law claim because he submitted an invalid social security number was unjustified and raises a significant concern that, when such evidence is admitted, undocumented workers will be denied compensation for work actually performed. Undocumented immigrants, by definition, do not have documents, and will necessarily either provide invalid documents or be unable to provide valid documents. If invalid or unavailable documents are a basis for denying claims for unpaid wages, immigration status will effectively be a complete bar to recovery that is otherwise protected under New Jersey law.

2. Revealing immigration status dissuades undocumented individuals from enforcing their right to be paid for hours actually worked, undercutting labor and immigration policy.

Under New Jersey law, it is "well established . . . that illegal aliens have rights of access to the courts." Crespo, 366 N.J. Super at 399 (quoting Montoya, 168 N.J. Super. at 104). This "well established" right exists only on paper if, in practice, an individual's undocumented immigration status restricts their ability to actually access the courts.

As a practical matter, even if immigration status cannot be used directly to bar undocumented immigrants from accessing the courts, knowledge that one's immigration status will be exposed during discovery or at trial is likely to deter undocumented individuals from exercising their right to file wage and hour claims due to fear of retaliatory discharge, detention, deportation, or criminal prosecution. Serrano, 407 N.J. Super. at 272 (holding that inquiries into immigration status "may have a chilling effect on those litigants when they attempt to vindicate their legal interests"); Flores, 233 F. Supp. 2d at 465 n.2. ("If forced to disclose their immigration status, most undocumented aliens would withdraw their claims or refrain from bringing an action . . . in the first instance"); United States v. Brignoni-Ponce, 422 U.S. 873, 879 (1975) ("The aliens themselves are vulnerable to exploitation because they cannot complain of substandard working conditions without risking deportation").

These fears have always been realistic and are well-documented. E.g., Hoffman, 535 U.S. at 140 (employer terminated employees who attempted to unionize); Sure-Tan, Inc. v. NLRB, 467 U.S. 883, 886-87 (1984) (employer reported undocumented workers to INS after they voted in favor of union representation); Singh v. Jutla, 214 F. Supp. 2d 1056, 1056 (N.D. Cal. 2002) (employer reported undocumented worker to INS after he filed a FLSA claim, worker was arrested and detained); Guillen v. B.J.C.R., LLC, 341 F.R.D. 61, 63 (D. Nev. 2022) (employer threatened undocumented worker with deportation if she reported hostile work environment). And these fears are all the more justified in the present political climate.

Indeed, in the case at bar, Marmic terminated Lopez shortly after he filed a claim for unpaid wages. Lopez, 2024 N.J. Super. Unpub. LEXIS 1282, at *10. Marmic contends that Lopez's termination was not retaliatory and instead was as a result of his poor work performance that coincidentally preceded his claim, but temporal proximity between protected conduct and adverse action is sufficient to create a material dispute of fact as to the existence of retaliation. See N.J.S.A. 34:11-56a25 (presumption of retaliation if an adverse action is taken against employee within 90 days of the employee filing a complaint); Maimone v. City of Atl. City, 188 N.J. 221 (2006) (stating that "temporal

proximity of employee conduct . . . and an adverse employment action . . . may support an inference of a causal connection").

Moreover, because Hoffman is an absolute bar to recovery of backpay for wages not earned due to unlawful termination, such as claims alleging termination in retaliation for filing a wage claim, safeguarding undocumented workers' ability to bring suit to at least recover unpaid wages for work already performed is a critical protection. See Flores, 233 F. Supp. 2d at 465 n.2 (stating that the "in terrorem effect" of "disclos[ing] their immigration status" would result in "most undocumented aliens . . . withdraw[ing] their claims or refrain[ing] from bringing an action," thus restricting undocumented immigrants' ability to pursue unpaid wage litigation, which "would effectively eliminate the FLSA as a means for protecting undocumented workers").

And removing wage and hour protections for undocumented workers who have actually worked harms not just those workers, but also harms documented workers: A central policy reason for requiring undocumented workers to be paid for hours they have actually worked is not just basic decency to those workers (who are no more at fault than the employers who have unlawfully employed them), but also because that right dissuades employers from avoiding hiring documented workers and instead hiring undocumented workers who can be underpaid with impunity. Failing to enforce this policy would have negative

ripple effects for society as a whole—reducing work available to documented workers, decreasing workplace safety standards, and increasing reliance on public assistance at the expense of taxpayers. See Parker v. NutriSystem, Inc., 620 F.3d 274, 279 (3d Cir. 2010) (noting that the policy behind FLSA wage and hour protection is to "prevent . . . desperat[e] . . . workers . . . from taking jobs away from [other] workers," "reduce unemployment," and mitigate "the increased risk of workplace accidents"); 8 U.S.C. § 1601(2) ("It continues to be the immigration policy of the United States that . . . aliens . . . not depend on public resources to meet their needs, but rather rely on their own capabilities").

POINT III

On Remand, If the Record is Not Already Dispositive, Lopez Should be Permitted to Demonstrate that He Satisfies the First Step of Mt. Clemens and Is Thus Entitled to Minimum Wage and Overtime, and Marmic Should Be Permitted to Demonstrate that the Cost of Lodging Should Be Credited to Such Payments.

On remand, this Court should instruct the trial court that a barter arrangement does not preclude employment status, that Hoffman does not bar Lopez's claim, and that the court may not permissibly consider Lopez's undocumented status and may not consider the prior instance in which he presented an invalid social security number. The factual record as it stands, once those errors are corrected, may well be enough to compel the conclusion that

Lopez has satisfied his burden on the first step of Mt. Clemens, and Marmic acknowledged that it did not keep the employment records necessary to refute Lopez's testimony, even if inexact, about the hours he worked, Trial Ct. Dec. Tr. 14:12-15.

The trial court would also have the discretion to re-open evidence to (1) gather further evidence from Lopez about the hours he actually worked to more fully determine whether he met his burden under Mt. Clemens to (A) show with certainty that he worked some hours, and was underpaid to at least some extent, and (B) that he raised a fair and just inference, even if inexact and not based on documentation, of the hours he worked, and (2) allow Marmic (A) the opportunity to present evidence that it has employment records of Lopez's actual work hours sufficient to satisfy its burden under Mt. Clemens, and (B) the chance to meet its burden to show that the cost of lodging should be credited as an offset to any minimum wages and overtime that it failed to pay Lopez.

Assuming Marmic has not forfeited the argument by not raising it at trial, the trial court should permit Marmic to attempt to meet its burden to prove that the cost of the lodging it provided should be credited as an offset against wages owed to Lopez—the record below does not so establish, and it is by no means clear that Marmic could do so, but it should be provided the opportunity to meet its burden. Under the analogous FLSA, employers must meet their burden to

satisfy numerous criteria in order for the employer to benefit from an offset and be credited for the value of lodging as a form of wages.

Of particular relevance are two criteria. First, "an employer who makes deductions from the wages of employees for 'board, lodging, or other facilities' . . . shall maintain and preserve records substantiating the cost of furnishing each class of facility." 29 C.F.R. § 516.27(a). Thus, employers who fail to keep such records are not entitled to claim the offset for nonmonetary compensation under 29 U.S.C. § 203(m), which requires determining the fair value of such compensation. The employer's records "shall include itemized accounts showing the nature and amount of any expenditures entering into the computation of the reasonable cost." 29 C.F.R. § 516.27(a)(1). The Department of Labor provides useful examples of the types of records that would satisfy employers' obligations: "records could include proof of mortgage or rental payments and utility bills. If an employer does not provide records to support its claim of a section [20]3(m) lodging credit, the employer has not met this prerequisite for including lodging costs in employees' wages." U.S. Department of Labor, Field Assistance Bulletin No. 2015-1 (Dec. 17, 2015), https://www.dol.gov/agencies/whd/field-assistance-bulletins/2015-1.

Second, "the lodging must be furnished in compliance with applicable, federal, state, or local law." 29 C.F.R. § 531.31. This includes proof that the

lodging had a certificate of occupancy including, notable for a basement apartment, two means of egress. In Reyes-Fana v. Moca Grocery, Inc., 2022 U.S. Dist. LEXIS 162447, at *2-4 (E.D.N.Y. Aug. 16, 2022), the court found that the plaintiff was an employee even though he "was not paid any wages for any work he did" and instead, "[i]n lieu of wages, Plaintiff was allowed to stay, rent free, in a windowless room [in the] basement" lacking a certificate of occupancy. The court found that the Plaintiff, compensated only through free lodging, was an employee within the meaning of the FLSA, and also held that the employer could not deduct the reasonable lodging costs from minimum or overtime wages owed to the employee because it "failed to maintain . . . lodging records, and because the lodging provided was in violation of local laws." Id. at *22-23 (citing 29 C.F.R. §§ 516.27, 531.31). See also Yu G. Ke v. Saigon Grill, Inc., 595 F. Supp. 2d 240, 256-57 (S.D.N.Y. 2008) ("[T]he employer must retain records documenting the out-of-pocket costs that it incurred [for non-cash benefits supplied to wage earners that it wishes to claim as an offset] and bears the burden of proving both the actual costs and their reasonableness.").

CONCLUSION

For the foregoing reasons, amicus curiae the Seton Hall Law School Center for Social Justice respectfully requests that this Court recognize that New Jersey's wage laws, including the WHL, reach all those an employer permits to work, regardless of whether that work is compensated through a nonmonetary, barter arrangement, and regardless of whether the claimant is an undocumented worker.

Respectfully submitted,

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