No. 08-21

In the Supreme Court of the United States

AGRI PROCESSOR CO., INC., PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

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QUESTION PRESENTED

Whether the National Labor Relations Board reasonably concluded that undocumented workers are employees under Section 2(3) of the National Labor Relations Act, 29 U.S.C. 152(3), as this Court held in *Sure-Tan, Inc.* v. *NLRB*, 467 U.S. 883 (1984).

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-29a) is reported at 514 F.3d 1. The decision and order of the National Labor Relations Board (Board) (App., *infra*, 1a-15a) is reported at 347 N.L.R.B. No. 107.

JURISDICTION

The judgment of the court of appeals was entered on January 4, 2008. A petition for rehearing was denied on April 1, 2008 (Pet. App. 40a-42a). The petition for a writ of certiorari was filed on June 30, 2008. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. The National Labor Relations Act (NLRA) defines "employee" to "include any employee" not expressly excluded. NLRA § 2(3), 29 U.S.C. 152(3). The definition then provides that "employee" does not include agricultural laborers, domestic servants, individuals employed by a parent or spouse, independent contractors, supervisors, and persons whose employers fall under the Railway Labor Act, 45 U.S.C. 151 *et seq.*, or otherwise are excluded from the NLRA. See NLRA § 2(3), 29 U.S.C. 152(3); *Sure-Tan, Inc.* v. *NLRB*, 467 U.S. 883, 891 (1984).

For decades, the National Labor Relations Board has concluded that the term "employee" includes workers who are undocumented aliens, and this Court has held that both "[t]he terms and [the] policies of the [NLRA] fully support the Board's interpretation." *Sure-Tan*, 467 U.S. at 891; see *id.* at 891 n.5 (tracing the history of the Board's interpretation). The Court explained in *Sure-Tan* that the statutory definition is "striking" in its breadth and that undocumented aliens do not fit within any of the statute's few exceptions. *Id.* at 891. Undocumented aliens therefore "plainly come within the broad statutory definition of 'employee.'" *Id.* at 892.

This Court also noted that the Board's interpretation was consistent with the NLRA's purpose. The NLRA seeks to "encourag[e] and protect[] the collective-bargaining process." *Sure-Tan*, 467 U.S. at 892. Excluding employees who are undocumented aliens from that process, the court explained, would "create[] a subclass of workers without a comparable stake in the collective goals of their legally resident co-workers, thereby erod-

ing the unity of all the employees and impeding effective collective bargaining." *Ibid.*

Finally, the Court observed that it "d[id] not find any conflict" between the Board's interpretation of the term "employee" and the immigration laws. *Sure-Tan*, 467 U.S. at 892. Nothing in the immigration laws "ma[de] it unlawful for an employer to hire an alien who is present or working in the United States without appropriate authorization." *Id.* at 892-893. The Court also noted that "[a] primary purpose [of the immigration laws] is to preserve jobs for American workers," and that "[a]pplication of the NLRA helps to assure that the wages and employment conditions of lawful residents are not adversely affected by the competition of illegal alien employees who are not subject to the standard terms of employment." *Id.* at 893. Application of the NLRA thus serves to diminish the incentive to hire illegal aliens, and thereby to diminish the incentive for the aliens themselves to enter the United States in violation of federal immigration laws. *Id.* at 893-894.

The Court noted, however, that the Board's authority to award *remedies* to undocumented alien "employees" could be limited by federal immigration policy. *Sure-Tan*, 467 U.S. at 902-903 & n.12. In particular, the Court held that reinstatement and backpay remedies must be conditioned on the employee's lawful admission to the country. *Ibid.* "[A] potential conflict with the [Immigration and Nationality Act] is thus avoided." *Id.* at 903.

Two years after this Court decided *Sure-Tan*, Congress enacted a new immigration statute that prohibits employers from hiring, or continuing to employ, any alien, knowing that he or she is not lawfully authorized to work in the United States. Immigration Reform and

Control Act of 1986 (IRCA), Pub. L. No. 99-603, sec. 101(a)(1), § 274A(a)(1) and (h), 100 Stat. 3360, 3368 (codified as amended at 8 U.S.C. 1324a(a)(1) and (h)). In light of those amendments, the Court subsequently held that the Board cannot award backpay to undocumented aliens. See *Hoffman Plastic Compounds, Inc.* v. *NLRB*, 535 U.S. 137, 147-151 (2002). The Court stated, however, that employers would not "get[] off scot-free" for NLRA violations against alien employees. *Id.* at 152. The Court recognized that the Board could and did impose "other significant sanctions" for violations of the NLRA, such as a cease-and-desist order enforceable by contempt. *Id.* at 152; see also *Sure-Tan*, 467 U.S. at 904 n.13.

2. a. Petitioner, a meat wholesaler, operates a facility in Brooklyn, New York. In August 2005, a local of the United Food and Commercial Workers Union (Union) requested an election to represent a unit of petitioner's employees. Petitioner and the Union stipulated to the scope of the proposed bargaining unit and agreed that an election would be held in September 2005. Pet. App. 2a, 31a. Petitioner's employees voted for union representation by a margin of 15 to 5. *Id.* at 31a-32a. After resolving petitioner's objections to the conduct of the election, the Board certified the Union as the collective-bargaining representative of petitioner's employees. *Id.* at 32a. Petitioner refused to bargain with the Union. *Ibid.*

b. The Board's General Counsel issued a complaint, alleging that petitioner's refusal to bargain violated Section 8(a)(5) and (1) of the NLRA, 29 U.S.C. 158(a)(5) and (1). Pet. App. 2a. At a hearing before an administrative law judge (ALJ), petitioner did not dispute that it had refused to bargain with the Union, but defended entirely

on the ground that the undocumented status of a number of its employees rendered the election void and relieved petitioner of any obligation to bargain. *Id.* at 30a, 32a-33a. Petitioner had used the Social Security Administration's online database to check the validity of the voting employees' Social Security numbers after the election, apparently for the first time. *Id.* at 2a, 33a. Based on the result of that online check, petitioner offered to prove that most of the numbers either did not exist or belonged to other people. *Id.* at 32a-33a. Petitioner contended that most of its workers who had voted in the election were undocumented, that undocumented aliens do not qualify as "employees" within the meaning of the NLRA, and that the election was therefore invalid. *Id.* at 2a. Petitioner urged that this Court's decision in *Hoffman* compelled the conclusion that undocumented workers no longer come within the statutory term "employee."

The ALJ rejected that defense and found that petitioner had violated the NLRA as charged. He applied the Board's position that the scope of the NLRA's protection encompasses illegal aliens. Pet. App. 33a (citing *Concrete Form Walls, Inc.*, 346 N.L.R.B. 831 (2006), enf'd, 225 Fed. Appx. 837 (11th Cir. 2007)). Although petitioner contended that *Hoffman* had changed the law, the ALJ concluded that *Hoffman* considered only whether undocumented aliens are eligible for particular remedies, not the antecedent question whether they may be considered "employees within the meaning of the [NLRA]." *Ibid.* The ALJ also noted the Board's ruling in *Concrete Form Walls* that non-matching Social Security numbers were not in any event sufficient evidence to prove that the employees were illegally working in the United States. Pet. App. 33a-34a.

c. The Board affirmed. App., *infra*, 1a-5a. The panel adopted the ALJ's order in pertinent part. See *id.* at 2a nn.2-3.

Member Kirsanow joined the decision in full, but added a brief additional explanation. Although he acknowledged that treating aliens as employees even when IRCA forbids their employment "may reasonably be seen as somewhat peculiar by the average person," that outcome was "compelled by Sec. 2(3)'s broad definition of 'employees,'" which the Board "is powerless to change." App., *infra*, 2a n.2. That, he said, "is the province of Congress." *Id.* at 3a n.2.

3. The court of appeals enforced the Board's order. Pet. App. 1a-17a.

a. The court of appeals began with the plain language of the NLRA, as construed in *Sure-Tan*. The court concluded that this Court had held that the NLRA's definition of "employee" "clearly includes undocumented aliens," and that that holding was "controlling" here. Pet. App. 4a.

The court then concluded that nothing in IRCA explicitly "alters the NLRA's definition of 'employee,'" which is the same as it was when this Court decided *Sure-Tan*. Pet. App. 5a. Nor, the court held, did IRCA implicitly repeal the broad language on which this Court had relied in *Sure-Tan*. The court applied the longstanding principle that one statute will not be read to repeal another by implication unless "such a construction is absolutely necessary . . . in order that the words of the later statute shall have any meaning at all." *Ibid.* (quoting *National Ass'n of Home Builders* v. *Defenders of Wildlife*, 127 S. Ct. 2518, 2532 (2007)). The enactment of IRCA does not require such a reading, the court concluded, because nothing in IRCA directly con-

tradicts the NLRA, and IRCA "has meaning without being read as partly repealing the NLRA: it prohibits employers from hiring undocumented aliens, which would otherwise be legal." *Id.* at 6a.

Indeed, the court of appeals noted, "all available evidence actually points" away from an implied repeal. Pet. App. 6a. First, Congress was plainly aware of *Sure-Tan*, but in adopting IRCA it "did not change the NLRA to 'expressly exempt[]' undocumented aliens from its coverage. Instead, Congress changed immigration law, never even hinting that it intended to amend the NLRA." *Id.* at 12a (quoting *Sure-Tan*, 467 U.S. at 892) (citation omitted; brackets in original). Second, under other circumstances Congress has expressly amended the NLRA's definition of "employee" to overrule this Court's interpretation of that term. *Ibid.* Third, the only references to the NLRA or the Board in the entire legislative history of IRCA point to the conclusion that Congress did not intend implicitly to amend the NLRA. Thus, the court noted both the House Judiciary Committee's explanation in its report that "the employer sanctions provisions *are not intended to limit in any way the scope of the term 'employee'* in Section 2(3)," and the committee's endorsement of the observation in *Sure-Tan* that NLRA coverage "helps to [protect] the wages and employment conditions of lawful residents." *Id.* at 7a (quoting H.R. Rep. No. 682, 99th Cong., 2d Sess., Pt. 1, at 58 (1986) (*House Report*)) (emphasis added); accord *id.* at 7a-8a (citing *House Report*, Pt. 2, at 8-9). Finally, the court noted that every other circuit to consider the question has concluded that the definition of "employee" upheld in *Sure-Tan* still controls. *Id.* at 9a (citing cases from the Seventh, Ninth, and Eleventh Circuits).

The court of appeals acknowledged that *Sure-Tan* had relied in part on the absence of any immigration law expressly barring employers from hiring illegal aliens. But it does not follow, the court stated, that this Court had intended that its holding in *Sure-Tan* would cease to have effect if Congress ever enacted such a law. Rather, the Court had merely sought to refute the contentions by two dissenting Justices in *Sure-Tan* that then-existing immigration law precluded a reading of the NLRA as applying to undocumented aliens. Pet. App. 10a. Nor, the court of appeals continued, did the Court in *Sure-Tan* state how it would resolve any conflict with the immigration laws should one be found to arise at a later date. *Ibid.*

Finally, the court of appeals rejected petitioner's argument that *Hoffman* had changed the relevant law. Because this Court in *Hoffman* "explicitly declined to revisit *Sure-Tan*'s holding that undocumented aliens are employees under the NLRA," but rather addressed only what *remedies* are available to such undocumented employees, the court of appeals concluded that *Sure-Tan* remained controlling and that *Hoffman* was simply not relevant to this case. Pet. App. 13a (citing *Hoffman*, 535 U.S. at 149 n.4).

The court of appeals thought that the relevant statutory language, as interpreted in *Sure-Tan*, was sufficiently clear to dispose of this case. But the court also noted that "the task of defining the term 'employee' is one that has been assigned primarily to the [Board]," and that "the Board's construction of that term is entitled to considerable deference" and will be upheld if it is "reasonably defensible." Pet. App. 14a (quoting *Sure-Tan*, 467 U.S. at 891) (internal quotation marks omitted). The court concluded that the Board's interpreta-

tion of "employee" is "entirely reasonable" and therefore entitled to deference, particularly in light of the NLRA's central purpose of "protecting the collective-bargaining process." *Ibid.* (quoting *Sure-Tan*, 467 U.S. at 892).

b. Judge Henderson joined the court's opinion, but concurred separately to echo Member Kirsanow's observation that the result seems "somewhat peculiar." Pet. App. 17a (quoting App., *infra*, 2a n.2).

c. Judge Kavanaugh dissented. Pet. App. 18a-29a. In his view, this Court's *Sure-Tan* opinion required the term "employee" to be construed according to the following "analytical framework": "If federal law does not prohibit employment of illegal immigrant workers, then the workers can be 'employees' under the NLRA. If on the other hand federal law prohibits employment of illegal immigrant workers, then the workers are not 'employees' under the NLRA." *Id.* at 20a. Under Judge Kavanaugh's view of the *Sure-Tan* holding, Congress's enactment of IRCA meant that illegal aliens ceased to be "employees" under the NLRA. See *id.* at 24a. He therefore would have "remand[ed] for the Board to address how a party may challenge a union election or certification upon discovering after the fact that illegal immigrant workers voted in the election and affected the outcome." *Id.* at 29a.

4. The court of appeals denied rehearing en banc by a vote of 7 to 3. See Pet. App. 41a-42a.

ARGUMENT

The court of appeals correctly sustained the National Labor Relations Board's interpretation of the term "employee" in Section 2(3) of the National Labor Relations Act. The Board's interpretation is the same as this

Court's in *Sure-Tan*; Congress did not amend the NLRA when it enacted IRCA two years later; the Board has consistently interpreted Section 2(3) in the same manner over the 22 years since IRCA's enactment; and the court of appeals' decision sustaining the Board's interpretation in this case is consistent with the decisions of the other courts of appeals that have addressed the question. Against this firmly settled background, review by this Court is not warranted.

1. As an initial matter, petitioner fails to acknowledge that this case turns (as *Sure-Tan* did) on an agency's interpretation of a term in the statute that the agency administers. When this Court ratified the Board's inclusive definition of "employee" in *Sure-Tan*, it relied principally on the "striking" breadth of Section 2(3), which does not include undocumented workers among its few express exemptions. Petitioner does not identify any error in that analysis or suggest that *Sure-Tan* was incorrect when decided. The narrow question presented in this case, therefore, is whether Congress, by enacting IRCA, implicitly amended the NLRA's definition of "employee," and did so with such clarity as to remove the Board's customary authority to interpret its organic statute. The Board has reasonably concluded that it did not, and the courts of appeals have unanimously sustained the Board's position. *NLRB* v. *Kolkka*, 170 F.3d 937, 940-941 (9th Cir. 1999); accord *NLRB* v. *Concrete Form Walls*, 225 Fed. Appx. 837 (11th Cir. 2007);[1] see also *Del Rey Tortilleria, Inc.* v.

[1] Concrete Form Walls argued to the Eleventh Circuit that aliens are not "employees." See Br. for Resp. at 10-14, *Concrete Form Walls*, *supra* (Nos. 06-13845, 06-14997); see also *Concrete Form Walls, Inc.*, 346 N.L.R.B. 831, 833-834 & n.15 (2006). The Eleventh Circuit summarily agreed with the Board's rejection of that argument.

NLRB, 976 F.2d 1115, 1121 (7th Cir. 1992) (noting that IRCA's legislative history "endorses" *Sure-Tan*'s holding that the Board permissibly treated undocumented aliens as employees).

a. The sound textual basis for the Board's interpretation remains unchanged. Congress did not add an exception to the NLRA for undocumented aliens, or change Section 2(3) in any way, when it enacted IRCA (or any subsequent immigration statute, see p. 16, *infra*). Petitioner contends (Pet. 11) that IRCA demonstrates a change in federal policy and that the applicable federal *law* must change with it, quoting the common-law maxim *cessante ratione*, *cessante ipsa lex*—"the reason of the law ceasing, the law itself ceases." *Rogers* v. *Tennessee*, 532 U.S. 451, 474 (2001) (Scalia, J., dissenting) (tracing the principle's history at common law). But as Justice Stevens has noted, the judiciary does not apply that principle to statutes that remain on the books, even if they may seem outmoded to the courts: "The maxim that *cessante ratione legis, cessat et ipsa lex*, applicable to the common law, does not govern the judiciary in cases involving application of positive law." *TWA* v. *Franklin Mint Corp.*, 466 U.S. 243, 273 (1984) (dissenting opinion). Section 2(3) remains on the books, unamended by Congress, just as it read at the time of *Sure-Tan*.

The dissenting judge in the court of appeals suggested that Congress had changed the NLRA, as authoritatively construed by this Court in *Sure-Tan*, without actually changing its text. In the dissent's view, the absence of any prohibition on employing illegal aliens was necessary to the holding in *Sure-Tan*, and when such a prohibition was enacted, the holding of *Sure-Tan* ceased to have force. But the Board has permissibly

concluded that the dissent's premise is incorrect. First, although the Court examined the relationship between the NLRA and federal immigration policy as an indicator of congressional intent, it did so only after examining the text of the NLRA. IRCA did not change that text, and because IRCA has independent force without reference to the NLRA, there is no reason to think that Congress meant to amend the NLRA without saying so. Second, the fact that employing illegal aliens was not independently unlawful was sufficient to show the *absence* of a conflict between labor and immigration law, but as the court of appeals explained, the enactment of IRCA does not mean that there *is* a conflict.

b. In fact, after IRCA, as before, there is no direct conflict between labor law and immigration law in this respect that would justify the courts' overriding the Board's judgment. As the court of appeals concluded, a congressional intent to bar the employment of aliens illegally present in the United States is not inconsistent with a congressional intent to protect the working conditions of *all* workers an employer has chosen to hire, through universal application of federal labor laws. Pet. App. 8a. The latter goal is a core purpose of the NLRA. As this Court explained in *Sure-Tan*, the willingness of undocumented workers to accept below-market terms of employment "can seriously depress" the employment conditions of legal workers, undermining employee unity and consequently interfering with the collective-bargaining process. 467 U.S. at 892 (quoting *De Canas* v. *Bica*, 424 U.S. 351, 356-357 (1976)); accord *Kolkka*, 170 F.3d at 941 (agreeing, in an election case, that *Sure-Tan*'s inclusive interpretation of "employee" "buttresses rather than conflicts with the purposes of the IRCA").

Enforcement of the NLRA's prohibition against unfair labor practices even as they affect employees who are not lawfully present in the United States does not render those workers' employment legal. Rather, the inclusive definition of "employee" merely prevents employers from violating the NLRA with impunity with respect to workers employed (either consciously or unknowingly) in violation of IRCA. As the Court recognized in *Sure-Tan*, excluding undocumented aliens from the definition of "employee" would "create[] a subclass of workers" outside the protection of the bargaining unit. 467 U.S. at 892. The Board could reasonably conclude that Congress would not have wanted to permit employers to benefit from their own violation of IRCA's employment provision—in the context of this case, to invalidate a union election after the fact, for the price of as little as $250 per alien in civil penalties under IRCA. See Immigration and Nationality Act § 274A(e)(4)(A), 8 U.S.C. 1324a(e)(4)(A).

Any doubt concerning the reasonableness of the Board's conclusion is dispelled by IRCA's legislative history, which makes clear that Congress did *not* intend to overturn the result in *Sure-Tan* and remove undocumented aliens from coverage under the NLRA altogether. See p. 7, *supra*; Pet. App. 6a-8a.

Accordingly, petitioner's generalized contentions that the United States currently hosts more immigrants and that its immigration laws are less forgiving than at the time of *Sure-Tan* do not demonstrate that the Board was unreasonable in continuing to harmonize these two well-supported policy goals in applying the text of the NLRA that Congress left unchanged. See, *e.g.*, *Fall River Dyeing & Finishing Corp.* v. *NLRB*, 482 U.S. 27, 42 (1987) (the Board's interpretation is entitled to judi-

cial deference if its view is "rational and consistent with the [NLRA]").

Nor does *Hoffman* undermine the recognition in *Sure-Tan* that including under the NLRA the undocumented workers an employer has chosen to hire safeguards the rights of *other*, lawfully employed workers. *Hoffman*'s limited concern was that a specific NLRA remedy—awarding backpay to undocumented aliens who were the targets of unlawful discrimination under the NLRA—would contravene federal immigration policy and encourage future immigration violations, particularly given that the NLRA requires victims to mitigate damages and, hence, to seek further (illegal) work during the backpay period. *Hoffman Plastic Compounds, Inc.* v. *NLRB*, 535 U.S. 137, 149-151 (2002). *Hoffman* thus established that the Board may not award *individuals* a particular remedy—backpay—that might encourage aliens illegally present in the United States to seek unlawful employment or, as petitioner contends (Pet. 12-13), encourage unions to use such aliens in organizing efforts.

At the same time, *Hoffman* also highlighted that the Board retains the authority to impose "other significant sanctions" when an employer violates the NLRA in its dealings with its employees, including its undocumented employees. Those remedies include requiring the employer to cease and desist from violations (on pain of contempt), which does not confer any incentive for employees to seek further unlawful employment. 535 U.S. at 152. As harmonized in *Sure-Tan* and *Hoffman*, federal labor policy and immigration policy thus simultaneously protect the labor rights of the workforce generally while creating disincentives to immigration violations by both workers and employers.

c. Because the operative statutory text remains unchanged, and because the Board's definition of "employee" is not contrary to federal immigration policy, this case presents no occasion for the Court to re-examine a longstanding statutory-interpretation precedent. *Stare decisis* has particular force in the context of statutory interpretation, particularly where—as here—Congress has legislated in the area for many years without altering the statute that this Court has interpreted. See, *e.g.*, *John R. Sand & Gravel Co.* v. *United States*, 128 S. Ct. 750, 756-757 (2008); accord *CBOCS W., Inc.* v. *Humphries*, 128 S. Ct. 1951, 1958 (2008).[2] Indeed, in *John R. Sand & Gravel*, this Court recently rejected an appeal to overrule a long-settled statutory interpretation based on "a turn in the course of the law" that (as the Court agreed) made the earlier statutory interpretation "anomalous." 128 S. Ct. at 756. (There, too, the claimant seeking to have this Court overrule settled law contended that the Court today should re-examine "the comparative weight Congress would likely have attached to competing legitimate interests." *Id.* at 756.) Moreover, the statute in *John R. Sand & Gravel* was a jurisdictional provision, which no federal agency had been vested with authority to interpret. Here, by contrast, the interpretation of the NLRA lies squarely within the Board's authority.

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[2] By contrast, in petitioner's principal case for departing from statutory stare decisis, Congress apparently had simply stood silent. *Boys Mkts., Inc.* v. *Retail Clerks Union, Local 770*, 398 U.S. 235, 241-242 (1970). Moreover, in that case the Court was convinced by subsequent, dissonant developments in the law that its original statutory interpretation had been wrong from the beginning. See *id.* at 249, 254. Here, by contrast, petitioner does not dispute that *Sure-Tan* was correct as a matter of pre-IRCA law.

d. It is, of course, open to Congress to revise the NLRA as it sees fit to accommodate changes in immigration policy. Congress did not do so in IRCA, after *Sure-Tan* was decided. And Congress has not done so in the 22 years since IRCA was enacted, during which time the Board (sustained by the courts of appeals) has adhered to the interpretation upheld in *Sure-Tan*—even though Congress has enacted several significant reforms of the federal immigration laws during that period. See, *e.g.*, Illegal Immigration Reform and Immigrant Responsibility Act of 1996, Pub. L. No. 104-208, Div. C, 110 Stat. 3009-546.

2. Although the Board and the court of appeals properly rejected petitioner's statutory-interpretation contention on its merits, petitioner would be extremely unlikely to overturn the unfair-labor-practice finding even if the Board's interpretation of the term "employee" were incorrect. Under the Board's precedents, petitioner did not sufficiently substantiate a basis for disregarding the election results based on petitioner's assertion that some voting employees were illegal aliens.

The Board has sustained unfair-labor-practice charges against employers who were "content to violate the IRCA and employ workers whom [they] believed were illegal aliens until those workers decided to vote in a Board-conducted election." *Concrete Form Walls*, 346 N.L.R.B. at 835. In particular, Concrete Form Walls "apparently accepted [its employees' employment-verification] documents as facially valid when it placed these employees on its formal payroll and only questioned their veracity after the employees voted in the election." *Id.* at 834 n.18. That "11th-hour concern with complying with the IRCA" is inadequate, the Board reasonably concluded. *Id.* at 835.

In that case, the Board rejected as insufficient the same type of proffer that petitioner made here. The Board concluded that an employer "fail[s] to prove that * * * employees were, in fact, illegal aliens" when its offer of proof consists (as petitioner's does here, Pet. App. 33a) only of evidence that the aliens offered inaccurate Social Security numbers. 346 N.L.R.B. at 834; see *id.* at 835.

Accordingly, even if the Court were inclined to review the Board's continued adherence to the interpretation upheld as reasonable in *Sure-Tan*, it would only be appropriate to do so in a case in which an employer made an appropriate demonstration of employees' illegal status, rather than taking a "wait-and-see" approach to the outcome of a representation election. Cf. *Concrete Form Walls*, 346 N.L.R.B. at 834-835 (employer, charged with discharging employees in retaliation for voting for union representation, defended on the ground that it had discharged them because they were illegal aliens, but the Board concluded that the employer's asserted reason was a pretext).[3]

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[3] Moreover, petitioner did not argue before the Board that the results of its post-election investigation into its employees' immigration status warranted an exception to the usual certification-bar rule that an employer must bargain with a certified union for one year, notwithstanding any post-election loss of majority. See *Brooks* v. *NLRB*, 348 U.S. 96, 101-104 (1954) (noting that even during the one-year period, the Board may revoke certification or decline to pursue an unfair-labor-practice charge "if the facts warrant").

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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OCTOBER 2008

APPENDIX

NATIONAL LABOR RELATIONS BOARD,
WASHINGTON, D.C.

Case No. 29-CA-27386

AGRI PROCESSOR CO., INC. AND LOCAL 342, UNITED FOOD AND COMMERCIAL WORKERS UNION

Aug. 31, 2006

DECISION AND ORDER

BY CHAIRMAN BATTISTA AND MEMBERS LIEBMAN AND KIRSANOW

On May 12, 2006, Administrative Law Judge Raymond P. Green issued the attached decision. The Respondent filed exceptions and a supporting brief. The Charging Party filed cross-exceptions and a supporting brief.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions and briefs and has decided

to affirm the judge's rulings, findings,[1] and conclusion[2]

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[1] The Respondent has excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

[2] With respect to the separate view of our colleague, we note that, unless and until the employees are declared to be illegal and are discharged and/or deported, they remain employees of the Respondent, they remain employees under the Act, they lawfully voted in the election that the Union won, and since the Union lawfully represents the bargaining unit, we do not think it "peculiar" to require the Respondent to bargain with the Union.

Member Kirsanow joins his colleagues in adopting the judge's conclusion that the Respondent has violated Sec. 8(a)(5) by refusing to bargain with the Charging Party Union, but would add the following observations. Relying on evidence that most of its unit employees presented social security numbers that do not match those in the Social Security Administration's records, the Respondent contends that these employees are illegal immigrants and that its refusal to bargain is justified by that fact. Whether or not the Respondent's employees are, in fact, working in the United States illegally is not an issue we need to address at this point. Assuming, however, that the Respondent's contention in this regard is correct, Member Kirsanow submits that an order compelling the Respondent to bargain with a union representing employees that the Respondent would be required to discharge under the Immigration Reform and Control Act, 8 U.S.C. § 1324a (IRCA), may reasonably be seen as somewhat peculiar by the average person. Nonetheless, he acknowledges that, as the Board recently explained in *Concrete Form Walls*, 346 NLRB No. 80, slip op. at 3-4 (2006), such an order is compelled by Sec. 2(3)'s broad definition of "employees." Setting aside the specifics of this case and speaking more generally, Member Kirsanow observes that although it may be more rational to resolve the tension between Sec. 2(3) and the IRCA in a manner that does not place employers in the position of having to bargain with a representative of workers not lawfully entitled to work, the Board's duty is to enforce the

and to adopt the Order as modified and set forth in full below.[3]

ORDER

The National Labor Relations Board orders that the Respondent, Agri Processor Co. Inc., Brooklyn, New York, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Failing and refusing to bargain collectively with Local 342, United Food and Commercial Workers Union.

(b) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) On request, bargain with the Union as the exclusive representative of the employees in the following appropriate unit concerning terms and conditions of employment and, if an understanding is reached, embody the understanding in a signed agreement:

> All full-time and regular part-time production and maintenance warehouse employees, including hi-lo drivers, loaders, pickers, checkers and forklift operators, employed by the Employer at its facility located

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Act as written. It is powerless to change the meaning of Sec. 2(3). That is the province of Congress.

[3] We adopt the judge's recommendation that the initial certification year commence on the date that the Respondent begins to bargain in good faith with the Union. We shall substitute the Board's standard language for portions of the judge's recommended Order and notice.

at 5600 1st Avenue, Brooklyn, New York, excluding all managers, office and clerical employees, salesmen, truck drivers, guards, and supervisors as defined in Section 2(11) of the Act.

(b) Within 14 days after service by the Region, post at its facility in Brooklyn, New York, copies of the attached notice marked "Appendix."[4] Copies of the notice, on forms provided by the Regional Director for Region 29, after being signed by the Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since January 23, 2006.

(c) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

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[4] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

Dated, Washington, D.C. August 31, 2006

Robert J. Battista Chairman

Wilma B. Liebman Member

Peter N. Kirsanow Member

(SEAL) NATIONAL LABOR RELATIONS BOARD

APPENDIX [TO DECISION AND ORDER]

NOTICE TO EMPLOYEES

POSTED BY ORDER OF THE

NATIONAL LABOR RELATIONS BOARD

An Agency of the United States Government

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this notice.

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist a union

Choose representatives to bargain with us on your behalf

Act together with other employees for your benefit and protection

Choose not to engage in any of these protected activities.

WE WILL NOT refuse to bargain with Local 342, United Food & Commercial Workers Union as the exclusive representative of the employees in the bargaining unit.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights listed above.

WE WILL, on request, bargain with the Union and put in writing and sign any agreement reached on terms

and conditions of employment for our employees in the following bargaining unit:

> All full-time and regular part-time production and maintenance warehouse employees, including hi-lo drivers, loaders, pickers, checkers and forklift operators, employed by us at our facility located at 5600 1st Avenue, Brooklyn, New York, excluding all managers, office and clerical employees, salesmen, truck drivers, guards, and supervisors as defined in Section 2(11) of the National Labor Relations Act.

AGRI PROCESSOR CO., INC.

Emily Desa, Esq., for the General Counsel.

Richard M. Howard, Esq. and *Jeffrey A. Meyer, Esq.*, for the Respondent.

Patricia McConnell, Esq., for the Charging Party.

DECISION

STATEMENT OF THE CASE

Raymond P. Green, Administrative Law Judge. I heard this case in Brooklyn, New York, on April 25, 2006. The charge was filed on January 30, 2006, and the complaint was issued on March 21, 2006. In substance, the complaint alleged that after the Union had been certified by the Board, the Respondent has refused to bargain.

The Respondent's defense boils down to the claim that a majority of the people who voted in the election "were subsequently found to be illegal aliens" and therefore the election should be declared a nullity because (a) the Union never had a valid showing of interest and (b) the illegal aliens, comprising most of the voting unit were not legally permitted to work for the Company and therefore could not share a community of interest with those employees who legally could be employed.

Based on the entire record, including my observations of the demeanor of the witnesses and after considering the arguments of counsel, I hereby make the following

FINDINGS AND CONCLUSIONS

I. JURISDICTION

The parties agree and I find that the Respondent is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act and that the Union is a labor organization within the meaning of Section 2(5) of the Act.

II. UNFAIR LABOR PRACTICES

The Union filed its petition for an election on August 24, 2005. On September 7, 2005, the parties executed a Stipulated Election Agreement that was approved by the Regional Director on September 8, 2005. The parties agreed that the unit was as follows:

> Included: All full-time and regular part-time production and maintenance warehouse employees, including hi-lo drivers, loaders, pickers, checkers and forklift operators employed by the Employer at its facility at 5600 1st Avenue, Brooklyn, New York.
>
> Excluded: All managers, office and clerical employees, salesmen, truck drivers, guards and supervisors as defined in Section 2(11) of the Act.

The election was held on September 23, 2005, and the tally of ballots showed that 15 employees cast ballots for the Union and that 5 employees cast ballots against union representation. There was 1 challenged ballot but that was not determinative.

On September 30, 2005, the Employer filed timely objections alleging that union representatives and/or agents engaged in conduct affecting the results of the election.

On November 10, 2005, the Regional Director issued a Report on Objections in which he overruled some but ordered that some other of the allegations to be sent to a hearing. To the extent that the Regional Director held that certain of the objections were not meritorious, those conclusions were adopted by the Board on December 21, 2005.

On December 16, 2005, I issued a Decision on Objections wherein I overruled those objections that were sent to a hearing. I recommended that the appropriate certification be issued to the Union.

The Respondent filed exceptions to my decision, but on January 11, 2006, the Board, by its Associate Executive Secretary, dismissed the exceptions because they were untimely filed.

On January 23, 2006, the Board issued a certification of representative to the Union.

The Union has made various demands for bargaining commencing on January 5, 2006, and continuing to date. The Respondent has refused to commence bargaining and indicated on the record that it would not do so.

At the hearing, I rejected the Respondent's defenses but permitted it to make an offer of proof. In essence, the Respondent offered to prove (and offered exhibits in support of its contentions), that a majority of the employees who were employed at the time of the election had submitted to the employer social security cards (along with Resident cards); and that upon a postelection check at a social security website, the Respondent discovered that these individuals either did not have social security numbers or that the numbers that they had submitted to the employer did not match the num-

bers listed with the Social Security Administration. The Respondent therefore opines that this shows that these individuals were undocumented aliens, having no permission to work legally in the United States. When asked if the Respondent had any other proof of their status, the Respondent's counsel said that he did not.

In my opinion, the Respondent's reliance on *Hoffman Plastic Compounds, Inc. v. NLRB,* 535 U.S. 137 (2002) is misplaced. In *Hoffman*, the Court merely held that the Board may not award backpay to undocumented workers because that would run "counter to the policies underlying IRCA, policies the Board has no authority to enforce or administer." The Court did not hold that such individuals should not be construed to be employees within the meaning of the Act or that employers could interfere with their Section 7 rights with impunity.

In *Concrete Form Walls, Inc.*, 346 NLRB No. 80 (2006), the Board rejected the Employer's contention that it could legally discharge employees because they were undocumented aliens. The Board also held that these individuals were valid voters in a Board election. Finally the Board concluded that the mere fact that the Employer offered evidence to show that the employees' social security numbers did not match those in the social security database, was not sufficient to show that they were illegally working in the country.

CONCLUSIONS OF LAW

1. By refusing to bargain with Local 342, United Food and Commercial Workers Union, the Respondent has violated Section 8(a)(1) & (5) of the Act.

2. The aforesaid violation affects commerce within the meaning of Section 2(6) and (7) of the Act.

THE REMEDY

Having found that the Respondent has engaged in certain unfair labor practices, I find that they must be ordered to cease and desist and to take certain affirmative action designed to effectuate the policies of the Act.

To insure that the bargaining unit employees will be accorded the services of their collective-bargaining representative for the full period provided by law, I shall recommend that the initial 1-year period of certification commence on the date the Respondent commences to bargain in good faith with the Union. *See Mar-Jac Poultry Co.*, 136 NLRB 785 (1962).

The General Counsel and the Charging Party request that the Board order the Respondent to pay for their legal expenses in contesting this case. They assert that this is justified because the Respondent's defenses are frivolous. Citing *Frontier Hotel & Casino*, 318 NLRB 857 (1995). Without commenting on the Respondent's defenses, I note that the hearing in this case took less than an hour and that the preparation for the hearing would have amounted to the drafting of the complaint, the copying of a number of documents and the reading of a few cases. I suspect that the total amount of time expended by either the General Counsel or the Charging Party's counsel to litigate this case could not have amounted to more than several hours. Since, the legal expenses for this amount of time is essentially nominal, I do not think that an award of legal expenses would be justified.[1]

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[1] Although McConnell's pay rate may or may not exceed the General Counsel's attorney, it is hard for me to imagine that the legal cost to the Union could be anything other than nominal.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended[2]

ORDER

The Respondent, Agri Processor Co., Inc., Brooklyn, New York, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Failing and refusing to bargain collectively with Local 342, United Food & Commercial Workers Union.

(b) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) On request, bargain with the Union as the exclusive representative of the employees in the certified appropriate unit concerning terms and conditions of employment and, if an understanding is reached, embody the understanding in a signed agreement.

(b) Within 14 days after service by the Region, post at its facilities in the Brooklyn, New York, copies of the attached notice marked "Appendix."[3] Copies of the no

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[2] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

[3] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judg-

tice, on forms provided by the Regional Director for Region 29, after being signed by the Respondent's authorized representative, shall be posted by the Respondent immediately upon receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that during the pendency of these proceedings, the Respondent has gone out of business or closed a facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since January 23, 2006.

(c) Notify the Regional Director in writing within 20 days from the date of this Order what steps the Respondent has taken to comply.

Dated, Washington, D.C. May 12, 2006

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ment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

APPENDIX [TO ALJ OPINION]

NOTICE TO EMPLOYEES
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Choose not to engage in any of these protected activities.

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WE WILL NOT in any like or related manner interfere with, restrain, or coerce our employees in the rights guaranteed to them by Section 7 of the Act.

WE WILL on request, bargain with the Union as the exclusive representative of the employees in the certified appropriate unit concerning terms and conditions of employment and, if an understanding is reached, embody the understanding in a signed agreement.

AGRI PROCESSOR CO., INC.