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IN THE SUPREME COURT OF THE UNITED STATES

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HOFFMAN PLASTIC COMPOUNDS, INC., :

Petitioner :

v. : No. 00-1595

NATIONAL LABOR RELATIONS BOARD :

- - - - -X

Washington, D.C.

Tuesday, January 15, 2002

The above-entitled matter came on for oral  
argument before the Supreme Court of the United States at  
10:16 a.m.

APPEARANCES:

RYAN D. McCORTNEY, ESQ., Costa Mesa, California; on behalf  
of the Petitioner.

PAUL R. Q. WOLFSON, ESQ., Assistant to the Solicitor  
General, Department of Justice, Washington, D.C.; on  
behalf of the Respondent.

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P R O C E E D I N G S

(10:16 a.m.)

CHIEF JUSTICE REHNQUIST: We'll hear argument now in Number 00-1595, Hoffman Plastic Compounds, Inc. v. The National Labor Relations Board.

Mr. McCortney.

ORAL ARGUMENT OF RYAN D. McCORTNEY

ON BEHALF OF THE PETITIONER

MR. McCORTNEY: Mr. Chief Justice, and may it please the Court:

The issue in this case is whether the award of back pay to an undocumented alien who never was legally present or legally authorized to work in this country conflicts with this Court's holding in Sure-Tan or with this country's immigration laws and policies.

In Sure-Tan, this Court held that the discriminatees in that case must be deemed unavailable for work and the accrual of back pay therefore tolled during any period when they were not lawfully entitled to be present and employed in the United States.

The Sure-Tan Court's back pay limitation is consistent with INA's dual requirement that to be employed in this country an alien must be both legally present and legally authorized to work. Despite this dual requirement, the board contends that Castro is entitled to

1 back pay even though he never was legally present or  
2 legally authorized to work during the back pay period.

3 The fatal flaw in the board's position lies in  
4 its adherence to its physical availability doctrine. The  
5 board contends that this Court denied back pay to the  
6 discriminatees in Sure-Tan only because they had left the  
7 country and were physically unavailable for work. If the  
8 board is right, the Sure-Tan discriminatees could have  
9 illegally reentered the country to establish physical  
10 presence and to commence the accrual of back pay.  
11 However, such reentry would violate the immigration laws  
12 of this country and be contrary to this Court's holding in  
13 Sure-Tan.

14 QUESTION: Have the immigration laws changed at  
15 all in any relevant respects since our decision in Sure-  
16 Tan?

17 MR. McCORTNEY: Yes, Your Honor, the passage of  
18 IRCA in 1986.

19 QUESTION: And what relevant changes did IRCA  
20 make?

21 MR. McCORTNEY: IRCA was an amendment to the INA  
22 that made the employment, the knowing employment of  
23 undocumented aliens unauthorized from the employer's  
24 perspective.

25 QUESTION: And is it correct that when Sure-Tan

1 was argued, IRCA, if that's the way you pronounce it, was  
2 being considered by Congress and the Government in its  
3 argument told us that if IRCA had been passed, back pay  
4 would not be available?

5 MR. McCORTNEY: That's correct, Your Honor.

6 Recognizing, as it must, that this Court in  
7 Sure-Tan conditioned the accrual of back pay on legal  
8 presence, the board contends that the Sure-Tan Court  
9 sought only to deter the discriminatees from illegally  
10 reentering this country to claim back pay.

11 QUESTION: Well, when you say conditioned it on  
12 legal presence, I mean, in fact they were not present. I  
13 mean, the people in that case were still out of the  
14 country, weren't they?

15 MR. McCORTNEY: That's correct, Your Honor.

16 QUESTION: So you have to acknowledge that it  
17 was dictum.

18 MR. McCORTNEY: Well, Your Honor, I would not  
19 call it dicta only because the Court set forth the  
20 conditions upon which the discriminatees might receive  
21 back pay if they were to legally reenter the country.

22 QUESTION: That's right, but it only had to say  
23 one condition in order to decide the case. Namely, you  
24 had to be in the country, and it went on to say, and in  
25 addition you have to be available to work, but that is

1 really unnecessary to the decision.

2 MR. McCORTNEY: Well, the threshold condition  
3 was legal reentry, and that was the starting point of the  
4 analysis. If they were to reenter, then of course they  
5 would have to establish at the back pay hearing --

6 QUESTION: Mr. McCortney --

7 MR. McCORTNEY: -- legal authorization to work.

8 QUESTION: If that is so, then why did the Court  
9 make the comment on page 901 of the opinion in  
10 footnote 11, talking about the board has said it will make  
11 it an arbitrary number of weeks, and the Court said the  
12 board has never attempted to impose a back pay award that  
13 the employer must pay regardless of the actual evidence as  
14 to such issues as the employee's availability to work?  
15 All of that would have been unnecessary if it were just  
16 this blanket rule, right?

17 MR. McCORTNEY: Well, Your Honor, I think in  
18 footnote 11 what the Court was addressing was the minimum  
19 back pay award of 6 months that the court of appeals had  
20 imposed and the board had adopted, and then the board  
21 tried to defend that award by arguing that it had in other  
22 cases had estimates of back pay, despite the fact that the  
23 discriminatee was unable to establish with any certainty  
24 the probable length of the back pay period.

25 I think the Court there was simply saying that,

1 look, you don't even go so far as to provide any showing  
2 of proof as to how long these discriminatees would have  
3 worked before their apprehension by the INS, but we don't  
4 read that to mean that had those discriminatees in Sure-  
5 Tan remained in the country, that they would have been  
6 entitled to back pay, because they wouldn't have been  
7 legally present and legally authorized to work.

8 QUESTION: Well, if the opinion in Sure-Tan we  
9 think equivocal, if it's a wash either way, what is your  
10 principal argument for reversal here?

11 MR. McCORTNEY: Assuming that Sure-Tan is  
12 equivocal?

13 QUESTION: Yes.

14 MR. McCORTNEY: That the board's award of back  
15 pay conflicts with the immigration laws and policies of  
16 this country as embodied in the INA and IRCA.

17 QUESTION: Well, what do you say the argument  
18 that the board makes that even if the dictum in Sure-Tan  
19 were a holding as you say it should be treated, that the  
20 statute has changed the landscape, and that the board's  
21 rule in effect is in aid of the statute, because the board  
22 is saying the illegality on the part of the employer comes  
23 when the employer knowingly employs these people despite  
24 knowledge of their illegal character, so in effect we're  
25 going to say that the obligation to pay back pay stops

1 when the employer knows that the alien in fact is  
2 illegally there.

3 Up to that point, however, we're going to follow  
4 a different policy. We're going to make the employer pay  
5 back pay because otherwise we would make it very easy for  
6 employers. We would, in fact, create an inducement for  
7 employers to ignore the law by, in effect, winking at  
8 illegality on the part of the workers, so the board is  
9 saying, sure, the statute changed the legal landscape even  
10 on your reading of Sure-Tan, and we've come up with what  
11 seems to be a sensible way of implementing it. What is  
12 your response to that?

13 MR. McCORTNEY: Your Honor, just the mere  
14 prospect of receiving back pay in this case encouraged  
15 Castro to extend his illegal stay by more than 4 years and  
16 to continue using --

17 QUESTION: Well, I think you're right, but the  
18 board is saying, yes, there's that inducement on one side,  
19 but there's a very powerful employer inducement if we come  
20 out the other way, and although I don't think the board  
21 put it in these words, I take it the board is saying, we  
22 think the employers are going to make a rational decision  
23 about inducements more clearly or more obviously than  
24 employees, the illegal aliens might do, so we're going to  
25 prefer the inducement or the policy that is going to have



1 the strongest effect on the employers. Isn't that a  
2 permissible choice for the board to make?

3 MR. McCORTNEY: No, Your Honor. The board's  
4 authority here is to enforce the provisions of the  
5 National Labor Relations Act to the extent that they do  
6 not conflict with the immigration laws and policies of  
7 this country, and --

8 QUESTION: But the board is saying we can't have  
9 it both ways. No matter which way we go, something we do  
10 would provide an inducement to violate the immigration  
11 laws. We think probably the best way to get where we want  
12 to go is to concentrate on inducements on the employer.

13 MR. McCORTNEY: Your Honor, I don't believe that  
14 those, the deterrence of the employer to -- that knowingly  
15 hires illegal aliens or employs them, that awarding back  
16 pay is necessary in light of the sanctions under IRCA that  
17 now subject employers that do so to civil and criminal  
18 sanctions, and so --

19 QUESTION: Wouldn't it also be the case that if  
20 the employer, by reason of this inducement, hired --  
21 supposed inducement -- hired somebody whom he knew at the  
22 time of the hiring to be an unlawful, an illegal alien,  
23 even applying the board's rule, he wouldn't have to pay  
24 any back pay.

25 MR. McCORTNEY: That's correct, Your Honor.

1           QUESTION:  What is -- here -- I think Justice  
2   Souter is -- we said in our cases just what Justice Souter  
3   said, I take it, INS v. Lopez-Mendoza, quoting what Sure-  
4   Tan says.  An employer can be guilty of an unfair labor  
5   practice in his dealings with an alien, notwithstanding  
6   the alien's illegal presence in this country.  You agree  
7   with that.  Retrospective sanctions against the employer  
8   may accordingly be imposed by the board to further the  
9   public policy against unfair labor practices.

10           Now, those -- that's what the Court said.  Now,  
11   this is a retrospective policy, a retrospective sanction  
12   of a compromise variety only for the period where the  
13   employer is not committing any labor law, any immigration  
14   law violation in order to further the labor policy.  Why  
15   doesn't this fit within the two sentences that I just  
16   described?

17           MR. McCORTNEY:  Because --

18           QUESTION:  And if this doesn't, what would?

19           MR. McCORTNEY:  Your Honor, what it doesn't  
20   address is the violation of the INA.

21           QUESTION:  I'm sorry.  What the Court said in  
22   the sentences I read is, retrospective -- I take it,  
23   retrospective sanctions can be assessed by the board.

24           Now, are we -- now, I want to know, if they  
25   can't do this, what can they do retrospectively, or is the

1 sentence I just read you by this Court wrong?

2 MR. McCORTNEY: Your Honor, I think what the  
3 sentence means, at least my reading of it, is that  
4 retrospective sanctions may be imposed, but not  
5 necessarily, and --

6 QUESTION: Fine.

7 QUESTION: What other rules are there, is  
8 what -- what other retrospective sanctions are there?

9 QUESTION: Yes. Yes, that's correct. Thank  
10 you.

11 QUESTION: Can the board fine the employer?

12 MR. McCORTNEY: No, Your Honor.

13 QUESTION: What else can the board do to punish  
14 the employer for the unfair labor practice?

15 MR. McCORTNEY: A cease and desist order, as in  
16 this case, with the threat of contempt sanctions.

17 QUESTION: That's a prospective --

18 QUESTION: I would have called that prospective.

19 QUESTION: -- sanction, isn't it?

20 MR. McCORTNEY: Yes.

21 QUESTION: So you really don't have any  
22 explanation for that language.

23 MR. McCORTNEY: All I would say, Your Honor, is  
24 that --

25 QUESTION: Which is, I suppose your explanation

1 is that that's as much dictum as your opponent says Sure-  
2 Tan was.

3 MR. McCORTNEY: That's correct, Your Honor.

4 QUESTION: So it's a wash, right?

5 QUESTION: Well, if that's the explanation, I  
6 take it that Sure-Tan was dealing with a case where the  
7 employer did know in respect to the sanction that the  
8 employee, the alien, was illegal, so Sure-Tan did not  
9 consider the kind of sanction here at issue, which is a  
10 sanction that applies only to the period where the  
11 employer did not know that the employee was an illegal,  
12 hence the employer was not violating the immigration law.

13 MR. McCORTNEY: It still doesn't address, Your  
14 Honor, the fact that the illegal presence and the use of  
15 fraudulent documents and working without authorization is  
16 a violation of the INA.

17 QUESTION: Is it unlawful? That's the question  
18 I was going to ask you. Is -- under the immigration laws,  
19 is it only the employer who is violating the law when he  
20 hires, with knowledge, an illegal alien, or is it also the  
21 case that an illegal alien who deceives an employer by  
22 providing a false green card and who then draws pay when  
23 he's illegally in the country, is that unlawful?

24 MR. McCORTNEY: Yes, Your Honor.

25 QUESTION: Now, I know --

1 QUESTION: I thought --

2 QUESTION: -- the use of the green card is, but  
3 is the working and getting pay unlawful under the  
4 immigration laws?

5 MR. McCORTNEY: Yes, it is.

6 QUESTION: I thought IRCA itself enacted a  
7 provision making it illegal for aliens to provide false  
8 documentation to get employment. That wasn't in the law  
9 when Sure-Tan was decided, was it?

10 MR. McCORTNEY: Yes, it was, Your Honor. In  
11 fact, let me just explain that 18 U.S.C. 1546 was already  
12 on the books, that prohibited the use of fraudulent  
13 documents for immigration purposes, and when IRCA came  
14 along it amended the INA but added 1324(c), which also  
15 prohibits the use of fraudulent documents to obtain  
16 employment, so at the time that Sure-Tan was decided, you  
17 had the following laws in this case that were violated by  
18 Mr. Castro, regardless of IRCA: entering a country  
19 illegally in violation of 8 U.S.C. 1325, failing to  
20 register as an alien within 30 days of his entry, a  
21 violation of 8 U.S.C. 1302, using fraudulent documents to  
22 obtain employment, a violation of 18 U.S.C. 1546,  
23 remaining in this country illegally and working without  
24 authorization, a violation of 8 U.S.C. 1182(a)(5), which  
25 was formerly 8 U.S.C. 11 --

1 QUESTION: Now, did IRCA add provisions and  
2 impose obligations on prospective employers to require  
3 them to review the documents and make sure that they  
4 appear to be regular on their face?

5 MR. McCORTNEY: Yes, Your Honor.

6 QUESTION: And that was a new provision?

7 MR. McCORTNEY: That was a new provision.

8 QUESTION: And is there any allegation in this  
9 case that the employer failed to comply with that?

10 MR. McCORTNEY: No, Your Honor. It's  
11 undisputed.

12 QUESTION: It's --

13 QUESTION: May I ask if your position would  
14 apply if this were a violation of the Fair Labor Standards  
15 Act instead of the labor act? If the employer had  
16 underpaid the employee, would he have a right to back pay?

17 MR. McCORTNEY: Your Honor, I -- in the amicus  
18 brief of the States they seem to equate back pay under the  
19 NLRA with back pay under the FLSA when they're two  
20 different things. Back pay --

21 QUESTION: I understand they're two different --  
22 I just want to know what your position is on that.

23 MR. McCORTNEY: No, we would not advocate at  
24 all, and we have not, taking wages away from undocumented  
25 aliens that have been earned for work already performed.

1           QUESTION: Even though they -- it was a crime to  
2 do any work? Why -- if you're sticking with your theory  
3 that everything that this person did on that job, from  
4 presenting the false documentation on, was unlawful, so  
5 why should he be paid anything for unlawful activity?  
6 You're making a distinction between the Fair Labor  
7 Standards Act and the NLRA, but your theory, I think,  
8 would cover both.

9           MR. McCORTNEY: Well, Your Honor, we give  
10 certain rights and benefits to undocumented aliens that  
11 are already in this country, and we do that to level the  
12 playing field between undocumented aliens and American  
13 workers so that unscrupulous employers won't prefer  
14 undocumented aliens over American workers.

15           QUESTION: Well, furthermore, just from the  
16 standpoint of equity, I suppose the employer has  
17 benefitted from the services in the case that Justice  
18 Ginsburg puts, and there's --

19           MR. McCORTNEY: Absolutely.

20           QUESTION: -- no benefit here save, arguably,  
21 from the illegal labor practice, but there's no benefit  
22 for work received.

23           MR. McCORTNEY: That's absolutely correct, Your  
24 Honor. In fact --

25           QUESTION: Would you clarify one thing for me?

1 MR. McCORTNEY: Sure.

2 QUESTION: Do I understand that if the employer  
3 and the employee both know of the illegality, that then  
4 there's no back pay?

5 MR. McCORTNEY: Yes, Your Honor.

6 QUESTION: It seems to me that's absolutely  
7 upside down.

8 MR. McCORTNEY: Well, Your Honor --

9 QUESTION: The -- and of course, you don't --  
10 this is the Government's position, you don't have to  
11 defend it, but in other words, as I understand the  
12 Government's -- once the employer knows that there's a  
13 violation and continues it, he's no longer liable for back  
14 pay. That's a strange calculus.

15 MR. McCORTNEY: Well, Your Honor, that's the  
16 problem with the rule, is that it in some ways rewards the  
17 unscrupulous employer in Sure-Tan and penalizes the  
18 innocent employer, as in Hoffman. If the unscrupulous  
19 employer knowingly hires an illegal alien, then whenever  
20 some kind of union organizing drive comes along and say  
21 gee, we can get rid of them, and we know they're illegal,  
22 and we're going to terminate them, then they can report  
23 them to the INS right from the outset --

24 QUESTION: Mr. McCortney --

25 QUESTION: Well, the difference is --



1 MR. McCORTNEY: -- get him departed, and cut off  
2 back pay.

3 QUESTION: The difference is, of course, that if  
4 the employer knowingly hires this alien, he's subject to a  
5 lot of other penalties under the immigration law.

6 MR. McCORTNEY: That's correct, Your Honor.

7 QUESTION: Take an employer who, you know, all  
8 he does, he says, I've checked their cards, I've checked  
9 their cards, the cards say they're here legally, and he  
10 runs some God-awful sweat shop.

11 Now, your theory, there is no remedy under any  
12 law against that employer but for a prospective remedy,  
13 and so everyone gets one bite at that apple.

14 QUESTION: Well, he has to pay for the sweat,  
15 though, doesn't he?

16 MR. McCORTNEY: Absolutely.

17 QUESTION: And it's pretty low cost, because  
18 he's violating every labor law under the sun.

19 QUESTION: If, indeed, the worker, under this  
20 scheme you're proposing, there's no doubt that the  
21 document -- undocumented alien works, he's going to get  
22 paid for the work.

23 MR. McCORTNEY: Absolutely, Your Honor, no  
24 doubt, and we have never advocated --

25 QUESTION: And in Justice Breyer's hypothetical

1       there's an OSHA violation.

2               MR. McCORTNEY:   Could be.   There could be an  
3       OSHA violation, and we're -- as I said in answer to  
4       Judge -- Justice Ginsburg's question, we recognize that  
5       undocumented aliens are given certain rights and benefits  
6       to level the playing field.

7               QUESTION:   What about title VII?

8               MR. McCORTNEY:   Under title VII, if it's back  
9       pay exactly like back pay under the National Labor  
10      Relations Act, where it's unearned wages for work not  
11      performed during the back pay period, then that would be a  
12      problem.

13              QUESTION:   Suppose the allegation is, they kept  
14      me in this entry-level job, although I was qualified for  
15      the next step, because I was a woman and they never  
16      promote women.   That's the charge, and she wants back pay,  
17      she wants to be paid at the rate she should have earned  
18      absent sex discrimination.

19              MR. McCORTNEY:   In that situation, Your Honor,  
20      if it were discovered that the illegal -- that this person  
21      was an illegal alien --

22              QUESTION:   Make it just like this case.

23              MR. McCORTNEY:   Then there are other remedies  
24      available under title VII to effectuate the policies of  
25      the act and to enforce compliance.

1           QUESTION: I'm asking about back pay for title  
2     VII. You said you would treat FLSA differently, and there  
3     would be back pay. Here, title VII, which -- would that  
4     go -- be bracketed with FLSA, or would it be bracketed  
5     with the NLRA?

6           MR. McCORTNEY: It would be -- if -- in your  
7     situation, you would get back pay, and let me explain the  
8     difference in this case. The problem with the board's  
9     remedy is that the very nature of the remedy creates a  
10    duty to mitigate, which in turn requires and encourages  
11    the illegal alien to seek interim employment, thereby  
12    committing further and new violations of the immigrations  
13    law.

14          QUESTION: So in title VII, if she were laid  
15    off, say, because they laid off all the women before they  
16    laid off any men, so she would also have a duty to  
17    mitigate in those circumstances, would the result be  
18    different?

19          MR. McCORTNEY: No. When there's a duty to  
20    mitigate which requires them to seek interim employment,  
21    that is where the rub is, but under title VII, under,  
22    like, the National Labor Relations Act, there's a whole  
23    array of other remedies available to enforce compliance.  
24    Punitive damages, you can -- compensatory damages,  
25    emotional distress, that is not dependent on the victims

1 authorization to work in this country.

2 QUESTION: Of course, her complaint, if it were  
3 complaint, should read something like, you know, I  
4 shouldn't have been working at all, and it was illegal for  
5 me to be working at all, and I'm complaining because I  
6 only got \$12,000 in illegal wages. I should have gotten  
7 \$14,000 in illegal wages. I don't find that a very  
8 appealing case anyway. Do you find that an appealing  
9 case?

10 MR. McCORTNEY: No, Your Honor, I don't. I  
11 don't find that an appealing case.

12 QUESTION: But you just told me that you would  
13 bracket title VII with the FLSA.

14 MR. McCORTNEY: Yes, because I --  
15 notwithstanding Justice Scalia's very good example that I  
16 don't find that appealing, that there is a way that this  
17 Court can distinguish between the National Labor Relations  
18 Act, which is remedial in nature, and all these other  
19 State and Federal discrimination laws that have punitive  
20 features to it that are not dependent on the undocumented  
21 alien's ability to work in this country.

22 QUESTION: Well, I don't have any doubt that  
23 there are other ways for us to distinguish this, and it  
24 may very well be that if this were an original matter with  
25 us we wouldn't have struck the balance where the board

1 did, but you've got the element here, the added element  
2 here of the board's decision, and I suppose we owe some  
3 kind of respect to it. Given the confusion of statutes,  
4 the extent to which we owe deference is not, perhaps,  
5 clear, but we've got to give some consideration to it,  
6 haven't we?

7 MR. McCORTNEY: Well, Your Honor --

8 QUESTION: If I could just supplement that, do  
9 we owe any deference to the views of the Attorney General  
10 of the United States, who is responsible for enforcing  
11 these -- both statutes?

12 MR. McCORTNEY: Your Honor, I don't believe so.  
13 Under -- we're looking at a remedial statute under 10(c)  
14 of the NLRA, and the only deference that the board is  
15 entitled to is, if the remedy that they order does not  
16 conflict with the immigration laws and policies of this  
17 country.

18 QUESTION: We don't give a deference to  
19 administrative agencies as to what damage are available in  
20 court. That's not part of their administration of the  
21 laws, is it? I don't know any case where we've said,  
22 well, what damages -- you know, the agency can tell us  
23 what damages we can award. That seems quite  
24 extraordinary.

25 QUESTION: Were there agency adjudications here?

1           MR. McCORTNEY: In what way, Your Honor? There  
2 was a back pay hearing, there was a underlying unfair  
3 labor practice proceeding.

4           QUESTION: Which -- and the result of which was?

5           MR. McCORTNEY: That the employer was found to  
6 have violated the National Labor Relations Act. The  
7 administrative law judge at the back pay hearing --

8           QUESTION: No, I mean, there was an  
9 administrative order to pay, wasn't there?

10          MR. McCORTNEY: Yes.

11          QUESTION: That's what I thought.

12          MR. McCORTNEY: But the administrative law judge  
13 did find -- did not award any back pay to Castro because  
14 it conflicted with -- Sure-Tan had found that it  
15 conflicted with IRCA.

16          QUESTION: But the board did.

17          MR. McCORTNEY: Yes.

18          QUESTION: Yes.

19          QUESTION: I guess you're quite right that if  
20 the board's award violates the immigration law, that's the  
21 end of the case.

22          MR. McCORTNEY: That's correct.

23          QUESTION: You win. But suppose that the  
24 immigration law doesn't forbid that award in terms, but  
25 its policy would, in fact, be hindered, while the labor

1 law, actually the policy is furthered, though it doesn't  
2 insist on this kind of award, wouldn't we defer to the  
3 board when it seeks to reconcile, or the Attorney General  
4 when they seek to reconcile the policies of the two  
5 statutes?

6 MR. McCORTNEY: No, Your Honor.

7 QUESTION: Because --

8 MR. McCORTNEY: I respectfully disagree, and  
9 this -- in Sure-Tan this Court said in devising remedies  
10 for unfair labor practices the board is obliged to take  
11 into account another equally important congressional  
12 objective, to wit, the objective of deterring unauthorized  
13 immigration that is embodied in the INA.

14 QUESTION: Well, that goes back as far as  
15 Southern Steamship Company, where you're talking about the  
16 mutiny statute, that the board can't just go ahead without  
17 any reference to competing statutes.

18 MR. McCORTNEY: Well, Your Honor, I would agree,  
19 if the board's remedy conflicts with the policies of  
20 another statutory scheme, then it's -- they're owed no  
21 deference.

22 QUESTION: The board did take that into account,  
23 though. I don't remember what they did in this case, but  
24 in the case where the board explained that it was, indeed,  
25 taking into account the policy of the immigration laws and

1 the policy of the NRA -- what was the name of that case?  
2 It was affirmed on appeal. The case where the board laid  
3 out its reasoning for taking this position.

4 MR. McCORTNEY: The APRA Fuel case?

5 QUESTION: Yes.

6 MR. McCORTNEY: Okay. Your Honor, the  
7 fundamental problem with this case is that this Court  
8 stated in Sure-Tan that the objective of the INA is to  
9 deter unauthorized immigration, and that a --

10 QUESTION: But let's go back to one thing it  
11 also said in Sure-Tan, which is that the court of appeals  
12 here made an estimate without any evidence as to the  
13 period of time these employees might have continued  
14 working before apprehension by the INS, and that sounds --  
15 working before apprehension by the INS, that sounds very  
16 close to what the board did in this case?

17 MR. McCORTNEY: Well, Your Honor, also in Sure-  
18 Tan, in the last sentence of the remedial section of the  
19 opinion it states, by directing the board to impose a  
20 minimum back pay award without regard to the employee's  
21 actual economic losses or legal availability to work, the  
22 court of appeals plainly exceeded its limited authority  
23 under the act. It made it clear that it wasn't just  
24 actual losses that was the problem, it was the fact that  
25 the discriminatees were not either legally present or



1     legally authorized to work.

2                 QUESTION:  So then, what do you make of the  
3     condition about the period between the violation and when  
4     the employees might have continued working before  
5     apprehension by the INS?

6                 MR. McCORTNEY:  Your Honor, I don't know,  
7     because the discriminatees in that case were -- left the  
8     country the same day their employment terminated.

9                 QUESTION:  I'm not talking about the outcome of  
10    that particular case, where they were in Mexico, but a  
11    case where they were here, and the question was, how much  
12    back pay, and there's a reference to not a flat 6 weeks or  
13    6 months or whatever, but a time period from the unlawful  
14    employment practice until one would expect the INS would  
15    pick up these people.

16                MR. McCORTNEY:  Your Honor, again I think that  
17    is consistent with the other language in the Sure-Tan  
18    decision which is repeated over and over again about legal  
19    availability to work, and being legally authorized to  
20    work, and why would the Court use that language if it  
21    didn't have to?

22                So I -- getting back to the policy of this that  
23    underlies the immigration laws of this country, it is to  
24    preserve jobs for American workers.  It is not the act of  
25    illegal entry that takes jobs away from American workers.

1 It's the act of working in this country without  
2 authorization that takes jobs away from American workers,  
3 and I would submit that the continued presence of an  
4 illegal alien in this country poses a greater threat to  
5 American jobs than an alien who enters this country  
6 repeatedly, because the latter presupposes that the alien  
7 has been physically absent from the job market for a  
8 period of time.

9 If the -- under the board's scenario, the Sure-  
10 Tan discriminatees could have reentered on a tourist visa  
11 and be legally present and not legally authorized to work,  
12 and under that scenario they're clearly not entitled to  
13 back pay because it violates 1182(a)(5), that sets forth  
14 the terms and conditions on which aliens can work in this  
15 country and those that can't.

16 The same would be true of aliens who enter the  
17 country on a student visa, or who overstay their visa and  
18 work without authorization, so whether you have an alien  
19 that enters this country illegally and works without  
20 authorization, or who enters this country legally and  
21 works without authorization, both takes jobs away from  
22 American workers, and both violate the INA.

23 QUESTION: Thank you, Mr. McCortney.

24 Mr. Wolfson, we'll hear from you.

25 MR. MCCORTNEY: Thank you, Your Honor.

1 ORAL ARGUMENT OF PAUL R. Q, WOLFSON

2 ON BEHALF OF THE RESPONDENT

3 QUESTION: Mr. Wolfson, before you get to the  
4 substance of the matter, I want to ask a question that  
5 sort of relates to something that Justice Steven asked --  
6 Stevens asked, and that is, can we take it that this -- I  
7 know that the SG's office usually reconciles the views of  
8 various agencies before a case is argued here. What was  
9 the position of the Immigration and Naturalization  
10 Service --

11 MR. WOLFSON: Justice Scalia --

12 QUESTION: -- in this matter when it was told  
13 that it -- that you're going to argue that courts should  
14 pay illegal aliens money that it was unlawful for them to  
15 earn? What did the INS say to that?

16 MR. WOLFSON: Justice Scalia -- may it please  
17 the Court -- the position in our brief has been developed  
18 in consultation with the Immigration and Naturalization  
19 Service. This is the position of the United States,  
20 and --

21 QUESTION: I understand that. Did the INS agree  
22 with it?

23 MR. WOLFSON: The INS has agreed with it and  
24 accepts it, and I'm here representing --

25 QUESTION: They accept it.

1 MR. WOLFSON: Right.

2 QUESTION: They have no choice --

3 MR. WOLFSON: Well --

4 QUESTION: -- but to accept it if the Attorney  
5 General --

6 MR. WOLFSON: Well --

7 QUESTION: -- tells them to. Well, I mean, if  
8 they agreed with it, and just thought --

9 MR. WOLFSON: The INS --

10 QUESTION: -- well, I have no -- it explains why  
11 we have a massive problem of illegal immigration, if  
12 that's how the INS feels about this.

13 MR. WOLFSON: I must disagree with that, Justice  
14 Scalia, and the point is, as the board recognized both in  
15 this decision and in the APRA Fuel decision which preceded  
16 it, the essential problem is that there is, as the board  
17 pointed out, an inseverable connection between illegal  
18 immigration, the availability of jobs, and poor working  
19 conditions for employees for -- that illegal immigrants  
20 are willing to take in the United States.

21 Now, Congress enacted IRCA on the premise that  
22 there was very little that it could do about the wage  
23 differential and the difference in levels of employment,  
24 unemployment that was drawing illegal immigrants to the  
25 United States in search of jobs.

1           QUESTION: What did it say in IRCA -- didn't the  
2 history of the report say that IRCA is not meant to  
3 undermine or diminish in any way labor protections in  
4 existing law, or to limit the powers of labor relations  
5 board to remedy unfair practices committed against  
6 undocumented employees?

7           MR. WOLFSON: That is exactly right, so

8           QUESTION: What is exactly right, that is what  
9 the legislative history --

10          MR. WOLFSON: That is what the legislative  
11 history says, but simultaneously in the --

12          QUESTION: What legislative history was that? I  
13 mean, was this a really powerful portion of legislative  
14 history?

15          MR. WOLFSON: Yes. Yes, it is.

16          (Laughter.)

17          QUESTION: One committee report?

18          MR. WOLFSON: It's two committee reports.

19          QUESTION: Two committee reports?

20          MR. WOLFSON: It's the Judiciary Committee,  
21 House Judiciary and the Education and Labor Committee, but  
22 I don't just have --

23          QUESTION: Of the House or the Senate?

24          MR. WOLFSON: Of the House.

25          QUESTION: Both of the House?

1 MR. WOLFSON: But I don't have just legislative  
2 history --

3 QUESTION: Two committees in one House.

4 MR. WOLFSON: I think it is important also to  
5 note that in IRCA Congress also wrote into law  
6 authorization of increased resources for enforcement of  
7 Federal labor laws by the Department of Labor by the Wage  
8 and Hour Division and the Office of Federal Contract  
9 Compliance.

10 QUESTION: Did that include -- did it include  
11 the National Labor Relations Board?

12 MR. WOLFSON: It did not refer to the National  
13 Labor Relations Board, but the point is, Congress knew  
14 that the Department of Labor was enforcing and should  
15 enforce Federal labor laws at the behest of and for the  
16 benefit of illegal aliens to obtain back pay for them.

17 QUESTION: They wanted to be sure that aliens  
18 who had no right to be here, had no right to be earning  
19 any money --

20 MR. WOLFSON: Well --

21 QUESTION: -- should get paid for periods that  
22 they didn't work? It's not a matter of their having  
23 worked and provided the employer with a benefit, which  
24 you're then reimbursing them for, but they haven't worked.

25 MR. WOLFSON: It is -- it's not just periods for

1     which they have worked, which might arguably distinguish  
2     the Fair Labor Standards Act --

3             QUESTION:   Right.   Right.

4             MR. WOLFSON:  -- minimum -- you know, maximum  
5     hours and minimum wage.  It's also the Office of Federal  
6     Contract Compliance, which enforces antidiscrimination  
7     provisions, routinely seeks back pay for aliens and others  
8     who have been terminated in violation of executive orders.

9             Another --

10            QUESTION:  Even though it's unlawful for them to  
11   receive that money?

12            MR. WOLFSON:  Even though -- yes, even though it  
13   is.

14            QUESTION:  That's extraordinary.  I --

15            MR. WOLFSON:  It's a very --

16            QUESTION:  Let me --

17            MR. WOLFSON:  -- fundamental part of the Fair  
18   Labor Standard Act.  Excuse me.

19            QUESTION:  In most back pay situations where the  
20   employer has committed an unfair labor practice and  
21   dismisses an employee improperly, the amount he's going to  
22   be stuck with for back pay is limited by the fact that the  
23   person unlawfully fired has to mitigate.  He has to find  
24   another job.  If he could have gotten another job easily  
25   and doesn't do so, the employer doesn't have to pay.  Now,

1     how is this unlawful alien supposed to mitigate?

2             MR. WOLFSON:   Well --

3             QUESTION:   Mitigation is quite impossible, isn't  
4     it?

5             MR. WOLFSON:   I'm not sure I agree with that  
6     exactly, Justice Scalia.   Here's -- I wouldn't say that  
7     the undocumented alien has a duty to mitigate.   I have to  
8     emphasize that the board is not --

9             QUESTION:   He does not have a duty to mitigate?

10            MR. WOLFSON:   I will agree with that.   I have to  
11    say the board has not examined this issue in detail, but  
12    first of all, of course, anything that he does obtain in  
13    the matter of interim wages will be deducted from his back  
14    pay --

15            QUESTION:   Oh.   Oh.

16            MR. WOLFSON:   -- and that is quite consistent  
17    with --

18            QUESTION:   If he unlawfully obtains another job,  
19    that will be deducted?

20            MR. WOLFSON:   And -- yes, and that is quite  
21    consistent --

22            QUESTION:   But if he's smart, he need not do  
23    that.

24            MR. WOLFSON:   Not --

25            QUESTION:   If he's smart he'd say, how can I



1 mitigate, it's unlawful for me to get another job.

2 MR. WOLFSON: Justice Scalia --

3 QUESTION: I can just sit home and eat  
4 chocolates and get my back pay.

5 MR. WOLFSON: I don't agree that the board would  
6 have to accept such a representation. That is, the board  
7 might permissibly conclude that an undocumented alien  
8 should not be any better off than an authorized worker by  
9 virtue of his undocumented status, so if an employer could  
10 say, well, if a person with the same credentials,  
11 background, education, and so forth, would have made a job  
12 search and would have obtained employment and would have  
13 obtained thus-and-such wages, this undocumented alien  
14 worker would have --

15 QUESTION: Should have done so.

16 MR. WOLFSON: Should have done -- or should  
17 have --

18 QUESTION: Should have violated the law.

19 MR. WOLFSON: Or should not benefit from the  
20 fact that he is an undocumented alien and being relieved  
21 of -- and getting more back pay than the similarly  
22 situated authorized worker.

23 Now, the board was faced with the task here of  
24 reconciling two important Federal statutory schemes, the  
25 Federal labor laws and the immigration laws, consistent --

1  
2 QUESTION: I would think that the -- does the  
3 board have to reconcile the Fair Labor Standards Act and  
4 the Office of Contract Compliance? I would think that  
5 it's responsible as the National Labor Relations Act and  
6 the Immigration Act in this case.

7 MR. WOLFSON: That is correct, Mr. Chief  
8 Justice, but I -- but the board did look to IRCA and the  
9 Court can look to IRCA, which includes these other  
10 provisions in the Department of Labor, to determine what  
11 Congress is attempting to achieve in IRCA, and those are,  
12 I think, reasonable indicators of what Congress'  
13 objectives were and how far it intended to go along with  
14 the legislative history of the --

15 QUESTION: Well, when the board makes its  
16 calculus and when the Government made its calculus, did it  
17 give any consideration to the fact that a union ought not  
18 as a matter of policy to use illegal aliens for organizing  
19 activity, or do you think the union can do that?

20 MR. WOLFSON: Well --

21 QUESTION: Is it consistent with the labor laws  
22 of the United States for the union to say it knowingly  
23 uses an alien for organizing activity?

24 MR. WOLFSON: I don't know that the board has  
25 addressed the point of knowingly using illegal aliens. I

1 do know that the board has concluded that undocumented  
2 aliens may be included within the bargaining unit, and  
3 indeed, in both Sure-Tan -- in Sure-Tan itself I believe  
4 they were included in the bargaining unit.

5 QUESTION: And that doesn't induce illegal  
6 immigration?

7 MR. WOLFSON: Well --

8 QUESTION: It seems to me that's a far more  
9 direct link than the very tenuous idea that you have that  
10 there's going to be more illegal immigration because they  
11 know they're going to get back pay. Here, what you're  
12 saying is that a union can, I suppose even knowingly, use  
13 illegal aliens on the workforce to organize the employer,  
14 knowing that by doing that the alien will still be  
15 entitled to back pay. That seems to me completely missing  
16 from any calculus, from any equitable calculus in your  
17 brief. I just -- and since it's a more direct link, I'm  
18 quite puzzled by it.

19 MR. WOLFSON: Well, I don't know -- I would  
20 suggest that the more powerful inducement towards illegal  
21 migration is the availability of the job, union or no.  
22 That is, even if the union is willing to include  
23 undocumented workers in its bargaining unit, there still  
24 has to be a job for that worker, and it is the employer  
25 who is fundamentally in control of that matter, and it is

1 the employer --

2 QUESTION: Mr. Wolfson, in these cases we're  
3 only talking about a situation where the employer, and  
4 presumably the union, too, doesn't know, because if the  
5 employer knows, then the employer's obligation is to  
6 dismiss that person, as I assume it would be the union's,  
7 too, but in all these cases the issue comes up only  
8 because the employer didn't know of the illegality, isn't  
9 that so?

10 MR. WOLFSON: Well, in this case the employer  
11 did not know. Now, there are cases, I have to say, where  
12 the employer does know, such as the APRA Fuel Corporation  
13 that was referred to, and in that case what the board has  
14 done is, it has said that the board -- the board has  
15 ordered reinstatement on condition that the undocumented  
16 alien put himself into a situation where he can obtain  
17 reinstatement legally. That is, under no circumstances  
18 does the board order reinstatement of an employee who  
19 everybody knows is undocumented.

20 QUESTION: But not back pay.

21 MR. WOLFSON: It does order back pay up to the  
22 point where either the employee is reinstated, or it  
23 terminates at a reasonable -- if the employee fails to put  
24 himself in compliance with the immigration laws and become  
25 qualified, the board cuts off back pay as of the end of a

1 reasonable period. That is consistent --

2 QUESTION: Even though the employer -- I thought  
3 that the rule was, as soon as the employer knows of the  
4 illegality we're not going to allow any back pay from then  
5 on.

6 MR. WOLFSON: Well, that is because in a case  
7 like this, what the board is doing is affording the  
8 employer the benefit of its general, after-acquired  
9 evidence rule.

10 QUESTION: If he knows about illegality from the  
11 very beginning, then we will --

12 MR. WOLFSON: Well, in a situation --

13 QUESTION: We will order back pay?

14 MR. WOLFSON: Yes, because in a situation like  
15 that the employee -- the employer is not well-situated to  
16 claim the benefit of the after-acquired evidence rule,  
17 because it cannot claim that it wouldn't have hired the  
18 alien anyway.

19 To use an example --

20 QUESTION: So you have two people violating the  
21 law, instead of one.

22 MR. WOLFSON: Well, there are two people  
23 violating the law here, Justice Scalia. I mean, the  
24 board -- I mean, there aren't two people violating the  
25 immigration laws, but the employer did violate the

1 National Labor Relations Act, and the board is quite  
2 properly --

3 QUESTION: From the time of his initial hiring  
4 up until his violation. I mean, but what you're saying is  
5 when both the employer and the employee are violating the  
6 law, we're going to -- you're asking the courts to give  
7 their benediction to this stark violation of United States  
8 law by awarding money that hasn't even been worked for.  
9 I -- it's just something courts don't do.

10 MR. WOLFSON: Well, the board is charged with  
11 the responsibility of developing a workable implementation  
12 of the National Labor Relations Act pursuant to its  
13 authority under section 10(c). In doing so, it of course  
14 must take into consideration the policies of the  
15 immigration law, but there is no --

16 QUESTION: What it's doing, though, really is  
17 kind of odd, because the result is that back pay awards to  
18 illegal workers are likely to be greater than to legal  
19 ones under this board's policy, and that's so odd, and it  
20 gives the illegal alien an incentive to try to phony up  
21 more documents and to extend for the longest possible time  
22 the charade that the worker is here lawfully, and that's  
23 surely strongly against the policies of the immigration  
24 act at the very least.

25 MR. WOLFSON: The problem, Justice O'Connor, is

1 that the immigration act, the policies come down on both  
2 sides.

3 I mean, yes, they obviously discourage illegal  
4 immigration and obtaining of jobs by illegal immigrants,  
5 but they also very strongly operate on the employer, and  
6 the fundamental premise on which Congress enacted IRCA was  
7 that it was the employer's -- the employer had a very  
8 strong and natural economic and competitive incentive to  
9 hire illegal workers, and it is that -- it is -- the  
10 board's concern, in this case I think quite properly, is  
11 that if back pay were removed from the equation the --

12 QUESTION: Well, but you --

13 MR. WOLFSON: -- Congress's attempt to -- excuse  
14 me. I'm sorry.

15 QUESTION: You say it comes down on both sides,  
16 and it makes certain acts by illegal immigrants illegal,  
17 the entry, and it makes certain acts by the employer  
18 illegal. Here, the worker, the alien was violating the  
19 law. The employer was not violating the law. So you say  
20 it comes down on both sides. If both were violating the  
21 law I could see your point, but the employer was not  
22 violating the law.

23 MR. WOLFSON: That is correct, Mr. Chief  
24 Justice, but the board is attempting to fashion -- the  
25 board doesn't know in advance which employer will violate

1 the law by hiring undocumented aliens knowingly and which  
2 will not, or which employer will, you know --

3 QUESTION: So you say this is a prophylactic  
4 rule?

5 MR. WOLFSON: I think that the board is  
6 fashioning a rule that is implementing Congress' policy  
7 objective in IRCA across the board.

8 QUESTION: But shouldn't remedies be looked at  
9 after the fact, let's find out who violated what and then  
10 fashion the appropriate remedy?

11 MR. WOLFSON: Well, the Court has not said that  
12 the board has to only fashion its remedies in a case in  
13 which the precise situation -- you know, in the precise  
14 situation into which it's dedicated.

15 In a case called NLRB v., I think, 7-Up Bottling  
16 Company the Court explained that the board can make its  
17 back pay calculations for the purpose of across-the-board  
18 rules rather than just the employer to which -- that is  
19 before the board itself, and the point is, even though  
20 this employer, even though there's no evidence that this  
21 employer violated IRCA when it -- nonetheless the board, I  
22 think, could quite reasonably say, well, if -- or if there  
23 is a flat rule that employees will never get back pay when  
24 they are terminated in violation of the National Labor  
25 Relations Act, employers then will pick up on that rule



1 and they will say, okay, now I can get away with it  
2 because there's not going to be any remedy for any  
3 employee, and this is a very large --

4 QUESTION: They won't get away with it. They're  
5 subject to prosecution for -- if they know that it's an  
6 illegal --

7 MR. WOLFSON: It's not just the problem of their  
8 knowing that they're illegal hiring. There also is the  
9 paperwork obligations, the verification systems, and I  
10 think there is a very real concern that an employer who  
11 knows that there's not really any monetary price to being  
12 lax in hiring, in checking whether illegal aliens are  
13 hired would say, well, on the one hand I just have the  
14 civil violations for violating the paperwork concerns. On  
15 the other hand, the labor of undocumented aliens is in a  
16 very real sense much --

17 QUESTION: But it's just not reasonable --

18 QUESTION: Why should the board be responsible  
19 for making sure that the employer documents his material  
20 about illegal aliens?

21 MR. WOLFSON: I don't think that -- it's not  
22 that the board is implementing IRCA, Mr. Chief Justice.  
23 It is that its policy here is consistent with the policies  
24 that I've been discussing.

25 QUESTION: Well, here's the thing. When an

1 employer reviews documents and concludes that they're  
2 valid and the person is lawfully here, then the employer  
3 isn't going to get some advantage of hiring some illegal  
4 alien because the worker will have to be paid and given  
5 benefits as though the worker were legally here, so  
6 there's no incentive for the employer under those  
7 circumstances to give a bum deal to the employee.

8 QUESTION: None at all.

9 QUESTION: But there is an incentive, it seems  
10 to me, for the employee to continue to conceal the facts,  
11 the facts that he's here illegally and has no right to  
12 work, and that the documents are false, and the board's  
13 rule fosters both those --

14 MR. WOLFSON: But one does have to take into  
15 account I think what would be the consequence of an  
16 opposite rule, that is, no back pay for an undocumented  
17 alien, and there is, I think, a very serious consequence  
18 that a flat rule that said something like, 7 million  
19 undocumented workers just simply get no back pay at all if  
20 they are in this country illegally and not employed.

21 That is a very large class of people to  
22 basically say, you are just without a remedy under the  
23 National Labor Relations Act, and there may be  
24 implications for other Federal labor laws as well, and --

25 QUESTION: But why should they be used to

1 organize a bargaining unit --

2 MR. WOLFSON: Because it --

3 QUESTION: -- if they're illegal employees? I'm  
4 baffled by that.

5 MR. WOLFSON: Because it -- well, because the  
6 labor laws benefit everybody, and it's not just -- I mean,  
7 they are -- when I say they're organizing a bargaining  
8 unit, obviously they are -- there may be -- in this case  
9 there were other citizens and authorized aliens who are  
10 interested in organizing for the purpose of vindicating  
11 their rights under section 7 of the labor relations act.  
12 The Court pointed this out in Sure-Tan, where it said it  
13 is appropriate to include illegal aliens within the  
14 definition of employees, because all the workers are in it  
15 together.

16 QUESTION: I would have thought, Mr. Wolfson,  
17 that when you said, you know, there are 7 million illegal  
18 aliens in this country, that what you would follow that  
19 with is not, that's an awful lot of people not to give  
20 back pay to. I would have thought you would follow it  
21 with, we have to do something to reduce this massive  
22 number of 7 million illegal aliens.

23 MR. WOLFSON: And what --

24 QUESTION: And what you don't want to do to  
25 reduce it is to give them back pay.

1           MR. WOLFSON: Now, there is no question that  
2     there is a serious problem of illegal immigration, and the  
3     INS and the Attorney General dedicate substantial  
4     resources to attempting to resolve that problem.

5           On the other hand, Congress without question  
6     recognized when it enacted IRCA that this was a many-  
7     faceted problem, and one aspect of the problem was that  
8     there was a natural magnet in drawing illegal,  
9     undocumented workers here in the wage differential, and  
10    that employers were willing to give jobs, and that it  
11    should not be cheaper for an employer to hire an  
12    undocumented alien than it is to hire --

13          QUESTION: Okay, but the argument, Mr.  
14    Wolfson -- every time -- and I understand that argument.  
15    Every time you make that argument, it seems to me the  
16    answer comes back, there are other ways to go against the  
17    employer. You can fine the employer, you can bring  
18    criminal actions against the employer, and so on, so that  
19    the answer always is the effort to discourage employers  
20    from hiring illegal aliens doesn't depend upon the back  
21    pay.

22          I thought the board's position was strongest to  
23    counter that when the board says, there's kind of the gray  
24    area in which it's not clear that we can prosecute. The  
25    evidence of what the employer knew at the relevant time is

1 not leaping out at us, and so what we are trying to do is  
2 to fashion a remedy for those cases in which it's not  
3 practical to prosecute, but which we know perfectly well  
4 in the real world employers are winking at the likelihood  
5 that they're employing illegal aliens. That's the group  
6 that we want to provide the inducement for by forcing back  
7 pay. Is -- am I giving the board too much credit?

8 MR. WOLFSON: I wouldn't say that the board has  
9 limited -- it certainly hasn't limited its remedy to that  
10 situation --

11 QUESTION: Well, why then, in the question --  
12 why in the question -- because I have exactly the same  
13 question. That's exactly what I thought. In the question  
14 that the Government presented it says, whether an order to  
15 pay back pay to an employee who was discriminatorily laid  
16 off, but only up to the date on which petitioner  
17 discovered that the employee was an undocumented alien,  
18 whether that kind of order is lawful. That's how you saw  
19 the question presented.

20 Now are you telling me that what I'm supposed to  
21 decide is a case I really didn't think I had to decide,  
22 which is, what happens if the board awards back pay to  
23 others, such as those whom the employer has always known  
24 were illegal?

25 MR. WOLFSON: We are not suggesting that the

1 Court has to decide that case here. Indeed, in our brief  
2 in opposition to the cert petition we pointed out that  
3 that was a different set of cases, the set of cases under  
4 the APRA --

5 QUESTION: Well, if it's a narrow question, just  
6 what Justice Souter said I had taken to be the precise  
7 rationale for the narrow set of cases we're supposed to  
8 decide. Now, maybe that's all not so. That, I think, is  
9 what he was saying, and I'm seconding it.

10 QUESTION: Clearly you haven't missed your  
11 opportunity.

12 (Laughter.)

13 MR. WOLFSON: Justice Breyer, my point is that  
14 the board in a case -- the board did rely on its APRA Fuel  
15 decision in this case, but what it held in this case was  
16 that an employer, once an employer learns that an alien is  
17 undocumented and therefore he cannot be hired, and in  
18 addition that the board accepts that that employer would  
19 not have hired that alien and would have discharged the  
20 alien when it found out that he was undocumented, then the  
21 employer should surely get the benefit of the after-  
22 acquired evidence rule that is applied in many, many kinds  
23 of Federal labor laws, including the Age Discrimination  
24 Act, for example.

25 QUESTION: Once you adopt that rule, however, it

1 seems to me that the asserted benefit to the immigration  
2 laws that you're claiming this rule has disappears. It is  
3 no disincentive to any employer, because the only employer  
4 who would get the benefit of the rule that you don't get  
5 any back pay would be the perfectly innocent employer who  
6 hires someone not knowing that the person is an unlawful  
7 alien. How are you possibly deterring anybody?

8           You're trying to deter the employer who hires an  
9 immigrant, apparently with this in the back of his mind:  
10 I know this guy's an immigrant and I can commit an unfair  
11 labor practice upon him. I'm rather skeptical whether  
12 that's high in the mind of any employer, but assuming it  
13 is, you still have to assume, if he's going to be  
14 deterred, that he knows that the person is an illegal  
15 immigrant, but this rule only applies to people who don't  
16 know.

17           MR. WOLFSON: Well, whether or not -- he may not  
18 know in the face of having clear, irrefutable evidence  
19 before him. On the other hand, he may be induced to be  
20 somewhat lax in his compliance with the obligations of the  
21 verification system, because --

22           QUESTION: Well, get him for that, then. Get  
23 him for that, then.

24           MR. WOLFSON: Well, that -- of course, that's  
25 not --

1           QUESTION: But your -- isn't another way to  
2 describe the class you're dealing with is, he may not know  
3 in the sense that the Government can prove that he knew,  
4 but there is a class of employees as to whom the evidence  
5 is not clear, and it is that class that we want to provide  
6 the negative inducement for. Isn't that the answer?

7           MR. WOLFSON: I think at a, I would say at a  
8 minimum that is the answer, and the board cannot know in  
9 advance --

10          QUESTION: Why should the board take over  
11 responsibility for those provisions that are basically  
12 immigration law provisions?

13          MR. WOLFSON: Mr. Chief Justice, the board does  
14 not view itself as enforcing the immigration laws. I  
15 think the question is, is this particular order  
16 inconsistent with the immigration laws, or is it  
17 consistent, and for some of the reasons that are being  
18 expressed here, all that we are saying is that it does  
19 not -- it is consistent with them.

20          Surely there is no direct conflict with the  
21 immigration laws. The board --

22          QUESTION: What you just agreed to in your  
23 colloquy with Justice Souter does contradict the  
24 immigration -- I remember when this statute was passed  
25 about what the responsibility of the employer was. It was



1 a clear provision of the statute that all the employer has  
2 to do is check the papers. It isn't the responsibility of  
3 the employer to look behind the papers and see whether  
4 it's forged.

5 Now you're saying, ah, but there are some  
6 employers that maybe, yeah, you know, they complied with  
7 the provision of the law, they looked at the card, which  
8 is what the -- there was a big fight over that. How much  
9 is -- investigatory responsibility is going to be placed  
10 on the employer, and the answer was basically none, just  
11 look at the documentation, and now you're saying, but some  
12 employers, we think they should have known better, and  
13 we're going to impose on this class of employers and, as  
14 it turns out, on a lot of others, liability which they  
15 shouldn't have.

16 MR. WOLFSON: They don't have any liability  
17 under IRCA. I mean, nobody is suggesting that the board  
18 can impose a liability under IRCA, but there is a concern,  
19 I think, that if an employer is totally exempted from back  
20 pay, a back pay remedy under another Federal labor law,  
21 that that does -- that does work an inducement on the part  
22 of the employer to hire illegal aliens.

23 QUESTION: Do no more than what the statute  
24 requires. Check the documentation. If the documentation  
25 is there, and valid on its face, he's entitled to proceed.

1 That's what the fight was about, and that's how the  
2 immigration law came out.

3 MR. WOLFSON: I do want to touch a bit on Sure-  
4 Tan, which I haven't had much of a chance to discuss.  
5 Our -- we have submitted in our brief that we think that  
6 the facts of the Sure -- of the situation in Sure-Tan  
7 really make it quite distinguishable from this particular  
8 case. In Sure-Tan, first of all I do want to point out  
9 that the condition that the Court explained and put on a  
10 reinstatement and back pay remedy, those did originate in  
11 the Seventh Circuit, and no party to this Court challenged  
12 that condition, that reinstatement and back pay had to be  
13 conditioned on the employee showing that he was legally  
14 authorized to be present and employed in the United  
15 States.

16 Now, the Court perceived that what happened in  
17 Sure-Tan was essentially the employer was being forced to  
18 say to the employee, you have a guaranteed job and a  
19 paycheck waiting for you right now, so come back to the  
20 United States right now and pick it up. I mean, that  
21 obviously is a very powerful lure to an employee to  
22 migrate back to the United States if there is no condition  
23 that the employee show that he is authorized.

24 We submit that the incentives work quite  
25 differently in a case like this where the employee does

1 remain in the United States. Congress did enact IRCA on  
2 the assumption that illegal, undocumented alien employees  
3 in the United States were at the very bottom of the wage  
4 scale, they were likely to remain here as long as they  
5 could get any job that was available, and as against that,  
6 we submit that the inducement to violate the immigration  
7 laws that petitioner suggests by the prospect of waiting  
8 around after years of litigation for the prospect of some  
9 kind of back pay award at the end of the day is quite  
10 minimal, and all the courts that have looked at this under  
11 other Federal law such as title VII and the FLSA have  
12 agreed that it is not the prospect of a back pay award  
13 that induces illegal migration or illegal stay in the  
14 United States, it is the prospect of any job at any wage  
15 that is available, and so the incentives do operate quite  
16 differently here than they did in Sure-Tan.

17 QUESTION: Mr. Wolfson, do you think a State  
18 court could enforce a contract for employment by an  
19 illegal alien?

20 MR. WOLFSON: I do not think that a State court  
21 could --

22 QUESTION: You know, an illegal --

23 MR. WOLFSON: Right.

24 QUESTION: -- makes a contract with an employer,  
25 then it is -- he sues because the employer doesn't go

1 ahead with it, and -- could a State court say, well, you  
2 made the contract, you should be liable for damages?

3 MR. WOLFSON: I think a State court could award  
4 damages, and State courts have done so. It could not  
5 order specific performance, because that would order -- it  
6 could not order specific performance in ordering the  
7 employer to employ the person because that would be  
8 employment in violation of IRCA, but there, there would be  
9 a direct conflict with IRCA, but State courts have --

10 QUESTION: There's no doctrine that conflicts in  
11 violation of the law are unenforceable?

12 MR. WOLFSON: They're not necessarily completely  
13 void. I mean, not just contracts, but State courts have  
14 awarded tort damages for lost wages. It is universally  
15 the rule that undocumented aliens are entitled to Worker's  
16 Compensation. I think only two States have gone the other  
17 way, and all of the State courts that have looked at that  
18 have said, yes, it is true, when the employee is just --  
19 you know, is injured and claims Worker's Compensation he  
20 is claiming a measure of compensation that is related to  
21 the employment he would have had, but nonetheless, the  
22 vast majority of State courts have held that illegal  
23 aliens can proceed under the Worker's Compensation rules,  
24 and the same is true of tort and contract damages as well.

25 QUESTION: But all of that is for work done --

1 MR. WOLFSON: No --

2 QUESTION: -- or injury suffered, not to  
3 enforce a contract which has not been executed, which is  
4 what's going on here.

5 MR. WOLFSON: Well, there may -- perhaps there  
6 is a difference between tort and contract damages, but it  
7 is not just for work done. If it is for injury suffered,  
8 it is for injury suffered as measured against that the  
9 work would have been done, or work that would have been  
10 done. I mean, surely that's the case in tort damages or  
11 Worker's Compensation, where the employee says, I would  
12 have worked and you owe me this money.

13 Thank you.

14 CHIEF JUSTICE REHNQUIST: Thank you, Mr.  
15 Wolfson. The case is submitted.

16 (Whereupon, at 11:16 a.m., the case in the  
17 above-entitled matter was submitted.)

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