IN THE SUPREME COURT
STATE OF FLORIDA

DIVISION OF WORKERS' COMPENSATION
(Intervenors Below)
Appellants

and

TANDEM STAFFING AND SPECIALTY RISK SERVICES, INC.,
(Appellees Below)

vs.

RICARDO CAGNOLI
Appellee.

CASE NO.: SC05-220

DCA Case No.: 1D03-5563

BRIEF OF AMICI CURIAE NATIONAL EMPLOYMENT LAW PROJECT, FARMWORKER COORDINATING COUNCIL OF PALM BEACH COUNTY AND COALITION OF FLORIDA FARMWORKER ORGANIZATIONS, INC. IN SUPPORT OF APPELLEE

FILED BY CONSENT OF THE PARTIES

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Identity and interest of *amici curiae*

This *amicus curiae* brief is prompted by dual concerns: the difficulties encountered by immigrant workers, often subject to much higher incidence of work injuries and accidents than native-born workers, in applying for and receiving workers' compensation benefits; and second, about the civil liberties and privacy concerns generated by the ubiquitous requirement of Social Security Numbers.

The NATIONAL EMPLOYMENT LAW PROJECT (NELP) has worked for over 30 years to advance the workplace rights of low-wage workers, including immigrant workers. Both directly and through its network with local community groups, labor unions and legal services organizations, NELP has represented thousands of immigrant workers attempting to enforce their labor rights. NELP attorneys have written, lectured, litigated, and engaged in policy advocacy on behalf of low-wage immigrant workers throughout the United States. In the past two years, NELP has submitted *amicus curiae* briefs in state workers' compensation cases in Maryland, Michigan, and Massachusetts on the issue of immigrants' entitlement to workers' compensation and has written extensively on this subject.

The FARMWORKER COORDINATING COUNCIL OF PALM BEACH COUNTY, INC., a Florida Not for Profit Corporation, began as a volunteer organization in 1977, responding to the emergency needs of Palm Beach County farmworkers. Since then, it has grown to a multi-office United Way agency

servicing the acute and unique needs of farmworkers. Its mission is to promote self-sufficiency and improve the quality of life of migrant and seasonal farmworkers through education, advocacy and access to services, including vital workers compensation benefits.

The COALITION OF FLORIDA FARMWORKER ORGANIZATIONS (COFFO), a Florida Not for Profit Corporation, is a statewide organization whose main objective is to enhance the living and working conditions of migrant and seasonal farmworkers and the rural poor in Florida. COFFO was founded in 1980 exclusively for the purpose of bettering the standard of living for agriculture workers and rural poor by administering programs that will assist them in the realization of economic upgrading, social justice, and human dignity, educational and cultural advancement. COFFO works with other farmworker organizations throughout Florida to ensure that farmworkers are benefiting from the services available to them, including workers compensation.

A. Summary of Argument

Immigrant workers in Florida occupy a large and growing segment of the workforce engaged in low-wage, high-injury occupations. Employers in low-wage, high injury industries often hire undocumented workers. Along with the vast majority of other US States, Florida provides workers' compensation benefits to workers, whether lawfully or unlawfully employed.

Since a statutory change in 1993, Florida law has required the Office of the Judges of Compensation Claims (OJCC) to dismiss petitions for benefits that do not comply with certain technical requirements, including the provision of a Social Security Number (SSN).[1] In the present case, Mr. Cagnoli's claim was rejected because he failed to provide the state of Florida with an SSN, the OJCC assuming that his failure to do so meant that he is an undocumented immigrant.[2]

The procedural requirement that workers must supply an SSN is clearly at odds with Florida's intent to provide benefits to undocumented workers, who are ineligible for SSNs. Moreover, as the First District Court of Appeals held, the requirement is invalid under the federal Privacy Act.

While requirement of the SSN may provide the agency with an easy way to identify claimants, it is unlawful. Any benefit in administrative efficiency is hugely outweighed by the potential to deny benefits to workers explicitly covered by the statute. To fail to cover workers under the Florida system merely for failure to

[1] 1993 Fla. Sess. Law Serv. Ch. 93-415, (S.B. 12-C) (West), providing that:

> The Office of the Judges of Compensation Claims shall review each petition and shall dismiss each petition, upon its own motion or upon the motion of any party, that does not on its face specifically identify or itemize the following:
>
> (a) Name, address, telephone number, and social security number of the employee….

[2] The OJCC's Order cites Florida law providing employment coverage under Florida law regardless of workers' status, and also Social Security regulations that provide that Social Security numbers are available to workers who have been granted work authorization by immigration authorities. *See,* Order Denying without Prejudice Motion to Vacate Order Striking Petition, 1.

divulge an SSN would undermine the purposes of the Workers' Compensation Act and would encourage employers to hire undocumented immigrants in high-risk occupations, since the employer would then receive a "free pass" on workers' compensation benefits.

B. Argument

I. The Florida workers' compensation system, which guarantees benefits to injured workers regardless of immigration status, is the state's means of striking the correct balance in allocating the costs of injuries incident to industry.

a. The Workers' Compensation system is a means by which the state is able to ensure that the costs of industrial injuries are allocated in the most efficient and cost-effective way.

Workers' compensation is a means by which a state can ensure that the costs of injuries incident to industry are not borne disproportionately by the workers who suffer the injuries. The workers' compensation laws developed from the realization that "the whole common-law doctrine of employer's liability for negligence, with its defenses of contributory negligence, fellow-servant's negligence, and assumption of risk, is based upon fictions, and is inapplicable to modern conditions of employment." *New York Central Railroad Co. v. White*, 243 U.S. 188, 197 (1917). Through the provision of workers' compensation, the employee's assumption of risk was re-adjusted:

> If the employee is no longer able to recover as much as before in the case of being injured through the employer's negligence, he is entitled to moderate

> compensation in all cases of injury, and has a certain and speedy remedy without the difficulty and expense of establishing negligence or proving the amount of the damages. Instead of assuming the entire consequences of all ordinary risks of the occupation, he assumes the consequences, in excess of the scheduled compensation, or risks ordinary and extraordinary.

Id., 243 U.S. at 201.

It has long been understood in Florida, as in other states, that workers' compensation is based upon the policy that industry should bear the burden of industrial accidents. *See, e.g., Dennis v. Brown*, 93 So.2d 584, 588 (Fla. 1957)("workmen's compensation acts were designed to remove from the workman himself the burden of his own injury and disability and place it on the industry which he served, and such acts should be liberally construed with the interest of the working man foremost."); *Protectu Awning Shutter Co. v. Cline*, 16 So.2d 342, 343 (Fla. 1944)("The purpose of Workmen's Compensation Act is to lift from the public the burden of supporting those incapacitated by industry and place upon industry the expenses incident to the hazards thereof ultimately passing on to the consumer such expense."); *De Ayala v. Florida Farm Bureau Cases. Ins. Co.*, 543 So.2d 204, 206 (Fla. 1989)("Workers' compensation program was established to see that workers in fact were rewarded for their industry by not being deprived of a reasonably adequate and certain payment for workplace accidents and to replace an unwieldy tort system that made it virtually impossible for businesses to predict or insure for the cost of industrial accidents"); Accord, *Val Blatz Brewing Co. v. Gerard*, 230 N.W. 622, 624

(Wis. 1930)("The fundamental idea upon which liability is imposed is that an injury to an employee, like damage to a machine, is a burden that should be borne by the product of the industry and ultimately paid by those who consume this product"); *Arnold v. Industrial Comm'n*, 21 Ill. 2d 57, 61 (1960); *McGanah v. State Accident Ins. Fund Corp,*. 296 Or. 145, 675 P.2d 159, 168-169 (1989); LARSON'S WORKERS' COMPENSATION LAW §1.03 [2].

This re-adjustment of the employee's assumption of risk through a departure from a traditional negligence-based approach to the employer's liability was also presumed to be reflected in the setting of wages: "[a]nd just as the employee's assumption of ordinary risks at common law presumably was taken into account in fixing the rate of wages, so the fixed responsibility of the employer, and the modified assumption of risk under the new system, presumably will be reflected in the wage scale." *New York Central Railroad Co.*, supra, 243 U.S. at 201.

This system of accident prevention and cost-spreading is known as "market deterrence." The theory attempts to "decide what the accident costs of activities are and let … the market determine the degree to which, and the way in which, activities are desired given such costs." CALABRESI, THE COST OF ACCIDENTS: A LEGAL & ECONOMIC Analysis (1970), 69. The market can exercise this influence if, *and only* if, the risks of each activity are reflected in the price of that activity. When the price of goods and services accurately reflect their social costs, consumers are able to

make informed decisions as to whether the social costs of a particular activity are acceptable. *Id.* at 70. Florida's interest in ensuring that the system of accident prevention and cost-spreading works is of particular relevance in this case, where the Board's decision could have the effect of excluding large segments of the working population from the workers' compensation system and thus distorting the reflected costs of doing business.

b. Undocumented immigrant workers must be compensated to the same extent as other workers, first, because they are frequently injured on the job, and second to remove employer incentives to prefer hiring undocumented workers over documented workers.

As in other states, immigrant workers in Florida occupy a large segment of the workforce engaged in low-wage, high-injury occupations. Florida's foreign-born population represents 16.7% of the population of the state, or over 2.7 million people.[3] It has been estimated that the total undocumented population of Florida numbers 850,000 as of 2004.[4]

Across the country, undocumented immigrant workers work in some of the lowest paid and highest risk industries, including construction, the industry in which Mr. Cagnoli was employed. A recent report of the Pew Hispanic Center estimates that in 2001 there were 620,000 undocumented workers employed in construction

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[3] *U.S. Immigration Statistics by State*, U.S.Census Bureau, *reprinted at http://www.gcir.org/about_immigration/usmap.htm*

[4] Jeffrey S. Passell, PEW HISPANIC CENTER, ESTIMATES OF THE SIZE AND CHARACTERISTICS OF THE UNDOCUMENTED POPULATION, MAR. 2005, *available at* <http://pewhispanic.org/files/reports/44.pdf.>

throughout the U.S.[5] Construction is listed as one of the ten occupations with the largest number of cases of nonfatal occupational injuries and illnesses involving days away from work by the Bureau of Labor Statistics (BLS). According to the BLS, in 2001 9,386 Hispanic workers and 331 Asian or Pacific Islander workers reported nonfatal occupational injuries and illnesses involving days away from work. Together, they made up 22.1% of the total of such injuries in the industry.[6]

Florida is one of six states that report the highest incidence of fatal occupational injuries to immigrant workers.[7] Fatal injuries to foreign-born workers in Florida account for one-quarter of all occupational deaths in the state, numbering over 500 in the years 1996-2001.[8] Twenty-three percent of fatalities occurred in construction.[9]

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[5] B. Lindsay Lowell and Robert Suro, HOW MANY UNDOCUMENTED: THE NUMBERS BEHIND THE U.S.-MEXICO MIGRATION TALKS, Mar. 2002, *available at* <http://www.pewhispanic.org/files/reports/6.pdf.>

[6] BUREAU OF LABOR STATISTICS, *Number and percent of nonfatal occupational injuries and illnesses involving days away from work for the ten occupations with the largest number of cases by case and worker characteristics, 2001, available at* <http://www.bls.gov/iif/oshwc/osh/case/ostb1145.pdf.>

[7] Katherine Loh and Scott Richardson, *Foreign-Born Workers: Trends in Occupational Fatalities, 1996-2001* MONTHLY LABOR REVIEW, 42, 50, Jun. 2004, 42, *available at* < http://www.bls.gov/opub/mlr/2004/06/art3full.pdf.>

[8] *Id.,* 50 and Table 10.

[9] *Id.,* Table 11.

Economist Paul Leigh has quantified the overall costs of occupational injuries and deaths.[10] Leigh's findings include that the occupations in which immigrants are overrepresented, construction laborers, are also those that contribute the most to total costs. If the segment of the Florida workforce represented by unauthorized immigrants were excluded from workers' compensation coverage, the cost-spreading purpose of the system would be undermined.

II. The state of Florida, along with other states, has repeatedly and explicitly concluded that undocumented immigrant workers must be covered by workers' compensation in order to preserve the risk-spreading principles discussed above.

As acknowledged by all parties, undocumented immigrants are covered under the Florida workers' compensation system. Since 1941, the Florida workers' compensation statute has explicitly covered immigrants, both documented and undocumented. The recent procedural requirement of an SSN should not defeat Florida's clear intent to cover all injured workers under its compensation system.

Both the statute itself and Florida case law are clear: in *Gene's Harvesting v. Rodriguez*, 421 So.2d 701, 701 (Fla. 1st D.C.A. 1982) and *Cenvill Development Corp. v. Candelo*, 478 So.2d 1168, 1171 (Fla. 1st D.C.A. 1985), the Court clearly allowed benefits to undocumented workers. The Court in *Cenvill* put it simply,

[10] J. P. Leigh, and Miller, T. R., *Ranking occupations based upon the costs of job-related injuries and diseases,* J OCCUP. ENVIRON. MED (1997). 39:(12)1170-1182.

"Illegal aliens indeed are entitled under the statute to workers' compensation benefits." The holding of *Cenvill* has recently been upheld in *Safeharbor Employer Services I, Inc. v. Velazquez,* 860 So.2d 984 (Fla. 1st D.C.A. 2003) (undocumented worker entitled to workers' compensation). In Florida, entitlement to wage loss benefits is based on proof of a connection between the injury and the alleged wage loss, not on the immigration status of the injured worker.[11]

Sound public policy underlies the decisions of Florida and other states to extend workers' compensation benefits to all workers irrespective of immigration status. To do otherwise would both improperly shift the cost of workplace injuries

[11] Some employers have suggested that the U.S. Supreme Court's recent ruling in *Hoffman Plastic Compounds, Inc v. NLRB,* 535 U.S. 137 (2002)(holding that undocumented workers are not entitled to back pay under the National Labor Relations Act) means that states are no longer allowed to provide workers' compensation benefits to undocumented workers. However, post-*Hoffman*, state courts and administrative agencies in Florida, as well as Arizona, Georgia, Massachusetts, Michigan, Minnesota, Nebraska, Oklahoma, Pennsylvania, Tennessee and Texas, have continued to hold that undocumented workers are covered under state compensation systems, in ten cases decided in 2002-2004. *Tiger Transmissions v. Industrial Commission of Arizona*, No. 1 CA-IC 02-0100 (May 29, 2003); *Safeharbor Employer Services I Inc., v. Velazquez,* 860 So.2d 984 (Fla. 1st D.C.A. 2003); *Wet Walls, Inc., v. Ledezma,* 598 S.E.2d 60 (Ga. App. 2004); *Medellin,* Board No. 03324300 (Mass. Dep. of Industrial Accidents, Dec. 23, 2003); *Sanchez v. Eagle Alloy*, 658 N.W.2d 510 (Ct. Apps. Mich. 2003), *order vacated* by *Sanchez v. Eagle Alloy*, 684 N.W.2d 342 (2004); *Correa v. Waymouth Farms, Inc.*, 664 N.W.2d 324 (2003); *Ortiz v. Chief Industries, Inc.,* 2002 WL 31771099 (Neb.Work.Comp.Ct., 2002); *Cherokee Industries, Inc v. Alvarez,* 84 P.3d 798 (Okla.Civ.App.Div. 3 2003); *The Reinforced Earth Company v. Workers' Compensation Appeal Board* (Astudillo), 810 A.2d 99 (Pa.2002); *Silva v. Martin Lumber Company*, 2003 WL 22496233 (Tenn. Workers Comp.Panel, 2003) *Appellant: *** v. Respondent*: ***, 2002 WL 31304032 (Tex.Work.Comp.Com., 2002).

to the worker and could, perversely, operate to encourage unscrupulous employers knowingly to employ undocumented immigrants, so that their claims can be denied with impunity. *See, Fernandez-Lopez v. Jose Cervino, Inc.*, 288 N.J. Super 14, 20 (1996)("the public policy against illegal immigration may actually be subverted by refusing to grant undocumented aliens workers' compensation benefits") *Dowling v. Slotnik*, 244 Conn. 781, 796, 712 A.2d 396 (1998)("excluding such workers from [workers' compensation could create] a financial incentive for unscrupulous employers to hire undocumented workers"). Exclusion of undocumented workers from worker's compensation benefits could also "provide a disincentive to assuring workplace safety." *Mendoza v. Monmouth Recycling Corp.*, 672 A.2d 221, 225 (N.J. Super. Ct. App. Div. 1996).

Florida law providing workers' compensation benefits to all workers, "whether lawfully or unlawfully employed," Fla. Stat. § 440.02(15)(a) is therefore consistent with the vast majority of states that have considered the issue.[12] Florida's guarantee of equal access to workers' compensation for all immigrant workers conflicts with its recently-imposed procedural requirement that applicants must provide a Social Security Number. This Court can and should resolve that conflict by reference to the federal Privacy Act.

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[12] See, Note, *Working in the Shadows: Illegal Alien's Entitlement to State Workers' Compensation*, 89 IOWA L. REV. 709, 719-723 (2004).

III. Florida's requirement of a Social Security number on workers' compensation applications violates the federal Privacy Act.

a. The Privacy Act is intended to protect personal privacy by restricting the uses of the Social Security Number.

Florida's procedure for filing a workers' compensation claim states that a claim shall contain the "name, address, and social security number of the employer and employee…" along with details of the accident. Fla. Stat. § 440.192(2). Florida's procedural requirement squarely conflicts with its guarantee of workers' compensation benefits to all workers. Among immigrants, eligibility for a social security number is generally limited to those who have work authorization. 20 C.F.R. § 422.104(a) (2), (b), and § 422.107 (2004). Thus, Florida conditions receipt of workers' compensation benefits for an injured worker on production of documents that many immigrants simply do not have.

Mr. Cagnoli's petition for workers' compensation benefits was rejected for his failure to provide a Social Security Number.[13] As the Court of Appeals held, that requirement is unlawful under the federal Privacy Act.

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[13] The Order said that Mr. Cagnoli could justify his failure to provide a Social Security Number by admitting that he was unlawfully employed. "To be exempt from the requirement a claimant will need to allege that he or she has applied for a number and been rejected, or that he or she is unlawfully employed and ineligible to apply for a social security number." Order, Dec. 31, 2003. As noted *infra n. 18*, such an admission and the OJCC "exception" implicate important Fifth Amendment rights. *See, Lefkowitz v. Turley*, 414 U.S. 70, 77 (1973)(Fifth Amendment applies to civil proceedings); *Village Inn Restaurant v. Aridi*, 543 So.2d 778 (Fla. 1st DCA 1989)(applying Fifth Amendment in workers' compensation proceeding).

The federal Privacy Act restricts the collection and dissemination of Social Security Numbers by federal, state and local government agencies. Under the Act, it is illegal "for any Federal, State, or local government agency to deny to any individual any right, benefit, or privilege provided by law because of such individual's refusal to disclose his social security account number." 5 U.S.C. § 552a (note)(Act of Dec 31, 1974), Pub.L. 93-579, § 7, 88 Stat. 1909.[14]

The SSN was established in 1936 as nothing more than an account number to facilitate the operation of the new Social Security Act. In the beginning, an effort was made to ensure that the SSN would not be used for unrelated purposes. In fact, from 1946 to 1972, the card bore the words "Not for Identification." SSA, Frequently Asked Questions, Q18 and 21, *at* http://www.ssa.gov.history/hfaq.html.

With the onset of the computer age, the use of the SSN for identification purposes or as a unique identifier, grew enormously. Public concern about the use of the SSN for purposes unrelated to the administration of Social Security also grew. The Privacy Act was the result of this concern.

In its consideration of the Privacy Act, the Senate Committee on Government Operations stated that the widespread use of SSNs as universal identifiers was "one

[14] Although the Privacy Act was never codified, it remains in the Statutes at Large, and is therefore law in the United States. *See, Schwier v. Cox*, 340 F.3d 1284, 1288 (11th Cir. 2003). It has been cited as law in U.S. Supreme Court decisions. *See, e.g., Selective Service System v. Minnesota Public Interest Research Group*, 468 U.S. 841, 865 n. 9 (1984).

of the most serious manifestations of privacy concerns." S. Rep. No. 93-1183 at 28, reprinted in Staffs of Senate Comm. On Gov. Op. and the House Comm. on Gov. Op, 94th Cong., *Legislative History of the Privacy Act of 1974 – S. 3418* (Pub. L. 93-579) 181 (Joint Comm. Print 1976) ("Legislative History").

b. Section 7(B) of the Act provides an exception for disclosure of the SSN only where a prior rule both (1) required disclosure of the SSN, and (2) used the SSN to verify identity.

Section 7(B) provides a limited exception, for "the disclosure of a social security number to any Federal, State, or local agency maintaining a system of records in existence and operating before January 1, 1975, if such disclosure was required under statute or regulation adopted prior to such date to verify the identity of an individual."

This Section of the Privacy Act, the "moratorium" on collection of SSNs, is the result of a compromise between separate amendments offered in the Senate and House versions of the bill. The original bill made it unlawful for anyone to require the disclosure of the SSN except in the administration of Social Security benefits. Legislative History, 23.

An amendment was offered in the Senate. Senator Goldwater introduced the concept of a "moratorium" on use of the SSN, in order to avoid total revamping of systems that relied on the SSN for verification of identity. Legislative History, 933.

The amendment exempted any information system that was in existence prior to 1975.[15] Legislative History, 804.

In the House, a separate amendment was offered. It outlawed collection of the SSN only with respect to federal agencies and federal benefits, but it allowed the use of the SSN in certain circumstances for verification of identity.[16] Legislative History, 932.

A compromise was reached, which created the language in the statute. The language on "grandfathered" use of the SSN in rules where it was previously used for verification of identity was added at this time. This language plainly requires that an existing rule is grandfathered only if it both is required by an existing rule, and if the purpose of the rule was to verify identity.[17]

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[15] The pertinent text of the amendment was as follows:

(a) It shall be unlawful for—

(1) any Federal, State or local government agency to deny to any individual any rights, benefit, or privilege provided by law because of such individual's refusal to disclose his social security account number, or ….

(b) The provisions of subsection (a) shall not apply with respect to – …

(2) any information system in existence and operating before January 1, 1975.

[16] The pertinent language said: (3) No Federal agency, or any State or local government acting in compliance with any federal law or federally assisted program, shall use the social security account number for any purpose other than for verification of the identity of an individual unless such other purpose is specifically authorized by Federal law."

[17] The compromise was described this way:

> To clarify the intent of the Senate and House, the grandfather clause of this section was re-stated to exempt only those governmental uses of the social security account number continuing from before January 1, 1975**,** *pursuant to a prior law or regulation that, for purposes of verifying identity, required*

c. The Division has made no showing that prior to 1975, disclosure of SSNs was required under state law.

Under the Privacy Act, the mere existence of a rule prior to 1975 does not meet the 7(2)(B) exception unless there is additionally proof that disclosure of the SSN was **required**. While the Division of Workers' Compensation ("Division") has produced some records indicating that rules have listed the SSN as an attribution of a claim for compensation, it is undisputed that the SSN was not **required** as a condition of acceptance of a claim until the most recent statutory amendments. In fact, in a prior brief *in this case,* the Division agreed that the SSN was not required until the amendments of 1994 and 2001:

> Prior versions of section 440.192 permitted the judge to accept petitions if they were sufficient to put the employer on notice of the benefits sought by the injured employee. The 1994 and 2001 statutory amendments to section 440.192 substantially revised the information required for the petition to be filed. The judge of compensation claims is no longer permitted to construe the specificity requirements liberally…"In the event the requirements are not met, dismissal without prejudice is mandated."[18]

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individuals to disclose their social security account number as a condition for exercising a right, benefit, or privilege.
Legislative History, 864. (emphasis added).

[18] Contrary to the assertions of the Division and the OJCC, the SSN is now a strict requirement of the law. Since 1994, the OJCC and the Division have attempted in various ways to reconcile the conflict between § 440.192's strict requirement that the injured worker provide a Social Security Number and § 440.02(15)(a)'s guarantee of workers' compensation benefits to all immigrant workers. Most recently, the OJCC has articulated its own "limited exception" to the SSN requirement. OJCC Admin. Order 2005-2, Feb. 24, 2005, p. 8. The exception is not authorized by statute. Nor does it mitigate the Privacy Act violations. Moreover, it creates additional legal problems. Foremost among these is that the exception

Brief of Intervener, Division of Workers' Compensation, In Support of Appellees, in the First District Court of Appeal, p. 4, quoting *Kennedy v. Orlando Shader Realty*, 711 So. 2d 156, 157 (Fla 1st DCA 1998).

Each of the regulations and statutes cited by the Division in its arguments before this Court explicitly makes a provision for acceptance of a claim which substantially complies with the requirements for acceptance, without a strict requirement of an SSN. In 1971, the Florida Supreme Court relied on such a provision when it held that submission of a letter by the wife of an injured worker, which gave his name and some of the details of his accident and claim, was sufficient to file a claim. *Turner v. Keller Kitchen Cabinets*, 247 So.2d 35, 39 (Fla.

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implicates important Fifth Amendment issues that the OJCC seems unwilling to acknowledge.

An exception which conditions receipt of compensation for injuries on possible admission of commission of a crime -- presents undocumented immigrant workers with a series of Hobson's choices: leave the line for an SSN on their form blank (and have their claim for compensation dismissed), admit in their statement that they have violated federal law (and face potential criminal prosecution), or claim the Fifth Amendment privilege against self-incrimination (and still potentially suffer dismissal of their claims).

The OJCC has indicated that it views assertion of Fifth Amendment privilege with respect to disclosure of the SSN as justifying dismissal, that the admission of unlawful employment is not testamentary, and that by working without authorization undocumented workers have "waived" their Fifth Amendment privilege against testifying about unlawful employment. OJCC Admin. Order 2005-2, p. 9. However, Fifth Amendment jurisprudence simply does not support these assertions. Should this issue be formally raised and considered by this Court, *amici* request an opportunity to fully address the Fifth Amendment issue.

1971). Plainly, the SSN was not required by state law until well after passage of the federal Privacy Act.

d. The Division has not shown that the SSN was used to verify identity prior to 1975.

Nor do the regulations cited by the Division meet the second requirement for "grandfathering" under the Privacy Act, in that there is no showing that the SSN was gathered for purposes of verifying identity. By its terms, section 7(B) provides for disclosure of a social security number if such disclosure was required under statute or regulation adopted prior to such date to *verify the identity of an individual."* (Emphasis added).

The exception applies only to state agencies that had in place, prior to 1975, a statutory or regulatory system that relied on the SSN for the purpose of verifying identity. In 1975, the relevant portion of the Florida statute read:

> Such claim shall be filed with the division at its office in Tallahassee and shall contain the name and address of the employee, the name and address of the employer, and a statement of the time, place, nature and cause of the injury *or such fairly equivalent information as will put the division and the employer on notice with respect to the identity of the parties and the nature of the claim.* (Emphasis added).

Fla. Stat. § 440.19(1)(c) (1975). The Division has submitted no proof that the SSN was used to verify identity prior to 1975. Thus, its rules do not meet the grandfather exception to the Act.

IV. Florida's failure to provide notice concerning the disclosure of Social Security numbers is a separate violation of the Privacy Act.

The Privacy Act independently requires that agencies requesting Social Security Numbers make certain disclosures. The Division's brief does not address this separate Privacy Act violation.

Section 7(b) of the Act states:

> (b) Any Federal, State, or local government agency which requests an individual to disclose his social security account number shall inform that individual whether that disclosure is mandatory or voluntary, by what statutory or other authority such number is solicited, and what uses will be made of it.

The two subsections have repeatedly been read together to require the disclosure mandated in subsection (b) even when the disclosure falls within one of the exceptions to the prohibition set forth in subsection (a). See, e.g., *Greidinger v. Davis,* 782 F.Supp. 1106 (E.D. Va. 1992), *rev'd and remanded on other grounds,* 988 F.2d 1344 (4th Cir. 1993); *Doyle v. Wilson,* 529 F.Supp. 1343 (D.C. Del. 1982).[19]

In *Greidinger,* for example, the state of Virginia's requirement of an SSN in order to register to vote was exempt under section 7(a) of the Act, but the state was still required to comply with section 7(b). In *Doyle,* the court noted that even if the

[19] These requirements reflect privacy concerns similar to those recently discussed by the Second District in *Thomas v. Smith*, 882 So.2d 1037, 1046-47 (2nd DCA 2004) (expectation of privacy in the SSN could only be abrogated by the demonstration of a compelling governmental interest).

Delaware Treasurer's practice of requiring the disclosure of SSNs was excepted by the 1976 amendments to the Social Security Act, the State Treasurer had not complied with the requirements of section 7(b). *Doyle*, 529 F.Supp. at 1350. The court explained, "adequate explanations of the information required by section 7(b) is critical to the right afforded by section 7(a) to withhold disclosure of the social security number, except in limited circumstances." *Id.*

> Even if the social security requirement were allowable under federal law, the State of Florida does not inform its workers' compensation applicants in accordance with the law. *See, Doe v. Sharp*, 491 F.Supp. 396 (D.Mass. 1980) (even where disclosure of the social security number is allowed under federal law, notice provisions must be met: "… the necessary protection of individual privacy requires that disclosure of information to the government be premised upon a choice informed by the knowledge of uses to be made of disclosed information." *citing* U.S.Code Cong. & Admin.News 1974 at 6917.)"

Id. at 350. The forms utilized by the Division of Workers Compensation do not comply with these requirements. *E.g*., Forms DFS-F2-DWC-1 and DFS-F2-DWC-3, available at http://www/fldfs.com/WC/forms.html.

Florida's failure to provide notice to injured workers concerning the use of the Social Security Number constitutes a separate violation of the federal Privacy Act.

C. Conclusion

For the foregoing reasons, the decision of the First District Court of Appeals should be upheld.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing has been furnished by U.S. Mail to counsel for appellee, Mark L. Zientz, Esq. and Andrea Cox, Esq., Law Office of Mark L. Zientz, P.A., 9130 S. Dadeland Blvd., Suite 1619, Miami, FL 33156, to counsel for the employer/carrier, Thomas Hodas, Esq., 250 Tequesta Drive, Suite 301, Tequesta, FL 33469, and to counsel for appellant, Daniel Y. Sumner, Esq. and David D. Hershel, Esq., Division of Workers' Compensation, 200 E. Gaines Street, Tallahassee, FL 32399-4229, on this __ day of April, 2005.

By: /s/ JoNel Newman
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CERTIFICATE OF COMPLIANCE

The undersigned hereby certifies that this brief complies with the font requirements of Fla. R. App. P. 9.210(2). The brief is computer-generated in Times New Roman 14-point font.

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