

INTER-AMERICAN COURT OF HUMAN RIGHTS

IN THE MATTER OF

REQUEST FOR ADVISORY OPINION

SUBMITTED BY

THE GOVERNMENT OF THE UNITED MEXICAN STATES

OC-18

Brief of *Amicus Curiae*: Labor, Civil Rights and Immigrants' Rights Organizations in the
United States

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Honorable Court:

Attorneys Rebecca Smith of the National Employment Law Project, Professor Sarah Cleveland, Amanda Levinson and Emily Rickers of the University of Texas School of Law, Professor Beth Lyon of Villanova University School of Law, ¹ Ana Avendano of the National Immigration Law Center and D. Michael Dale of the Northwest Worker Justice Center present this brief *amicus curiae* on behalf of fifty labor, civil rights and immigrants' rights organizations in the United States, listed in Appendix A, in the matter of the Request for Advisory Opinion submitted by the Government of the United Mexican States to the Inter-American Court of Human Rights regarding the human rights of migrant workers, OC-18.

INTRODUCTION

Immigrant workers in the United States of America are among the most poorly paid and poorly treated in the workforce. *Amici's* attempts to protect the rights of immigrants, including unauthorized² workers, have been severely hampered by domestic U.S. laws that discriminate on the basis of alienage and immigration status, and especially by a recent decision of the United States Supreme Court in *Hoffman Plastic Compounds, Inc. v. National Labor Relations Board*, 535 U.S. 137, 122 S.Ct. 1275, 152 L.Ed.2d 271 (2002).

Immigrant workers in particular employment-related visa categories are explicitly excluded from the protections of certain U.S. labor and employment laws. So, too, immigrant workers who lack employment authorization required by federal law ("unauthorized immigrants") are denied the protection of some state and federal laws. As a result of the *Hoffman* decision, many employers have defended pending cases by claiming that unauthorized immigrant workers have no labor and employment rights in the United States. Undoubtedly, some lower courts will find that unauthorized immigrants are excluded from the protections of additional labor laws.

In the U.S., employer threats to retaliate against complaining workers by calling in the U.S. Immigration and Naturalization Service to arrest them are common. These threats are on the rise in the last several months, and have had several pernicious effects: First, they have a severe chilling effect on workers' ability to enforce their remaining rights. Second, employers who would first hire, then abuse, and finally retaliate against

¹ Nothing in this brief purports to represent the official views of the University of Texas nor of Villanova University.

² This brief uses the term "unauthorized" worker to describe immigrant workers who do not possess authorization to be employed pursuant to U.S. law. This group includes workers who are in the United States legally for various reasons (on student visas, asylum applicants, etc.) but who nevertheless lack authorization to work. The term "undocumented" immigrant is used to describe immigrants whose presence in the U.S. is illegal. These workers form a subset of the immigrant population that is unauthorized to work. Most relevant court decisions are based on the presence or absence of work authorization.

unauthorized employees gain a competitive advantage over those who follow the law. Since these employers suffer no penalty for violating the law, they are encouraged to hire the undocumented, and the goals of U.S. immigration laws are thus thwarted.

Amici are concerned that continued employer threats of retaliation and actual retaliation mean that, regardless of the outcome of pending legal cases, many immigrant workers will be too intimidated to bring their legitimate complaints to the authorities. Because of this chilling effect, and because of legal restrictions on access to federal legal services for undocumented immigrants, the result will be more severe exploitation of a highly vulnerable workforce, all to the detriment of workers, law-abiding employers, and domestic immigration policy.

The OAS Charter proclaims that "work gives dignity to the one who performs it."³ Discriminatory U.S. laws deprive millions of migrant workers of that dignity simply because they have been forced to cross international borders in order to survive. In the name of immigration control, U.S. federal and state employment laws violate international human rights law binding on this country.

Amici recognize that states retain the authority under international law to decide whether to admit aliens. For the purposes of this case, *amici* do not dispute that a state may have the right to deny employment to aliens altogether under certain circumstances, in order to further its border control policy. However, once an alien is present in a state's territory and actually working, international law, including the instruments of the OAS system, prohibits discrimination on the basis of alienage or immigration status in workplace benefits and protects the right to freedom of association for all workers. U.S. employment laws that discriminate against migrant workers on the basis of alienage or immigration classification accordingly violate these norms.

This *amicus* submission considers only those human rights sources that are binding in some form on the United States. *Amici curiae* understand that this Court has no jurisdiction over the United States and do not make the following argument in order to seek any binding legal pronouncements on our government's actions. We feel it is important, however, to demonstrate that the United States' practice subjects the massive migrant worker population in this country to human rights deprivations of the most serious kind. We hope thus to demonstrate to this Honorable Court the urgent necessity for strong regional standards regarding the protection of migrant workers.

The importance of this question for millions of OAS nationals who migrate for employment, and the lack of jurisprudence from other international bodies regarding the employment rights of migrant workers, create an important opportunity for this Court to clarify the obligations of the Inter-American system and to provide fundamental human rights protection to this uniquely vulnerable group.

³ Charter of the Organization of American States. Apr. 30, 1948, art 45(b), 2 U.S.T 2394, 2422, 119 U.N.T.S. 3.

ARGUMENT

I. U.S. LAWS DENY BASIC EMPLOYMENT PROTECTIONS TO FOREIGN WORKERS ON THE BASIS OF ALIENAGE OR IMMIGRATION STATUS.

A. The Unauthorized Population Performs a Large Part of the Low-Wage, High Risk Employment in the United States

North America absorbs the highest number of international migrants in the world.⁴ The United States is the top migrant-receiving nation, and has the largest international migrant population worldwide.⁵ A subgroup of the migrant population is undocumented. The number of undocumented immigrants in the United States is estimated at roughly double the entire undocumented population of Europe.⁶ In some industries, these numbers are extremely high. For example, eighty-one percent of U.S. farm workers are foreign-born, mainly from Mexico.⁷ At least half of the agricultural workforce is not authorized to work in the United States.⁸

Various sources provide estimates of the undocumented population in the U.S. The U.S. Immigration and Naturalization Service (INS) keeps a periodically updated estimate of undocumented residents. The latest INS statistic estimates 5 million undocumented immigrants as of 1996.⁹ More recent private estimates profit from the 2000 Census process, which invested resources in encouraging greater participation by undocumented immigrants.¹⁰ The Pew Hispanic Center, a non-partisan research organization,¹¹ estimates

⁴ United Nations Population Division Department of Economic and Social Affairs, *International Migration 2002*, available at < <http://www.un.org/esa/population/publications/ittmig2002/Migration%202002.pdf>>.

⁵ *Id.*

⁶ Peter Stalker, *Types of Migrant*, available at < http://www.pstalker.com/migration/mg_types.htm#>. The few available estimates of the undocumented immigrant population in Canada are extremely unreliable, because of the Canadian's government's refusal to fund such research, but one 1995 report estimated "at least about 200,000." J. Samuel, *Temporary and Permanent Labour Immigration into Canada: Selected Aspects, The jobs and effects of migrant workers in northern America - Three essays* (International Labour Organization Migration for Employment Programme International Migration papers 10) 1, 22 (1995) (on file with amici).

⁷ U.S. Department of Labor, FINDINGS FROM THE NATIONAL AGRICULTURAL WORKERS SURVEY (NAWS) 5 (2000).

⁸ U.S. Department of Labor, Research Rep. No. 8, *Findings from the National Agricultural Workers Survey 1997-98* 5, 22 (Mar. 2000).

⁹ U.S. Department of Justice, Immigration and Naturalization Service, *2000 Statistical yearbook of the Immigration and Naturalization Service*, 271 (Sep. 2002).

¹⁰ Jeffrey Passel, *New Estimates of the Undocumented Population in the United States* 1 (2002), available at < <http://www.migrationinformation.org/feature/display.dfm?ID=19>>.

¹¹ B. Lindsay Lowell and Roberto Suro, *How many undocumented: The numbers behind the U.S.—Mexico Migration Talks*, available at < <http://www.pewhispanic.org/site/docs/pdf/howmanyundocumented.pdf>> [hereinafter PEW HISPANIC CENTER STUDY].

the total illegal-resident population in the United States at 7.8 million.¹² The Migration Policy Institute tentatively places the 2000 undocumented population at 8.5 million.¹³

The Pew Hispanic Center estimates the numbers of undocumented immigrants in the workforce, placing the unauthorized urban labor force at 5.3 million¹⁴ and the unauthorized agricultural labor force at 1.2 million.¹⁵ The Center notes that there is significant overlap between the urban and agricultural work force and because of the uncertainty about how to calculate the overlap, the authors decline to provide an estimate of the total unauthorized workforce.¹⁶ For the purposes of this brief, using the urban labor force figure of 5.3 million as a rough estimate of the total number of undocumented workers in the United States is sufficient to establish the population as a serious economic factor and compelling focus of political and human concern.

About 4.7 million of the U.S. undocumented population, or 55 %, come from Mexico. About 1.9 million come from other nations in Latin America, and 1.1 million come from Asia. A few hundred thousand undocumented immigrants come from Europe, Canada, and Africa.¹⁷

Undocumented workers in the United States work in a variety of low wage, high risk occupations. The manufacturing sector employs 1.2 million undocumented workers. The services sector employs 1.3 million undocumented workers. One million to 1.4 million unauthorized workers labor in the fields. Six hundred thousand more work in construction and 700,000 work in restaurants.¹⁸

In 1996 and 1997, INS inspections found that 23% of workers at Nebraska and Iowa meatpacking plants had questionable documents. An INS inspection of eighty-nine construction businesses in Las Vegas found that 39% of workers appeared to be unauthorized to work. Inspections of seventy-four Los Angeles-area garment contractors found 41% of the employees were unauthorized to work.¹⁹ In recent years, the number of unauthorized immigrant workers in the poultry industry has increased, prompting the INS to deem the employment of unauthorized workers a major problem.²⁰

Many of these same industries are known for low wages, dangerous conditions, and frequent violations of labor laws. A U.S. Department of Labor (DOL) survey found that

¹² *Id.* at 5. This figure represents a "midrange total... between a low estimate of 5.9 and a high estimate of 9.9 million."

¹³ Passel, *supra* note 10 at 1.

¹⁴ PEW HISPANIC CENTER STUDY, *supra* note 11 at 7.

¹⁵ *Id.* at 8.

¹⁶ *Id.*

¹⁷ Michael Fix and Jeffrey S. Passel, *Immigration and Immigrants: Setting the Record Straight*, The Urban Institute Table 3 (May 1994), available at < <http://www.urban.org/pubs/immig/immig.htm> >.

¹⁸ PEW HISPANIC CENTER STUDY, *supra* note 10 at 7.

¹⁹ General Accounting Office, GAO/GGD-99-33, *Illegal Aliens: Significant Obstacles to Reducing Unauthorized Alien Employment Exist* 6 (Apr. 1999)(on file with amici).

²⁰ See, Lena H. Sun & Peter S. Goodman, *Poultry Firm to Help INS Monitor Workers*, WASH. POST A18 (Oct. 23, 1998); David Griffith, *Jone's Minimal: Low Wage Labor In the United States* 157 (1993) (suggesting that poultry employers had "developed a preference for those most likely to be illegal aliens.")

in 2000, 100% of all poultry processing plants were non-compliant with federal wage and hour laws.²¹ A separate DOL survey found that in 1996, half of all garment-manufacturing businesses in New York City could be characterized as sweatshops, and a DOL survey in agriculture focused on cucumbers, lettuce, and onions revealed that compliance in these commodities was unacceptably low.²²

Injuries and deaths of Latino workers engaged in hazardous employment are extremely high and increasing. In the year 2000, construction fatalities involving Latino workers increased by 24%, while Latino employment was up only six percent.²³ New York has the nation's highest rate of immigrants killed in the workplace, with foreign-born workers accounting for three out of every 10 deaths.²⁴

In 2001, farm workers employed in the production of crops accounted for only one percent of the workforce, but represented six percent of the occupational deaths.²⁵ In that year, there were 49 farm fatalities in the state of California alone.²⁶

Thus, it is no secret that many U.S. employers are hiring unauthorized workers and profiting from their labor. Both because of overt exclusions from the protection of domestic labor laws, and because of the practical and legal effects of the United States Supreme Court's recent decision in *Hoffman Plastic Compounds v. NLRB*, 535 U.S. 137, 122 S.Ct. 1275, 152 L.Ed.2d 271 (2002), the task of enforcing workers' rights has become increasingly more difficult. The *Hoffman* decision has contributed to a general climate of fear among immigrant workers in the United States and a general reluctance, and often, inability, to enforce existing rights. The following sections will examine that climate, employers' willingness to hire the unauthorized, and the limitations of U.S. labor law that exacerbate the victimization of these workers.

B. Case Examples: Unscrupulous Employers Use Extra-Judicial Threats to Suppress Exercise of Labor Rights.

The practice of threatening to expose, and exposing, workers to the U.S. Immigration and Naturalization Service in order to suppress immigrant workers' exercise of their labor rights has been a common one in the United States for many years. For example:

Victor Benavides began working as a boiler mechanic in 1990. Before he was hired, the president of the corporation personally interviewed Mr. Benavides. Mr. Benavides told the president that he was working unlawfully in the United States. The president

²¹ U.S. Department of Labor, FY 2000 Poultry Processing Compliance Report (2000).

²² *Labor Department: Close to Half of Garment Contractors Violating Fair Labor Standards Act*, DAILY LAB. REP. (BNA) 87 (May 6, 1996); U.S. Department of Labor, *Compliance Highlights* 1,3 (Nov. 1999).

²³ U.S. Department of Labor, Bureau of Labor Statistics, NATIONAL CENSUS OF FATAL OCCUPATIONAL INJURIES IN 2000 (Aug. 14, 2001).

²⁴ Thomas Maier, *Death on the Job: Immigrants at Risk*, NY NEWSDAY (Dec. 16, 2001).

²⁵ U.S. Department of Labor, Bureau of Labor Statistics, NATIONAL CENSUS OF FATAL OCCUPATIONAL INJURIES, 2001, Table 2: Fatal Occupational injuries and employment by industry (Sep. 25, 2002), available at <<http://stats.bls.gov/news.release/cfoi.t04.htm>>.

²⁶ Andy Furillo, *Farm death sparks manslaughter charge*, SACRAMENTO BEE (Dec. 18, 2001).

responded that he only needed a “legal” name so that Benavides could be listed on the company’s books. Several months later, when Benavides and another undocumented worker, Alberto Guzman, became active in a union organizing drive, and in an atmosphere of “flagrant and pervasive unfair labor practices,” the workers were fired. One day after the union won the election, the employer asked the INS to investigate the legal status of its employees.²⁷

In 1999, workers at a Holiday Inn Express hotel in Minneapolis voted to join the Hotel Employees and Restaurant Employees union. A call to the INS by the employer resulted in the arrest of eight members of the union’s negotiating committee.²⁸

In 1996, the Teamsters’ and United Farm Workers’ unions began a joint organizing drive in Washington State’s lucrative apple industry, beginning with a packing company in Wenatchee, Washington. One employee, Mary Mendez, quotes the employer’s anti-union consultant as having told the workers: “there hasn’t been a union here yet, and the INS hasn’t done any raids. But with a union, the INS is going to be around.” The union lost the subsequent election.²⁹

Silvia Contreras worked as a secretary for a company that sells commercial insurance to truck drivers. In 1997, after Ms. Contreras filed a claim for unpaid wages and overtime under the Fair Labor Standards Act, her employer turned her in to the INS.³⁰

In *U.S. v. Alzanki*,³¹ an employer confined her immigrant employee to the apartment, forced her to work fifteen hour days, exposed her to noxious cleaning chemicals, and refused to provide medical treatment when the chemicals caused her illness. The employer threatened her with deportation almost daily. He was later convicted of holding her in involuntary servitude.

In Gilbert, Arizona, female employees at Quality Art LLC, a picture frame manufacturing company, accused their employer of offensive and intrusive searches, as well as other harassment on the basis of sex, such as being assigned to sex-segregated positions. The employer retaliated by terminating some employees, forcing some workers to quit their jobs based on the hostile work environment, and reported the women to the INS. Although INS officials said that they sympathized with the women – calling them “courageous” for coming forward -- INS indicated that the women likely would be returned to their countries.³²

²⁷ *A.P.R.A. Fuel Oil Buyers Group, Inc.*, 320 N.L.R.B. 408, 409, 415 (1995).

²⁸ T. Alexander Aleinikoff, *Illegal Employers*, AM. PROSPECT (Dec. 4, 2000), available at <<http://www.prospect.org/print/VII/25/aleinikoff-t.html>>.

²⁹ David Bacon, *Immigration Law – Bringing Back Sweatshop Conditions* (Nov. 10, 1998), available at <<http://www.igc.org/dbacon/Imgrants/11sanctn.html>>. (documenting similar employer abuses in a maintenance company in the Silicon Valley of California, a knitting company on Long Island, and a video company in San Leandro, California).

³⁰ *Contreras v. Corinthian Vigor Ins. Brokerage Inc.*, 25 F. Supp. 2d 1053 (N.D. Cal. 1998).

³¹ 54 F.3d 994, 999 (1st Cir. 1995), cert. denied, 516 U.S. 1111 (1996).

³² Yochi J. Dreazen & Rudy Kleysteuber, *Allegations of Sexual Harassment in Arizona Put Immigration Service and EEOC at Odds*, WALL ST. J. (Aug. 22, 2000), available at 2000 WL-WSJ 3040954.

Since the United States Supreme Court decision in *Hoffman Plastic Compounds v. NLRB*, unscrupulous employers' threats of retaliation have continued unabated. Immediately after the Court's ruling, an employer's attorney in New York cited *Hoffman* when he issued a written threat of litigation against a community group that had announced the intention to protest unpaid wages. The attorney stated, falsely, that *Hoffman* had outlawed a demonstration by the group.³³

Four Peruvian farm workers filed a claim against their former employers for minimum wage and overtime violations, discrimination, and for housing them in substandard housing over a four-year period from 1997 through 2001. After their lawsuit was filed, the defendant's father contacted the INS, and repeatedly pressured the agency to take enforcement action against the plaintiffs, claiming that the unpaid workers are both undocumented and "terrorists." When *Hoffman* was decided, the employer used it to argue – incorrectly – that the workers were not protected by U.S. labor and employment law.³⁴

Alejandro Vazquez and David Sanchez both worked for a Michigan Company as laborers. Both were seriously injured in separate accidents at the workplace, suffering, respectively, a joint separation and a hand injury requiring several surgeries. After the injuries, the employer received a letter indicating that the two did not have social security numbers, and questioned them about this fact in the workers' compensation proceedings. The employer fired both injured workers, and opposed the workers' compensation claim on the basis that they are undocumented workers from Mexico. Their claims are pending in the Michigan Court of Appeals. The court has just determined that wage loss benefits are unavailable to undocumented injured workers in Michigan because they have committed a "crime" under state law by working illegally.³⁵

Twenty-two Mexican workers were recruited from California to work as carpenters on a power project in Texas. This past summer, a local newspaper reported that after two weeks of work, the workers were told that they would not be paid, and that they must leave or the contractor would call the US Immigration and Naturalization Service. The workers were owed for two weeks of work at \$12 to \$16 per hour.³⁶ Other examples are noted in the report, "Used and Abused," compiled by the Mexican American Legal Defense and Education Fund and the National Employment Law Project, attached as Appendix B.

C. The Employer Sanctions Scheme in the U.S. Poses No Deterrent to Employer Threats.

1. Basics of the employer sanctions law.

³³ Nancy Cleeland, *Employers Test Ruling on Immigrants*, LOS ANGELES TIMES C1 (Apr. 22, 2002).

³⁴ *Centeno-Bernuy v. Becker Farms W.D.N.Y.* No. 01-CV-839(A) (filed November 28, 2001).

³⁵ *Sanchez v. Eagle Alloy*, 2003 WL 57544, ___ N.W.2d ___ (Ct. Apps. Mich. 2003).

³⁶ See *Undocumented Immigrants Leave Job without Paychecks*, BEAUMONT ENTERPRISE (Aug. 15, 2002).

The Immigration Reform and Control Act of 1986 (IRCA) contains an “employer sanctions” scheme that prohibits the employment of unauthorized aliens in the United States.³⁷ IRCA established an “employment verification system” designed to deny employment to aliens who are not lawfully present in the United States, or who are not lawfully authorized to work in the United States. IRCA mandates that employers verify the identity and eligibility of all new hires by examining specified documents before they begin work.

Under the IRCA, if an immigrant job applicant is unable to present the required documentation, she cannot legally be hired.³⁸ If an employer unknowingly hires an unauthorized alien, or if the alien becomes unauthorized while employed, the employer is compelled to discharge the worker upon discovery of the worker's unauthorized status. Employers who violate the law may be liable for civil fines and may be subject to criminal prosecution.

IRCA also makes it a crime for an unauthorized alien to present fraudulent documents to his or her employer.³⁹ Unauthorized immigrants who use or attempt to use fraudulent documents to subvert the employer verification system established by IRCA are subject to fines and criminal prosecution.⁴⁰

2. *Employer sanctions are not an effective deterrent to hiring unauthorized workers.*

As noted above, employer hiring of unauthorized immigrants continues unabated after IRCA. Employers have little reason to fear that INS will sanction them for hiring unauthorized immigrants, and can easily come to see hiring of the unauthorized as a legitimate cost-saving decision. This is because the employer sanction system is full of holes and left largely ignored by federal agencies.

The language of the verification requirements provides employers with a “gaping loophole” that they exploit by hiring immigrants whom they know have presented fraudulent documents.⁴¹ Under IRCA, employers are only required to accept documents that appear on their face to be genuine and to relate to the individual named.⁴² This has meant that an employer can ignore documents it suspects are invalid, allow the worker to use documents that belong to another person, or even take part in procuring documents for the worker. “In effect, employers who are willing to comply just enough to avoid appearing to disregard the law totally, but who in fact continue to rely on unauthorized labor, are insulated from the law’s sanctions provisions.”⁴³

³⁷ Immigration and Nationality Act, § 274A, as amended, 8 U.S.C.A. § 1324a.

³⁸ *Id.*

³⁹ 8 U.S.C.A. § 1324c.

⁴⁰ *Id.*; 18 U.S.C.A. § 1546(b).

⁴¹ William J. Murphy, Note, *Immigration Reform without Control: The Need for an Integrated Immigration-Labor Policy*, 17 SUFFOLK TRANSNAT’L L. REV. 165, 177-78 (1994).

⁴² 8 U.S.C.A. § 1324a(b)(1)(A) (1994).

⁴³ Linda Bosniak, *Exclusion and Membership: The Dual Identity of the Undocumented Worker Under United States Law*, 1998 WIS. L.REV. 955, 986 (1998).

Even where employers fail utterly to comply with the law, average employer sanctions fines are low and rarely assessed. In fiscal year 1999, the INS apprehended 1,714,035 aliens. Of this number, the Border Patrol made 1,579,010 apprehensions, of which 97 percent were made along the southwest border.⁴⁴ By contrast, the number of warnings to employers nationwide was 383, down 40 percent from 1998. The INS issued only 417 notices of intent to fine employers nationwide in 1999, a decrease of 59%.⁴⁵ In the year 2000, warnings to employers decreased another 26 percent, and notices of intent to fine decreased yet again, by 57 percent.⁴⁶

According to the Immigration and Naturalization Service itself, “Neither Republicans nor Democrats nor a broad range of interest groups is prepared to support an employer sanction program that actually would work.”⁴⁷ Thus, under the current legal scheme in the United States, employers may readily hire unauthorized workers, take advantage of them, and then threaten to turn them in to the INS, all without fear of governmental action.

3. *Employers continue to hire unauthorized workers after IRCA because it is profitable.*

Unauthorized immigrants commonly will decline to report private or official abuse and are frequently unwilling to pursue civil claims in court.⁴⁸ The lack of access to safety-net programs such as unemployment insurance, food stamps and welfare, supply further reasons for unauthorized workers to suffer workplace illegality without risking job separation.⁴⁹

In Dallas, Texas, the Regional Administrator of the Wage and Hour Division of the U.S. Department of Labor indicates that illegal immigrant workers endure sexual harassment, denial of overtime pay and wages below the minimum federal standard because they are worried they will be deported.⁵⁰

When unauthorized workers are not protected by labor laws, unscrupulous employers are encouraged to hire them. This, in turn, undermines the effectiveness of a country’s immigration laws. When it considered the IRCA for passage, the United States Congress understood this dynamic. In their consideration of IRCA, both houses of Congress agreed that employers easily abuse undocumented workers. Each house concluded that

⁴⁴ U.S. Department of Justice, U.S. Immigration and Naturalization Service, *1999 Statistical Yearbook of the Immigration and Naturalization Service* 4 (Mar. 2002) available at <<http://www.ins.gov/graphics/aboutins/statistics>>.

⁴⁵ *Id.* at 5.

⁴⁶ I.N.S., *Enforcement 2000*, Excerpt from *INS Statistical Yearbook 2000*, 4, available at <<http://www.ins.gov/graphics/aboutins/statistics/ENF00yrbk/ENF2000.pdf>>.

⁴⁷ Former INS commission Doris Meissner, quoted in Jonathan Peterson, *INS Penalty System Falls Down on Job*, LOS ANGELES TIMES A1 (Aug. 6, 2001).

⁴⁸ Bosniak, *supra* note 43 at 1017.

⁴⁹ *Id.* at 993-94. See also, Albor Ruiz and Greg Gittrich, *Migrants Did Dirty and Dangerous Work: WTC Cleanup Crews Not Protected, Often Not Paid*, NY DAILY NEWS 3 (Jan. 11, 2002).

⁵⁰ L.M. Sixel, *Aggressive Stance Urged for Equal Employment Opportunity Commission/Witnesses Describe Abuse of Immigrants*, HOUSTON CHRON (June 23, 1999) available at 1999 WL 3997076.

undocumented immigrants, “out of desperation, will work in substandard conditions and for starvation wages.”⁵¹ For that reason, Congress stated that, after IRCA, labor laws should continue to protect the undocumented.⁵² Unfortunately, enforcement has not occurred. As discussed in the next section, unauthorized workers and other immigrant workers remain unprotected by many U.S. employment laws, both by the *Hoffman* and other court decisions, and by express exclusions in state and federal law.

D. Court Decisions Deprive Certain Immigrants of Meaningful Remedies for Violation of their Rights.

Immigrant workers in particular immigration categories, especially unauthorized immigrants, are expressly excluded from the remedies available to their U.S. citizen counterparts. Here we outline the *Hoffman Plastic Compounds* decision and its effect on remedies available to unauthorized workers under U.S. law.

1. Collective bargaining laws – Unauthorized workers not entitled to meaningful remedies for violation of their rights.

The primary law under which workers are guaranteed the right to organize trade unions and bargain collectively in the United States is the National Labor Relations Act.⁵³ Although unauthorized workers are considered “employees” under the NLRA,⁵⁴ under current law, workers in irregular migratory status are not afforded the same remedies for violation of this right as are other workers. In its March 2002 decision in *Hoffman Plastic Compounds v. NLRB*,⁵⁵ the Supreme Court held that an unauthorized worker cannot recover the remedy of back pay for an unlawful termination under the National Labor Relations Act.

The limitation on remedies afforded to unauthorized workers means that many workers will not exercise their rights to organize. The limitation on remedies has also spilled over into other areas of law. As noted in Section B, above, and the attached Report in Appendix B, some employers in the U.S. are attempting to use the *Hoffman* decision to limit undocumented workers’ rights in many areas.

The *Hoffman* case involved a worker named Jose Castro. Mr. Castro was working in a factory in California and was fired, along with other co-workers, for his organizing activities. The National Labor Relations Board, the agency that administers the NLRA, ordered the employer to cease and desist, to post a notice that it had violated the law and to reinstate Mr. Castro, and to provide him with back pay for the time he was not working because he had been illegally fired.

⁵¹ H.R. Rep. No. 99-682(I) at 47 (1986), 99th Cong., 2d Sess. (1986) reprinted in 1986 U.S.C.C.A.N. 5662. (“Rep. No. 99-682(I)”), cited in *A.P.R.A. Fuel Oil Buyers Group, Inc.*, 320 N.L.R.B. 408, 414 and n.32 (1995), *aff’d* 134 F.3d 50 (2d Cir. 1997).

⁵² *Id.*

⁵³ 29 U.S.C.A. § 151 *et. seq.*

⁵⁴ *Sure-Tan, Inc. v. N.L.R.B.*, 467 U.S. 883.

⁵⁵ 535 U.S. 137, 122 S.Ct. 1275, 152 L.Ed.2d 271 (2002)

During a hearing on his case, Mr. Castro admitted he had used false documents to establish work authorization and that he was an unauthorized worker. The U.S. Supreme Court ultimately held that unauthorized workers cannot receive back pay under the National Labor Relations Act. Under the Act, back pay is paid to a victim of an illegal anti-union firing in order to compensate him for wages he would have earned had he not been wrongfully fired.

In reaching this decision, the Supreme Court focused on the fact that the “legal landscape [had] now significantly changed”⁵⁶ since Congress had enacted the Immigration Reform and Control Act of 1986, and its employer sanctions provisions. According to the Court, IRCA’s prohibition on employer hiring of unauthorized workers, and on workers’ acceptance of employment without work authorization requires the National Labor Relations Board to deny back pay to these workers, because back pay would compensate these workers for work they cannot lawfully perform.

Neither the U.S. Constitution, nor any provision of IRCA or the NLRA prohibits back pay awards to unauthorized workers. However, the Court refused to defer to the NLRA’s enforcement scheme because it reasoned that to do so would “trump” Congressional immigration policy. It is important to note that the U.S. government pursued Castro’s case and defended the position that he was entitled to back pay before the US Supreme Court.

The Supreme Court did not have before it any arguments based on international law; nor were international legal precepts taken into consideration in its decision. Nor did the Court, which decided the case by the slimmest of margins – five justices supporting the decision and four opposing – take into account the practical impact of its decision on the labor rights of international migrant workers.

Since the *Hoffman* decision, the National Labor Relations Board has stated that unauthorized workers will not be entitled to back pay, or to reinstatement when they are illegally fired, unless they can show that they now have lawful employment status.⁵⁷ The Board’s policy does not distinguish between employers who knowingly hire workers who are unauthorized, in violation of U.S. law, and those who do not know of the worker’s illegal status at the time of hire.

Back pay is the only meaningful remedy available to workers under the NLRA. After *Hoffman*, the only remedies available to unauthorized immigrants in the U.S. are these: an employer who illegally fires an unauthorized worker might be ordered to post a notice about the violations of the law, and it might be told to “cease and desist” violating the law. In certain cases, an employer who violates the law again, might be subject to penalties for contempt of court. Back pay is the only monetary compensation afforded under the National Labor Relations Act to victims of employer wrongdoing. After the Court’s decision, this remedy is unavailable to unauthorized workers, with the result that

⁵⁶ *Id.* at 1282.

⁵⁷ NLRB General Counsel, *Procedures and Remedies for Discriminatees Who May Be Unauthorized Aliens after Hoffman Plastic Compounds, Inc.* (Jul. 19, 2002), available at <<http://www.lawmemo.com/emp/nlr/gc02-06.htm>>.

workers will be much less likely to exercise their remaining rights, unscrupulous employers will have no reason to respect those rights, and law-abiding employers will be tempted to violate the law or face a competitive disadvantage.

2. *Discrimination laws – Unauthorized workers not entitled to equal remedies with authorized workers.*

The *Hoffman* decision also has important implications for the remedies available to unauthorized workers under the U.S. anti-discrimination laws. In the United States, Title VII of the federal Civil Rights Act protects workers' rights to be free from discrimination based on several factors: sex, color, race, religion and national origin.⁵⁸ The Age Discrimination in Employment Act protects workers' rights to be free from discrimination based on age.⁵⁹ The Americans with Disabilities Act protects workers' rights to be free from discrimination based on disabilities.⁶⁰

Unauthorized workers may not be entitled to back pay for wrongful termination under laws enforced by the EEOC.

The U.S. Equal Employment Opportunity Commission (EEOC) is the government agency that enforces most federal employment discrimination laws. After the *Hoffman* decision, the EEOC rescinded its "Enforcement Guidance on Remedies Available to Undocumented Workers."⁶¹ It noted that since its former practice of awarding back pay to undocumented workers was based on the NLRA, it was reviewing that practice in light of *Hoffman*. The EEOC's statement leaves in doubt whether undocumented workers will be entitled to back pay under Title VII.

Recently, a federal court in New York issued a troubling decision in a case involving violations of the Americans with Disabilities Act, suggesting that *Hoffman* has made the issue of immigration status relevant to a worker's standing to sue for relief under the anti-discrimination laws, and which may well serve as an indicator of things to come. In denying a defendant's motion to dismiss in *Lopez v. Superflex, Ltd.*,⁶² the judge noted:

If Hoffman Plastics does deny undocumented workers the relief sought by plaintiff, then he would lack standing. As that issue is not ripe for decision, we decline to rule on it at this time. However, if plaintiff were to admit to being in the United States illegally, or were to refuse to answer questions regarding his status on the grounds that it is not relevant, then the issue of his standing would properly be before us, and we would address the issue of whether Hoffman

⁵⁸ 42 U.S.C.A. § 2000e *et. seq.*

⁵⁹ 29 U.S.C.A. § 621 *et. seq.*

⁶⁰ 42 U.S.C.A. § 12101 *et. seq.*

⁶¹ U.S. Equal Employment Opportunity Commission, Rescission of Enforcement Guidance on Remedies Available to Undocumented Workers Under Federal Employment Discrimination Laws, *available at* <<http://www.Eeoc.gov/docs/undoc-rescind.html>>.

⁶² *See*, 2002 U.S. DIST. LEXIS 15538 (S.D.N.Y. 2002).

Plastics applies to ADA claims for compensatory and punitive damages brought by undocumented aliens.⁶³

Like denial of the back pay remedy under the National Labor Relations Act, denial of back pay to unauthorized immigrant victims of discrimination means that one of the most effective deterrents to further violations is no longer available. It remains to be seen whether certain courts may limit unauthorized immigrant workers' rights to receive other forms of monetary compensation for discrimination.

Unauthorized workers not protected at all against age discrimination in five states.

Prior to the U.S. Supreme Court's decision in *Hoffman*, most courts in the country agreed that unauthorized immigrants were entitled to the protection of age discrimination laws. In one case, however, prior to *Hoffman*, the Fourth Circuit Court of Appeals, covering the states of Maryland, North Carolina, South Carolina, Virginia and West Virginia, had held that an individual without work authorization was not "qualified" for job, and therefore not protected by the federal law against age discrimination in employment.⁶⁴

Foreign nationals under H-2A visa program excluded from protection of law in five states.

The same court has also held that the Age Discrimination in Employment Act did not protect foreign national applying for a job from outside the United States under the H-2A visa program because he was not authorized to work at the time of his job application, and therefore not qualified for the job.⁶⁵

3. *Minimum wage and overtime violations -- workers' rights to back pay for retaliatory firings not clear.*

In the United States, the federal Fair Labor Standards Act guarantees a minimum wage, currently \$5.15 per hour, and a right to overtime pay for hours worked over 40 in a week for covered workers.⁶⁶ The law is explicitly intended to protect the wages of low-income workers, and to protect law-abiding employers from the unfair competition that results from unscrupulous employers' payment of unfairly low wages.⁶⁷

Prior to *Hoffman*, the Eleventh Circuit had held that an unauthorized worker was eligible for unpaid wages under the Fair Labor Standards Act in *Patel v. Quality Inn South*.⁶⁸ The court concluded that "the Fair Labor Standards Act's coverage of unauthorized aliens is fully consistent with the IRCA and the policies behind it."⁶⁹ Moreover, the court concluded that the plaintiff was eligible for back pay on the basis that the plaintiff was

⁶³ *Id.* at *8.

⁶⁴ *Egbuna v. Time Life*, 153 F.3d 184 (4th Cir. 1998).

⁶⁵ *Reyes-Gaona v. North Carolina Growers' Ass'n.*, 250 F.3d 861 (4th Cir. 2001).

⁶⁶ 29 U.S.C.A. § 201 *et. seq.*

⁶⁷ 29 U.S.C.A. § 202(a).

⁶⁸ 846 F.2d 700 (11th Cir. 1988).

⁶⁹ *Id.*, at 704.

“not attempting to recover back pay for being unlawfully deprived of a job. Rather, he simply seeks to recover unpaid minimum wages and overtime for work already performed.”⁷⁰

Hoffman leaves intact the right to minimum wage and overtime pay under the FLSA since *Hoffman* deals only with back pay for work not performed. The U.S. Department of Labor, the federal agency charged with enforcing the Fair Labor Standards Act, has stated that the Department “will fully and vigorously enforce the Fair Labor Standards Act without regard to whether an employee is documented or undocumented.”⁷¹ However, the Department has not made clear its view on unauthorized immigrants’ entitlement to back pay for retaliatory discharges, saying that it is “still considering” *Hoffman*’s effect on this remedy.⁷²

E. U.S. Laws Explicitly Exempt Certain Immigrants from Workplace Protections.

As noted above, the *Hoffman* decision has resulted in a diminution of the remedies available to unauthorized workers under U.S. laws protecting the right to organize and protecting workers from discrimination in employment. In addition, even prior to *Hoffman*, some U.S. laws have expressly discriminated against workers in certain immigration categories, including both unauthorized workers and other workers in particular visa categories. This section outlines those laws.

1. Workers’ rights to be compensated for on the job injuries limited in some states.

Workers’ compensation is a state system that provides remuneration for employees who have been injured while working on the job. In general, it covers the medical costs of an injured employee, and allows a worker to continue to be partially paid during the period s/he is unable to work. Workers’ compensation laws also provide compensation for disabilities and for the family of an employee who dies on the job. In the United States, workers give up their right to sue an employer for unhealthy conditions on the job that cause them injuries. In return, workers receive certain benefits for any on the job injury through the workers’ compensation system, whether or not the employer causes the injury. Though workers’ compensation is generally an issue of state law, and the state laws vary, generally workers receive medical payments, partial replacement of wages, pensions, death benefits, and sometimes retraining for new jobs.

In most states, unauthorized workers are covered under the law.

⁷⁰ *Id.*

⁷¹ U.S. Department of Labor, *Hoffman Plastic Compound, Inc, v NLRB, Questions and Answers* (on file with *amici*).

⁷² U.S. Department of Labor, *Fact Sheet #48: Application of U.S. Labor Laws to Immigrant Workers: Effect of Hoffman Plastics decision on laws enforced by the Wage and Hour Division*, available at <<http://www.dol.gov/esa/regs/compliance/whd/whdfs48.htm>>.

The majority of the States' workers' compensation laws include "aliens" in the definition of covered employees.⁷³ Entitlement to lost wages under state workers' compensation laws turns on state statutes and their definition of "worker" or "employee." State courts in California, Colorado, Connecticut, Florida, Georgia, Iowa, Louisiana, Nevada, New Jersey, New York, Pennsylvania, and Texas have specifically held that unauthorized workers are covered under their state workers' compensation laws.⁷⁴ However, at least one state, Wyoming, explicitly denies workers' compensation benefits to unauthorized immigrants.⁷⁵

At least two states deny certain rehabilitation benefits to unauthorized workers.

Vocational rehabilitation benefits are normally provided for workers who have been injured on the job as part of the overall workers' compensation benefits package. Vocational rehabilitation is granted so that an injured employee may be retrained to perform the same job, or to perform a different job at the same company. Courts in the states of Nevada and the State of California have concluded that unauthorized workers are not entitled to vocational rehabilitation benefits under certain circumstances.⁷⁶

Death benefits for non-residents limited in some states.

Workers' compensation laws in many states bar the non-resident family members of workers killed on the job from receiving full benefits. In those states, whenever the family member is living outside the United States and is not a United States citizen, the family members do not receive the full death benefits award. There are several ways in

⁷³ See ARIZ. REV. STAT. § 23-901(5)(b); CAL. LAB. CODE § 3351(a); FLA. STAT. ch. 440.02(14)(a); IL COMP. STAT. 820/305(1) b (West 2002); KY. REV. STAT. ANN. § 342-0011(21); MICH. STAT. ANN. § 17.237(161)(1)(I); MINN. STAT. § 176.011 subd.9(1); MISS. CODE ANN. § 71-3-27; MONT. CODE ANN. § 39-71-118(1)(a); NEB. REV. STAT. § 48-115(2), 48-144; NEV. REV. STAT. ANN. § 616A.105; N.M. STAT. ANN. 52-3-3; N.C. GEN. STAT. 97-2(2); N.D. CENT. CODE § 65-01-02(17)(a)(2); OHIO REV. CODE ANN. 4123.01(A)(1)(b); S.C. CODE ANN. § 42-1-130; TEX. LAB. CODE § 401.011, 406.092; UTAH CODE ANN. § 34A-2-104(1)(b); VA. CODE ANN. 65.2-101.

⁷⁴ See *Champion Auto Body v. Gallegos*, 950 P.2d 671 (Colo. Ct. App. 1997); *Gene's Harvesting v. Rodriguez*, 421 So.2d 701, 701 (Fla. Dist. Ct. App. 1982); *Pablo D. Artiga v. M.A. Patout and Son*, 671 So.2d 1138, 1139 (La. Ct. App. 1996); *Lang v. Landeros*, 1996 Ok Civ. App. 4; 918 P.2d 404 (Okla. Ct. App. 1996); *Gayton v. Gage Carolina Metals Inc.*, 560 S.E.2d 870 (N.C. Ct. App. 2002); *Ruiz v. Belk Masonry Co.*, 559 S.E.2d 249 (N.C. Ct. App. 2002); *Rivera v. Trapp*, 519 S.E.2d 777 (N.C. Ct. App. 1999); *Mendoza v. Monmoth Recycling Corp.*, 672 A.2d 221 (N.J. Super. Ct. 1996); *The Reinforced Earth Company v. Workers' Compensation Appeal Board*, 810 A.2d 99 (Pa. 2002); *Dowling v. Slotnik*, 712 A.2d 396, 403 (Conn. 1998); *Dynasty Sample Company v. Beltrain*, 479 S.E.2d 773 (Ga. 1996); *Commercial Standard Fire and Marine Co. v. Galindo*, 484 S.W.2d 635, 637 (Tex. Civ. App. 1972); *Fernandez-Lopez v. Jose Cervino, Inc.*, 288 N.J. Super 14, 20, 671 A.D.2d 1051, 1054 (N.J. Super. Ct. App. Div. 1996). See, also, *Iowa Erosion Control v. Sanchez*, 599 N.W.2d 711, 715 (Iowa, 1999) ("The employer has furnished no authority to support its view that, on grounds of policy or morality, [decendent worker's surviving mother's] immigration status has any bearing on her entitlement to benefits."); *Del Taco v. Workers' Compensation Appeals Board*, 79 Cal. App. 4th 1437, 1439-1442 (Cal. Ct. App. 2000) (holding that the California workers' compensation laws apply to aliens but do not "expressly authorize vocational rehabilitation benefits for an 'illegal worker'" who is not otherwise "medically eligible."

⁷⁵ WYO. STAT. ANN. § 27-14-102 (a)(vii).

⁷⁶ *Tarango v. State Industrial Insurance System*, 25 P.3d 175 (Nev. 2001); *Foodmaker v. Workers' Compensation Appeals Board*, 78 Cal. Rptr.2d 767 (Cal. Ct. Apps., Div. 2 1999).

which states limit compensation to nonresident alien beneficiaries. Some states limit compensation compared to the benefits a lawful resident would have received, generally 50% (Arkansas, Delaware, Florida, Georgia, Iowa, Kentucky, Pennsylvania, and South Carolina).⁷⁷ Some states restrict the types of non-resident dependents who are eligible as to receive benefits as beneficiaries (Arkansas, Delaware, Florida, Kentucky, Pennsylvania). Other states limit coverage based on: the length of time a migrant has been a citizen (Wisconsin), the laws of the alien resident beneficiary's home country (Washington) or the cost of living in the alien resident beneficiary's home country (Oregon).⁷⁸ Alabama denies benefits to all foreign beneficiaries.⁷⁹ Although these laws do not explicitly discriminate on the basis of alienage alone, they disproportionately deny equal benefits to non-nationals, who are most likely to have beneficiaries who are non-resident aliens.

New rulings may endanger unauthorized workers' entitlement to wage loss compensation.

Since the U.S. Supreme Court ruling in *Hoffman*, employers in two states have challenged unauthorized workers' entitlement to workers' compensation coverage, or to elements of that coverage. The Supreme Court of Pennsylvania has held that, while an injured unauthorized worker is entitled to medical benefits, illegal immigration status would justify terminating benefits for temporary total disability (wage loss) benefits.⁸⁰ Very recently, the Michigan Court of Appeals decided that wage loss benefits may be cut off to undocumented workers as of the date that the employer "discovers" that the worker is unauthorized. Cases like these encourage unscrupulous employers to suddenly "discover" a workers' unauthorized status as soon as he or she suffers an on the job injury, thereby lowering the employer's workers' compensation premiums.⁸¹

2. *H-2A workers denied many employment protections.*

Approximately 40,000 workers who are admitted to the United States annually as temporary non-immigrant workers to perform agricultural work under the H-2A program, most of whom are from Mexico, are denied many basic federal employment protections.⁸² H-2A workers are excluded from the protections of the Migrant and Seasonal Agricultural Worker Protection Act (MSAWPA), which is the principal federal employment law for agricultural workers.⁸³ This exclusion has many serious effects. H-2A migrant workers, unlike other farm workers, are not entitled to disclosures about the

⁷⁷ CODE OF ALA. § 25-5-82 (2002); A.C.A. § 11-9-111 (2002); 19 DEL. C. § 2333 (2001); FLA. STAT. § 440.16 (2002); O.C.G.A. § 34-9-265 (2002); IOWA CODE § 85.31 (2002); KRS § 342.130 (2001); 77 P.S. § 563 (2002); S.C. CODE ANN. § 42-9-290 (2001).

⁷⁸ WIS. STAT. § 102.51 (2001); REV. CODE WASH. 51.32.140 (2002); ORS § 656.232 (2001).

⁷⁹ A.C.A. § 11-9-111 (2002).

⁸⁰ *The Reinforced Earth Company v. Workers' Compensation Appeal Board*, 810 A.2d 99 (Pa. 2002).

⁸¹ *Sanchez v. Eagle Alloy*, 2003 WL 57544, ___ N.W.2d ___ (Ct. Apps. Mich. 2003).

⁸² U.S. Department of Labor, Employment and Training Administration, Office of Workforce Security, *2001 H-2A Activity Report* (April 5, 2002) (on file with *amici*) states that 44,825 workers were approved for visas in 2001. Some number fewer than that represents the number of workers who actually entered the country.

⁸³ 29 U.S.C. A. § 1802(8)(B)(2) and (10)(B)(iii).

job terms at the time they are recruited.⁸⁴ Indeed, the recruiter need not even tell the worker for whom he will be working for in the United States. The labor contractors used to recruit and hire H-2A workers need not be registered and monitored by the U.S. Department of Labor. The MSAWPA's transportation safety standards and vehicle insurance requirements for migrant workers are inapplicable to H-2A workers,⁸⁵ and H-2A workers are denied the full monetary remedies provided by the MSAWPA as well as the ability to sue in federal court.⁸⁶

H-2A workers' permission to remain lawfully in the United States is tied to only one employer. These workers therefore lack the freedom to leave abusive employers and seek other employment in the United States.⁸⁷ In addition to the general exclusion of agricultural workers from the collective bargaining protections of the NLRA, H-2A workers are denied rights to freedom of association to demand higher wage rates or better working conditions as a practical matter, because employers are legally permitted to reject such demands and to fire and deport H-2A workers who make them.

3. *Citizenship discrimination law excludes unauthorized immigrants.*

Immigrants without work authorization are excluded from the protection of the Unfair Immigration-Related Employment Practices Act, which protects against discrimination based on citizenship and national origin in employment.⁸⁸ This Act was passed at the same time as the IRCA, and was intended to protect immigrants from discrimination that might result from the imposition of IRCA's employer sanctions provisions.

4. *Immigrant workers' rights of access to legal representation restricted.*

In 1974, the U.S. Congress passed the Legal Services Corporation Act (LSCA), which was designed to provide equal access to the civil justice system for people who cannot afford lawyers.⁸⁹ To this end, the LSCA created the Legal Services Corporation, an independent corporation that makes grants to legal aid programs.⁹⁰ One of the key reasons that working people need access to the civil justice system is to enforce their labor rights. As a practical matter, without the means to bring suit in court, workers' rights cannot be adequately enforced.⁹¹

⁸⁴ See, 29 U.S.C.A. § 1821.

⁸⁵ *Id.* § 1841.

⁸⁶ *Id.* § 1854.

⁸⁷ Under some circumstances, businesses that constitute "joint employers" may transfer workers among different businesses, however the workers themselves lack the right to change employers. See 8 U.S.C.A. § 1184(c)(1), 8 C.F.R. § 214.2(h)(5); 20 C.F.R. § 655.106(a)-(b); § 655.106(c)(2).

⁸⁸ 8 U.S.C.A. § 1324b(a)(3).

⁸⁹ Legal Services Corporation Act, as amended 1977, 42 U.S.C.A. § 2996, *et. seq.*

⁹⁰ 42 U.S.C.A. § 2996.

⁹¹ For example, in adopting the Migrant and Seasonal Agricultural Workers Protection Act, Congress identified the lack of a private right to sue as a primary reason for failure of its predecessor statute. S.Rep.No. 1206, 93d Cong., 2d Sess. 3 (1974); H.R.Rep.No. 1493, 93d Cong., 2d Sess. 1 (1974). Accordingly, one of the "major purpose[s]" of the 1974 Amendments was to "creat[e] a civil remedy for persons aggrieved by violations of the act." *Id.* Congress deemed "an unfettered federal civil remedy" to be "crucial to the effective enforcement of existing law," *Id.*

Certain immigrants, including the unauthorized and H-2B workers, have no right to legal assistance.

Legal Services Corporation programs are prohibited from providing legal assistance “for or on behalf of” most immigrant workers who are not lawful permanent residents.⁹² This ban on representation prohibits representing unauthorized workers, as well as many categories of workers who are legally admitted to work in the United States, such as workers admitted to perform unskilled non-agricultural labor under the H-2B program. Legal aid programs can be fined or have their funding taken away if they are found to have provided services to unauthorized workers. Without the help of legal services, low-wage immigrant workers cannot afford to hire an attorney to press their legal cases. Therefore, they are effectively prevented from enforcing their remaining rights.

II. U.S. EMPLOYMENT LAWS CONCERNING MIGRANT WORKERS VIOLATE FUNDAMENTAL INTERNATIONAL NORMS OF NONDISCRIMINATION AND FREEDOM OF ASSOCIATION.

States historically have asserted the right to restrict the rights and activities of foreign nationals based on either their non-citizen or immigration status for a variety of reasons. International law recognizes the right of states to control movement across their borders, as a matter both of sovereignty and of national security.⁹³ States have exercised this right through direct measures such as physical border controls, visa and entry permits, and quotas that limit the number and nationality of people who may enter the country. States also have sought to control immigration through indirect measures, such as limits on access to employment or denial of access to public benefits. States furthermore have denied aliens rights that arguably are owed only to individuals who are citizens or official members of the political community, such as the rights to vote, to hold public office, to engage in certain political activities, and to hold certain civil service jobs.⁹⁴ States also have discriminated against non-nationals for purely xenophobic reasons through restrictions on social and cultural life, such as bans on inter-ethnic marriage or the teaching of foreign languages.

Although international law recognizes the right of states to control their borders, international law prohibits many forms of discrimination against non-nationals, whether or not the individuals are legally present in the state. No state, for example, can claim the right to commit genocide or torture against non-nationals. As discussed below, non-nationals also are protected by fundamental human rights in the workplace such as the prohibition against discrimination and the protection of freedom of association.

⁹² 45 C.F.R. §§ 1626.1.

⁹³ WARWICK MCKEAN, *EQUALITY AND DISCRIMINATION UNDER INTERNATIONAL LAW*, 194 (1983). *See also* RYSZARD CHOLEWINSKI, *MIGRANT WORKERS IN INTERNATIONAL HUMAN RIGHTS LAW: THEIR PROTECTION IN COUNTRIES OF EMPLOYMENT*, 73 (1997).

⁹⁴ MCKEAN, *supra* note 93, at 194.

U.S. employment laws discriminate against migrant workers based on a number of criteria, such as the worker's possession of a valid work authorization or a particular visa status, the presence of the worker's alien relatives outside the country, or the worker's unlawful immigration status. The denial of meaningful remedies for violations of freedom of association under *Hoffman*, and the denial of workers' compensation and vocational rehabilitation benefits in some states, turn on whether an immigrant (whether lawfully present in the country or not) possesses a legal work authorization. The restrictions on the rights of H-2A workers are tied to the particular visa status of such workers as lawful temporary non-immigrants. Restrictions on death benefits to non-resident alien beneficiaries disparately impact immigrant workers and their alien dependents. And migrants who are not lawfully present in the United States are denied access to federally-funded legal services representation in employment and other claims.

Amici do not contest that states have a right under international law to control their borders. Nor do they contend, for purposes of this brief, that states cannot deny the right to employment to certain immigrants as part of an immigration control policy. *Amici* contend instead that once an alien is physically present in a country's territory and secures employment, denial of fundamental workplace protections to that immigrant worker violates fundamental international human rights norms regarding nondiscrimination and freedom of association. As discussed herein, international treaties that are binding in some form on the United States make clear that fundamental human rights protections, including nondiscrimination and freedom of association, protect individuals in the workplace, regardless of the worker's nationality or immigration status.

A. U.S. Employment Laws Violate the Prohibition Against Discrimination

Numerous international instruments binding on the United States likewise establish a universal norm of nondiscrimination that protects all persons within a state's jurisdiction. The U.N. Human Rights Committee has established that most of the provisions of the International Covenant on Civil and Political Rights (ICCPR) apply equally to aliens, including the Article 2 and Article 26 prohibitions on discrimination, and that differences in treatment based on alienage or nationality constitute discrimination when they are not based on objective and reasonable criteria. The Committee's interpretation of this standard supports a finding that the differential employment laws outlined above violate Articles 2 and 26 of the ICCPR. A similar norm of nondiscrimination is recognized by the instruments of the Inter-American system and supports the conclusion that U.S. laws denying workplace protections on the basis of nationality or immigration status violate Article II of the American Declaration. The International Labour Organization (ILO) has concluded that the principle of nondiscrimination is a fundamental human right which protects all individuals in the workplace, regardless of their nationality or immigration status. And although some of the substantive employment benefits addressed in this brief, such as workers' compensation, may not themselves be fundamental rights under international law, *discrimination* in such benefits based on criteria that are not objective and reasonable violates fundamental international human rights law.

1. Binding treaty provisions

The right to nondiscrimination is one of the most fundamental human rights recognized by international law. Articles 55 and 56 of the U.N. Charter pledge all member states to respect “human rights and fundamental freedoms for all without distinction as to race, sex, language, or religion,”⁹⁵ and recognize that such protection is “necessary for peaceful and friendly relations among nations.”⁹⁶ The principle of nondiscrimination has been further elaborated to prohibit discrimination based on nationality or other status in the following treaty provisions that are applicable to the United States:

American Declaration of the Rights and Duties of Man (ADHR or American Declaration)⁹⁷

Article II:

All persons are equal before the law and have the rights and duties established in this Declaration without distinction as to race, sex, language, creed or any other factor.

American Convention on Human Rights (ACHR or American Convention)⁹⁸

⁹⁵ U.N. CHARTER, arts. 55(c), 56.

⁹⁶ *Id.* art. 55.

⁹⁷ American Declaration of the Rights and Duties of Man (ADHR), OAS Res. XXX, International Conference of American States, 9th Conf., OAS Doc. OEA/Ser. L/V/I. 4 Rev. XX (1948) (emphasis added). The American Declaration was adopted in 1948 as a resolution of the General Assembly of the OAS, and is directly binding on the United States by virtue of the United States’ ratification of the OAS Charter in 1951. See Organization of American States, Signatures and Ratifications of the OAS Charter, available at <www.oas.org/juridico/english/sigs/a-41.html>. The Declaration’s original status as a non-binding document has evolved by virtue of the Commission’s and the Court’s jurisprudence, so that the Declaration is now considered to be indirectly binding. David Harris, *Regional Protection of Human Rights: The Inter-American Achievement*, in THE INTER-AMERICAN SYSTEM OF HUMAN RIGHTS 5 (David J. Harris & Stephen Livingstone, eds.) (1998). In Advisory Opinion No. 10, the Inter-American Court held that the Declaration had been incorporated into the American system as an authoritative document. See I/A Court H.R., *Interpretation of the American Declaration of the Rights and Duties of Man Within the Framework of Article 65 of the American Convention on Human Rights*, Advisory Opinion OC-10/89, July 14, 1989, Series A, No. 10, ¶ 36. The Court also held that the American Declaration defines human rights and individual rights as referred to in the OAS Charter. *Id.* ¶ 45. The Inter-American Commission on Human Rights has further elaborated a complementary principle that allows Petitioners to supplement the American Convention on Human Rights (ACHR) with the ADHR when the latter document provides more fulsome protection. The Commission notes that American Convention norms will be relied on “insofar as [petitioners allege] violations of *substantially identical rights* set forth in both instruments.” *Paul Lallion*, Case No. 11.765, Report No. 124/99, ¶ 26 (September 27, 1999). Moreover, the U.S. government regularly appears before the Inter-American Commission on Human Rights to defend cases brought against it under the American Declaration.

⁹⁸ American Convention on Human Rights, Nov. 22, 1969, 1144 U.N.T.S. 123 (entered into force July 18, 1978) (emphasis added). The United States has signed, but not ratified, the American Convention. See Organization of American States, Signatures and Ratifications of the American Convention on Human Rights, Pact of San Jose, Costa Rica, available at <<http://www.oas.org/juridico/english/Sigs/b-32.html>>. The standards laid out in the ACHR should nonetheless be applied to this country’s treatment of migrant workers for two reasons. First, as explained above, the ADHR is binding on the United States, and the American Convention is regarded as an interpretation of the norms contained in the ADHR. See *supra* note 97. Second, according to the Vienna Convention on the Law of Treaties, a state which has signed, but not

Article 1:

1. The States Parties to this Convention undertake to respect the rights and freedoms recognized herein and to ensure to *all persons subject to their jurisdiction* the free and full exercise of those rights and freedoms, without any discrimination for reasons of race, color, sex, language, religion, political or other opinion, *national or social origin*, economic status, birth *or any other social condition*.

2. *For the purposes of this Convention, "person" means every human being.*

Article 24:

All persons are equal before the law. Consequently, they are entitled, without discrimination, to equal protection of the law.

International Covenant on Civil and Political Rights (ICCPR)⁹⁹

Article 26:

All persons are equal before the law and are entitled without any discrimination to the equal protection of the law. In this respect, the law shall prohibit any discrimination and guarantee to all persons equal and effective protection against discrimination on any ground such as race, colour, sex, language, religion, political or other opinion, *national or social origin*, property, birth *or other status*.

International Covenant on Economic, Social and Cultural Rights (ICESCR)¹⁰⁰

ratified, a treaty is obliged to refrain from acts that would contravene the object and purpose of the treaty. Vienna Convention on the Law of Treaties, *concluded* May 23, 1969, 1155 U.N.T.S. 331, 25 I.L.M. 543, art. 18 (“A State is obligated to refrain from acts which would defeat the object and purpose of a treaty when: (a) it has signed the treaty . . . , until it shall have made its intention clear not to become a party to the treaty”). The United States has signed but not ratified the Vienna Convention, but has accepted that treaty’s provisions as binding customary international law. *See, e.g., Treaties and Other International Agreements: The Role of the United States Senate*, S. Rep. No. 106-71, 106th Cong., 2d Sess. 113 (2001) (“During this interim period [prior to ratification] the treaty is not yet in effect, but under international law nations have an obligation not to do anything that would defeat the purpose of the treaty.”). There is no set definition for what level of violation contravenes a treaty’s object and purpose, but retrogressive measures such as those described above would seem to fall exactly into this category.

⁹⁹ International Covenant on Civil and Political Rights, Dec. 16, 1966, 999 U.N.T.S. 171 (entered into force Mar. 23, 1976) (emphasis added). The ICCPR was adopted to implement principles set forth in the Universal Declaration of Human Rights into binding treaty law. The United States ratified the ICCPR in 1992, and although the United States Senate appended a declaration that the treaty was not self-executing, *see* United Nations High Commissioner for Human Rights, United Nations Treaty Collection, Declarations and Reservations, available at <http://193.194.138.190/html/menu3/b/treaty5_esp.htm>, that declaration does not alter the force of the treaty as binding international law.

¹⁰⁰ International Covenant on Economic, Social, and Cultural Rights, Dec. 16, 1966, 993 U.N.T.S. 3 (entered into force Jan. 3, 1976) (emphasis added). Like the ICCPR, the ICESCR was adopted to codify into binding treaty law the principles set forth in the Universal Declaration. The United States has signed, but not ratified, the ICESCR. *See* Office of the United Nations High Commissioner for Human Rights,

Article 2(2):

The States Parties to the present Covenant undertake to guarantee that the rights enunciated in the present Covenant will be exercised without discrimination of any kind as to race, colour, sex, language, religion, political or other opinion, *national or social origin*, property, birth or other status.¹⁰¹

Universal Declaration of Human Rights (UDHR)¹⁰²

Article 2

Everyone is entitled to all the rights and freedoms set forth in this Declaration, without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, *national or social origin*, property, birth or other status.

Article 7

All are equal before the law and are entitled without any discrimination to equal protection of the law. *All* are entitled to equal protection against any discrimination in violation of this Declaration and against any incitement to such discrimination.

ILO Convention (No. 111) Concerning Discrimination in Employment¹⁰³

Article 1(1):

For the purpose of this Convention the term discrimination includes-- (a) any distinction, exclusion or preference made on the basis of race, colour, sex, religion, political opinion, *national extraction or social origin*, which has the effect of nullifying or impairing equality of opportunity or treatment in employment or occupation.

Article 2:

Status of Ratifications of the Principal Human Rights Treaties, available at <<http://193.194.138.190/pdf/report.pdf>>. The United States' signature nevertheless obligates the United States not to violate the object and purpose of the treaty, as discussed *supra* note 98.

¹⁰¹ Although the ICESCR nondiscrimination clause is limited to "the rights enunciated in the present Covenant," the employment rights discussed in this brief are protected by the ICESCR. Thus, ICESCR Article 2(2) is fully relevant to this general discussion of nondiscrimination.

¹⁰² Universal Declaration of Human Rights, G.A. Res. 217 (AIII), U.N. GAOR, 3d Sess., pt. 1, at 71, U.N. Doc. A/810 (1948). As an early statement of human rights that was unanimously adopted by the U.N. General Assembly, the Declaration is evidence of early and ongoing support for the international norms examined herein. Moreover, the principles of the UDHR are widely considered to have reached the status of customary international law. See discussion in Richard B. Lillich, *The Growing Importance of Customary International Human Rights Law*, 25 GA. J. INT'L & COMP. L. 1 (1995/1996).

¹⁰³ ILO Convention Concerning Discrimination in Respect of Employment and Occupation (No. 111), June 25, 1958, 362 U.N.T.S. 31 (entered into force June 15, 1960).

Each Member for which this Convention is in force undertakes to declare and pursue a national policy designed to promote, by methods appropriate to national conditions and practice, equality of opportunity and treatment in respect of employment and occupation, with a view to eliminating any discrimination in respect thereof.

The ILO has identified the prohibition against discrimination in employment as one of four “core” worker rights that are internationally recognized as fundamental human rights (the other core rights are freedom of association, and the prohibition against forced and child labor)¹⁰⁴ and thus are binding on all ILO members.¹⁰⁵

The plain language of the specific nondiscrimination provisions discussed above suggests that these international instruments prohibit employment discrimination on the basis of alienage. As discussed more fully below, the language of the nondiscrimination provisions is unambiguously universal. The equality provisions declare that “all persons” or individuals are equal, not merely “all citizens” or even “all persons lawfully present in a country.” The instruments also explicitly prohibit discrimination based on national or social origin and other status.

Furthermore, the overall language and structure of the instruments listed above supports the interpretation that aliens are entitled to the treaty’s substantive work-related protections. Like the specific nondiscrimination provisions, the instruments’ other substantive provisions are generally applicable to all persons. Unlike the European Convention on Human Rights and the Convention to Eliminate all Forms of Racial Discrimination, the Inter-American instruments, the ICCPR, ICESCR, Universal Declaration, and ILO Conventions do not provide for general exceptions based on citizenship or immigration status.¹⁰⁶ Moreover, the jurisprudence of the U.N. Human

¹⁰⁴ These four fundamental rights are supported by eight ILO conventions. See ILO, *Fundamental ILO Conventions*, available at <<http://www.ilo.org/public/english/standards/norm/whatare/fundam/index.htm>>. For purposes of this discussion, the relevant conventions are those relating to nondiscrimination in employment, e.g., ILO Convention Concerning Discrimination in Respect of Employment and Occupation (No. 111), *supra*, and those relating to freedom of association, e.g., ILO Convention Concerning Freedom of Association and Protection of the Right to Organize (No. 87), July 9, 1948, 68 U.N.T.S. 16 (entered into force July 4, 1950); Convention Concerning the Application of the Principles of the Right to Organize and to Bargain Collectively (No. 98), July 1, 1949, 96 U.N.T.S. 257 (entered into force July 18, 1951).

¹⁰⁵ Although the United States has not ratified the ILO’s fundamental conventions relating to nondiscrimination and freedom of association, under the ILO’s 1998 Declaration on Fundamental Principles and Rights at Work, all ILO member states, including the United States, are obligated to respect these core principles, regardless whether they have ratified the relevant ILO conventions. See ILO Declaration on Fundamental Principles and Rights at Work, art. 2 (June 18, 1998), 37 I.L.M. 1233 (1998) (declaring that “all Members, even if they have not ratified the Conventions in question, have an obligation arising from the very fact of membership in the Organization to respect, to promote and to realize, in good faith and in accordance with the Constitution, the principles concerning the fundamental rights which are the subject of those Conventions”), available at <<http://www.ilo.org/public/english/standards/decl/declaration/text/index.htm>>.

¹⁰⁶ The European Convention on Human Rights includes a general clause authorizing the denial of all political rights to non-nationals. See European Convention for the Protection of Human Rights and Fundamental Freedoms, Nov. 4, 1950, 213 U.N.T.S. 221, art. 16. Article 1(2) of the Convention on the Elimination of Racial Discrimination also excludes from the Convention’s scope distinctions “between citizens and non-citizens.” International Convention on the Elimination of All Forms of Racial

Rights Committee, the Inter-American human rights bodies and the ILO support a finding that international law prohibits denying workplace rights to aliens who are actually employed, regardless of their immigration status, at least with respect to fundamental rights such as nondiscrimination and freedom of association. The language and interpretation of the ICCPR, Inter-American instruments, ICESCR, and ILO Convention No. 111 are each addressed in turn, below.

2. *Aliens are protected by the ICCPR, and cannot be discriminated against in either Covenant or non-Covenant rights absent reasonable and objective criteria.*

The plain language and negotiating history of the ICCPR and interpretations of the U.N. Human Rights Committee establish that aliens are entitled to the protections of the ICCPR, with a few limited exceptions, and that the principle of non-discrimination under the ICCPR applies fully to aliens. In other words, states cannot discriminate on the basis of nationality or other status under the ICCPR unless the distinction is based on reasonable and objective criteria.

Only three provisions of the ICCPR expressly distinguish between citizens and aliens. Article 25, regarding “Political Rights,” recognizes rights only for citizens to participate in government, to vote, and to public service, while Article 13 prohibits the arbitrary expulsion of aliens. Articles 12 and 13 further permit States parties to deny a very narrow range of rights to *undocumented* non-citizens, such as the freedom of movement and the right to choose one’s residence (Art. 12), and the right to certain procedural protections in expulsion proceedings (Art. 13), each of which applies only to aliens “lawfully within the territory” of a State party.¹⁰⁷ According to the CCPR Commentary,¹⁰⁸ the focus on lawful aliens in Article 12 reflects the view that “*aliens* located on the territory of a State Party have the same claim as citizens to respect for and protection of the rights guaranteed by the ICCPR...; [although] the decision on whether they are permitted to be in the territory of a State Party remains the sole matter of the State concerned.”¹⁰⁹

Other than these specific provisions that distinguish between citizens and aliens or between legal and illegal aliens, the ICCPR expressly allows for discrimination against non-citizens only “[i]n time of public emergency which threatens the life of the nation”

Discrimination, Mar. 7, 1966, 660 U.N.T.S. 195 (entered into force Jan. 4, 1969). Other than the narrow distinctions for aliens set forth in Articles 13 and 25 of the ICCPR, discussed herein, none of the instruments addressed in this brief similarly provide for distinctions based on alienage.

¹⁰⁷ *E.g.*, ICCPR, *supra* note 99, Art. 12(1) (“everyone lawfully within the territory of a State shall, within that territory, have the right to liberty of movement and freedom to choose his residence”). *See also* David Weissbrodt, *Progress Report On The Rights Of Non-Citizens*, U.N. Doc. E/CN.4/Sub.2/ 2002/25 (2002), ¶ 38 [hereinafter Weissbrodt, *2002 Progress Report*].

¹⁰⁸ MANFRED NOWAK, U.N. COVENANT ON CIVIL AND POLITICAL RIGHTS: CCPR COMMENTARY (1993) [hereinafter “CCPR COMMENTARY”].

¹⁰⁹ CCPR COMMENTARY, § 12-3, p. 199.

and then only “to the extent strictly required by the exigencies of the situation,”¹¹⁰ circumstances which certainly are not presented here. Under the principle of *expressio unius est exclusio alterius*, therefore, aliens are entitled to the other protections of the ICCPR.

Moreover, although Articles 2 and 26 expressly secure ICCPR rights and prohibit discrimination only on the basis of national origin and other status, rather than expressly on nationality, the negotiating history indicates that one of the primary purposes of Article 2 was to prohibit discrimination against aliens in ICCPR rights.¹¹¹ Negotiating states repeatedly noted that Articles 2 and 26 should not prohibit *all* unequal treatment of aliens,¹¹² but the absence of any express provision in the ICCPR for distinctions based on alienage (other than in Articles 12, 13 and 25), led several states to enter reservations that would allow differential treatment of aliens in certain circumstances.¹¹³

Consistent with the plain language of the ICCPR and its negotiating history, the United Nations Human Rights Committee (HRC) has ruled that most state obligations under the treaty apply equally to non-nationals.¹¹⁴ In its General Comment on the Position of Aliens, the Committee rejects the suggestion that states are entitled to deny or limit aliens’ protections under the Covenant. As stated by the Committee:

[E]ach State party must ensure the rights in the Covenant to “all individuals within its territory and subject to its jurisdiction” In general, the rights set forth in the Covenant apply to everyone, . . . irrespective of his nationality or statelessness. . . . Thus, the general rule is that each one of the rights of the Covenant must be guaranteed without discrimination between citizens and aliens.

¹¹⁰ ICCPR, *supra* note 99, art. 4(1) (“In time of public emergency which threatens the life of the nation and the existence of which is officially proclaimed, the States Parties to the present Covenant may take measures derogating from their obligations under the present Covenant to the extent strictly required by the exigencies of the situation, provided that such measures are not inconsistent with their other obligations under international law and do not involve discrimination solely on the ground of race, colour, sex, language, religion or social origin.”). Unlike the ICCPR’s Article 2(1) and Article 26 nondiscrimination clauses, the Article 4 derogation clause does not include “national origin” among the impermissible grounds for discrimination. According to the travaux préparatoires, this omission reflects the drafters’ recognition that States often find it necessary to discriminate against non-citizens in time of national emergency. See Weissbrodt, *2002 Progress Report*, *supra* note 107, ¶ 20; CCPR COMMENTARY, § 4-28, p. 86.

¹¹¹ CCPR Commentary, § 2-31, p. 43. Early drafts of Article 2 by the United States, the United Kingdom, and the drafting committee expressly provided that the rights of the Covenant applied equally to citizens, nationals, aliens and stateless persons, though a broader application was ultimately adopted. *Id.* § 2-43, p. 51, n. 119. Moreover, the ICCPR’s protection under Article 2 was expressly extended to all “individuals” within a state’s territory rather than to all “persons”, to prevent states from excluding some persons from the treaty’s protections by denying them legal personality. *Id.* § 2-23, pp. 39-40.

¹¹² *Id.* § 2-43, p. 51.

¹¹³ Austria, whose domestic bill of rights only protects equality for nationals, entered a reservation that Article 26 would not preclude differential treatment of Austrian nationals and aliens. CCPR/X/2/Rev.3, *reprinted in* CCPR COMMENTARY, Appendix, at 751. Trinidad and Tobago likewise reserved the right to restrict property acquisition by aliens. *Id.*, Appendix, at 768.

¹¹⁴ The Human Rights Committee is the treaty body established by Article 40 of the ICCPR to monitor and interpret state compliance with that treaty. States Parties are required to submit to the Human Rights Committee periodic reports on their progress in implementing ICCPR rights.

Aliens receive the benefit of the general requirement of non-discrimination in respect of the rights guaranteed in the Covenant, as provided for in article 2 thereof.¹¹⁵

The Committee's General Comment notes that of the rights set forth in the Covenant, only political rights such as the vote in Article 25 are limited to citizens.¹¹⁶ The Committee specifically observed that aliens are entitled to the Covenant's protections regarding nondiscrimination and freedom of association, among others.¹¹⁷

The General Comment recognizes that states have the right in principle to decide whom to admit to their territory, and that states may condition permission to enter by imposing some restrictions on movement, residence, and employment.¹¹⁸ The Committee noted, however, that "in certain circumstances an alien may enjoy the protection of the Covenant *even in relation to entry or residence*, for example, when considerations of non-discrimination, prohibition of inhuman treatment and respect for family life arise."¹¹⁹ The Comment further notes that once an alien is lawfully present in a country, his or her freedom of movement can be restricted only under the conditions set forth in Article 12(3) of the ICCPR¹²⁰ and in a manner with the other rights recognized by the ICCPR.¹²¹

Moreover, the Committee confirmed that entitlement to most of the ICCPR's protections is not limited to aliens who are legally present. The General Comment noted that Article 13's restriction to legal aliens was an exception to the general principle that the ICCPR's protections apply to all persons in a State's territory.¹²² And even here, the Committee observed that "[d]iscrimination may not be made between different categories of aliens in the application of article 13."¹²³

¹¹⁵ *The position of aliens under the Covenant*, 11/04/86, CCPR General Comment 15, U.N. Doc. HRI/GEN/1/Rev.1 at 18 (1994), ¶¶ 1-2, available at < <http://www1.umn.edu/humanrts/gencomm/hcom15.htm> > [hereinafter "General Comment"]. The Human Rights Committee is authorized to issue "such general comments as it may consider appropriate." ICCPR, art. 40(4). The Committee's general comments are addressed to all States parties and are intended, among other things, "to draw the attention of the States parties to matters relating to the improvement of . . . the implementation of the Covenant" and to "stimulate activities of States parties . . . in the promotion and protection of human rights." *Statement on the duties of the Human Rights Committee under article 40 of the Covenant*, Decision of the Committee of 30 October 1980, CCPR/C/18, A/36/40, reproduced in CCPR COMMENTARY, Appendix, at 845. Such comments, therefore, are an important interpretive guide to the ICCPR.

¹¹⁶ General Comment, ¶ 2.

¹¹⁷ *Id.* ¶ 7.

¹¹⁸ *Id.* ¶ 6.

¹¹⁹ *Id.* ¶ 5.

¹²⁰ ICCPR Article 12(3) requires any restrictions on Article 12 rights to be, among other things, "necessary to protect national security, public order (ordre public), public health or morals, or the rights and freedoms of others."

¹²¹ General Comment, ¶ 12.

¹²² *Id.*, ¶ 9 ("the particular rights of article 13 only protect those aliens who are lawfully in the territory of a State party. This means that national law concerning the requirements for entry and stay must be taken into account in determining the scope of that protection, and that illegal entrants and aliens who have stayed longer than the law or their permits allow, in particular, are not covered by its provisions.").

¹²³ *Id.* ¶ 10.

a. U.S. employment restrictions violate ICCPR articles 2 and 26

The prohibitions of discrimination under ICCPR Articles 2 and 26 are both relevant to the question before this Court. Article 2 bars discrimination in the rights that are protected by the ICCPR (such as discrimination in freedom of association), while Article 26 prohibits discrimination in substantive rights and benefits that are not, themselves, mandated by the ICCPR.¹²⁴

Under both Articles 2 and 26, whether a distinction based on alienage or other criteria is prohibited turns on whether the distinction is *based on reasonable and objective criteria*, and whether the distinction is *proportional* in a given case.¹²⁵ The prohibited bases for discrimination listed in Articles 2 and 26 (distinctions on grounds of race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status) are not comprehensive, but represent particularly reprehensible distinctions that are especially likely to be found to be violations.¹²⁶

In elaborating on these principles in the *Broeks* and *Zwaan-de Vries* cases, involving gender discrimination under the Dutch Unemployment Benefits Act, the Human Rights Committee reasoned that equal protection of the law “prohibits discrimination in law or in practice in any field regulated and protected by public authorities,” but that not all differences in treatment are discriminatory, since “[a] differentiation based on reasonable and objective criteria does not amount to prohibited discrimination within the meaning of Art. 26.”¹²⁷ The Committee nevertheless found that Article 26 had been violated, since the unemployment law discriminated on the basis of sex – an unreasonable criterion.

Likewise, in *Gueye et al. v. France*,¹²⁸ the Committee applied this test to find that a French employment law disadvantaging non-nationals violated Article 26. The case was brought by a group of Senegalese nationals who had served in the French military during the colonial era, and who were provided lower pensions for their military service than French nationals.¹²⁹ The Committee noted that Article 26 expressly prohibits discrimination only on the basis of “national origin,” not on nationality *per se*, but nevertheless concluded that the French law’s differentiation based on citizenship constituted a distinction based on “other status” under Article 26. The Committee also found that Article 26 had been violated, despite the fact that the ICCPR does not expressly protect the right to a pension.¹³⁰

¹²⁴ See, e.g. Decision of the Human Rights Committee under article 5(4) of the Optional Protocol to the International Covenant on Civil and Political Rights, Thirty-Fifth Session, concerning Communication No. 196/1985; CCPR/C/35/D/196/1985 (April 6, 1989) [hereinafter *Gueye v. France*]. See also the *Broeks* and *Zwaan-de Vries* cases, Nos. 172/1984, 182/1984, §§ 12.4-12.5; General Comment 18/37, § 12 (“the application of the principle of non-discrimination contained in article 26 is not limited to those rights which are provided for in the Covenant”).

¹²⁵ CCPR COMMENTARY, § 2-33, p. 44.

¹²⁶ CCPR COMMENTARY, § 26-25, p. 474.

¹²⁷ Nos. 172, 182/1984, §§ 12-15.

¹²⁸ *Gueye v. France*, *supra* note 124.

¹²⁹ Initially, the French pension program had awarded equal benefits to all veterans regardless of nationality, but a subsequent law reduced benefits for non-French citizens. *Id.* ¶ 8.2.

¹³⁰ *Id.* ¶ 9.4.

The Committee concluded that France’s justifications for the discrimination against non-nationals were not based on “reasonable and objective criteria,” and thus were not permissible.¹³¹ The Committee reasoned that the pension program’s purpose was to reward veterans for their service to the government, and that the nationality of the recipient was therefore irrelevant.¹³² The Committee stated that “[a] subsequent change in nationality cannot by itself be considered as a sufficient justification for different treatment, *since the basis for the grant of the pension was the same service which both they and the soldiers who remained French had provided.*”¹³³

The *Gueye* analysis is directly relevant to U.S. employment laws limiting protections for legal migrant workers, and it seems clear that many, if not all, of these provisions violate Articles 2 and 26 under the Committee’s reasoning. The *Gueye* case illustrates a number of points relevant to the question before this Court. First, it reaffirms the Human Rights Committee’s position that provisions of the ICCPR (and, *amici* argue, of human rights treaties generally), are applicable to non-nationals absent express language to the contrary. Even though the ICCPR does not expressly address discrimination based on nationality, the *Gueye* case confirms that the treaty bars distinctions based on nationality or alienage, like other distinctions, unless they are reasonable and objective.

Second, the *Gueye* case demonstrates that distinctions based on alienage violate Article 26 even if the ICCPR does not expressly protect the substantive benefit at issue (in this case, a right to pensions). In addition to discrimination in freedom of association, an ICCPR right which cannot be denied in a discriminatory manner under Article 2, the other employment benefits at issue in this case are protected by many substantive treaty provisions binding on this country, including the rights to fair remuneration, proper working conditions, and effective recourse through legal aid. (For the relevant treaty provisions, see Appendix C, Tables 1-5). The *Gueye* case stands for the proposition that discrimination in these benefits is improper, absent a reasonable and objective basis, even if the substantive rights themselves are not fundamental, or even recognized by the ICCPR.

In fact, the pension plan at issue in *Gueye* is closely analogous to the various U.S. states’ death benefit schemes which discriminate against decedents (the vast majority of whom are aliens) whose beneficiaries are aliens not residing in the U.S. Although these death benefit schemes do not facially discriminate on the basis of nationality, in contrast to the French pension scheme in *Gueye*, like the French pension plan, their clear purpose is to

¹³¹ France contended that the policy was justified because (1) the Senegalese officers were no longer French nationals; (2) it was too difficult for France to establish the identity and family situation of former soldiers in African countries; and (3) the cost of living in France was significantly higher than in the former colonies. *Id.* ¶ 1.5. France further argued that Senegalese soldiers who wished to receive full pensions could restore their French nationality. *Id.* ¶ 7.1.

¹³² *Id.* ¶ 9.5 (emphasis added). The Committee further found that “mere administrative inconveniences” in administering the pension scheme could not justify unequal treatment, and that the justification based on living standards was pretextual, since a French national living in Senegal would have received a larger pension than a Senegalese national who also resided there. *Id.* ¶ 9.5.

¹³³ *Id.*

deny equal benefits to non-resident aliens in a manner which is not tied to the actual cost of living in the particular locale where the beneficiary resides. Under the *Gueye* analysis, discrimination in such benefits may be impermissible even if the benefits themselves are not mandated by the ICCPR.

Finally, the *Gueye* decision makes clear that in determining whether discrimination in an employment benefit is reasonable and objective, and therefore permissible, a court should examine the underlying purpose of the employment law at issue to determine whether the distinction employed is relevant to achieving that purpose. The U.S. laws workplace protections that discriminate on the basis of alienage or immigration status fail under this test. Employment benefits such as protection of freedom of association, workers' compensation, and access to legal services fundamentally serve the purpose of protecting employees at work, and most effectively achieve their purpose when applied and enforced equally with respect to all workers. Once an alien is employed, that employee's nationality, or even his or her legal status, is irrelevant to the employment law's goal of protecting individuals in the workplace and preventing exploitation. Indeed, allowing such laws to be applied differentially to non-citizen or unauthorized workers will only undermine the rights of other workers, promote labor exploitation, and adversely affect the laws' underlying protective goal.

The *Gueye* case did not directly address the issue of immigration control, which is likely to be the primary governmental motive offered to justify limiting worker protections for unauthorized workers. But immigration control cannot be viewed as the primary purpose of employment protection laws, and the United States' restrictions on the employment protections of aliens do not objectively and reasonably serve this purpose. Given the fact that even employer sanctions laws have not curbed the entry of undocumented persons into the United States, it seems fantastic to argue that denying aliens fundamental rights to freedom of association, workers' compensation, vocational training, death benefits or legal representation could accomplish U.S. immigration goals. Furthermore, the justification of immigration control does not plausibly apply to restrictions on the rights of lawfully present and *authorized* workers in the United States, such as the denial of freedom of association to H-2A workers.

In sum, *amici* recognize that states retain the authority under the ICCPR to decide whether to admit aliens. For the purposes of this case, *amici* do not dispute that a state may have the right to deny employment to aliens altogether under certain circumstances, in order to further its border control policy. However, once an alien is present in a state's territory and actually working, that alien is fully entitled to the ICCPR's workplace protections, and distinctions based on alienage are permissible only when based on reasonable and objective criteria. Distinctions in employment protections are legitimate only if nationality or immigration status is somehow objectively and reasonably relevant to achieving the employment protection's goal. Applying this standard to the question before the Court should lead this Court to conclude that differential application of employment protections to aliens who are present and working in a state's territory cannot be justified. Every worker in America is contributing to our society, and has need of protection *in his or her role as a worker*. Any employment situation is fraught with

unique vulnerabilities. These vulnerabilities, compounded in the case of a foreign worker, are an inappropriate - and, as demonstrated above, ineffective - vehicle for migration policy. Far from being a reasonable and objective path toward migration control, differential labor protections for migrant workers merely represent the receiving country's ability to take advantage of workers whose bargaining power is wiped out by unemployment and deprivations in their homelands.

b. U.S. employment restrictions violate the American Declaration

The plain language and *expressio unius* arguments set forth above regarding the ICCPR are equally applicable to the American Declaration and Convention. The language of the Inter-American instruments is universal, and does not expressly provide for distinctions on the basis of alienage or immigration status. Like the ICCPR, the American Convention limits rights of freedom of movement and residence and procedural protections in expulsion proceedings to aliens “lawfully in the territory of a State Party” (Article 22), and permits limitations on rights of political participation on the basis of citizenship, nationality and residence (Article 23). The treaty, however, otherwise does not distinguish on these grounds. Moreover, Article 29 of the Convention provides that no restrictions may be imposed on Convention rights other than those provided for in the treaty,¹³⁴ while Article 30 provides that even the restrictions authorized under the Convention “may not be applied except in accordance with laws enacted for reasons of general interest and in accordance with the purpose for which such restrictions have been established.”¹³⁵

The nondiscrimination jurisprudence of the Inter-American system substantially comports with that under the ICCPR and supports the conclusion that U.S. employment laws improperly discriminate against immigrant workers. This Court's 1984 Advisory Opinion on the Proposed Amendments to the Naturalization Provision of the Constitution of Costa Rica laid down the fundamental principle that state sovereignty over immigration does not trump human rights:

¹³⁴ American Convention, art. 29(a).

¹³⁵ American Convention, art. 30. According to the Inter-American Court's interpretation of Article 30, a law enacted in the “general interest” must be “an integral element of public order.” Inter-American Court of Human Rights, Advisory Opinion OC-1/82, *The Word “Laws” in Article 30 of the American Convention on Human Rights*, ¶ 29 (September 24, 1982). In Advisory Opinion No. 5, the Court held that the terms ‘general welfare’ and ‘public order’ “must be subjected to an interpretation that is strictly limited to the ‘just demands’ of ‘a democratic society’ which takes account of the need to balance the competing interests involved and the need to preserve the object and purpose of the Convention.” Inter-American Court of Human Rights, Advisory Opinion OC-5/85, *Compulsory Membership in an Association Prescribed by Law for the Practice of Journalism (Arts. 13 and 29 of the American Convention on Human Rights)*, ¶ 67 (November 13, 1985) The purpose of public order, in turn, is “the protection of the essential rights of man and the creation of circumstances that will permit him to achieve spiritual and material progress and attain happiness.” *The Word Laws, supra*, ¶ 29 (quoting the American Declaration, first introductory clause). Davidson has concluded from this language that a legitimate purpose is designed in “the interests of national security, public safety or public order, or to protect public health or morals or the rights or freedoms of others,” in effect reading into the Court's opinion the requirements imposed by ICCPR Article 22, discussed *infra*. See J. SCOTT DAVIDSON, *THE INTER-AMERICAN HUMAN RIGHTS SYSTEM* 50 (1997).

[D]espite the fact that it is traditionally accepted that the conferral and regulation of nationality are matters for each state to decide, contemporary developments indicate that international law does impose certain limits on the broad powers enjoyed by the states in that area, and that the manners in which states regulate matters bearing on nationality cannot today be deemed within their sole jurisdiction; those powers of the state are also circumscribed by their obligations to ensure the full protection of human rights.¹³⁶

The Court went on to discuss Costa Rica's proposed naturalization rule in light of the American Convention's nondiscrimination provisions. It stated that "equality springs from the oneness of the human family and is linked to the essential dignity of the individual...[i]t is...irreconcilable with that notion to characterize a group as inferior and treat it with hostility or otherwise subject it to discrimination in the enjoyment of rights which are accorded to others not so classified. It is impermissible to subject human beings to differences in treatment that are inconsistent with their unique and congenerous character."¹³⁷

The Court continued to establish a reasonable proportionality test for nondiscrimination under the Convention. The Court held that discrimination exists "when the classifications selected are based on substantial factual differences and there exists *a reasonable relationship of proportionality* between these differences and the aims of the legal rule under review."¹³⁸ The Court then went on to examine the proposed naturalization restrictions on the basis of whether the restrictions were "inconsistent with the nature and purpose of the grant of nationality."¹³⁹

In a recent contentious case decision applying the standards laid down by this Court, the Inter-American Commission on Human Rights found that the United States had violated the right to equality of a group of migrants being held in indefinite detention.¹⁴⁰ In so doing, the Commission required that distinctions be based on reasonable and objective criteria, and be reasonably proportional to the objective being pursued. Thus, "[t]he right to equality includes the prerequisite of an *objective and reasonable justification* as a distinction basis."¹⁴¹ The Commission found that "even though differences in the treatment of nationals and foreigners are admitted with respect to the entrance and permanence in the territory of any given country, the State has to demonstrate that distinctions of this nature are *reasonable and proportionate with the objective they pursue*."¹⁴² In other words, even sovereign state decisions regarding entrance and duration of stay must be objective, reasonable, and proportional. As argued above, conditioning workplace protections on citizenship or immigration status is not reasonably related or proportional to an immigration-related objective.

¹³⁶ Inter-American Court of Human Rights, Advisory Opinion OC-4/84, *Proposed Amendments to the Naturalization Provision of the Constitution of Costa Rica*, ¶ 32 (Jan. 19, 1984).

¹³⁷ *Id.* ¶ 55.

¹³⁸ *Id.* ¶ 57.

¹³⁹ *Id.* ¶ 60.

¹⁴⁰ Inter-American Commission on Human Rights, Report No. 51/01, Case 9903, April 4, 2001.

¹⁴¹ *Id.* ¶ 68 (emphasis added).

¹⁴² *Id.* ¶ 69 (emphasis added).

Special note should also be made of the centrality of the rights at issue for immigrant workers in the United States. Worker rights in the Americas begin with the OAS Charter, which refers to the specific importance of worker rights three times and makes numerous other provisions for protecting work-related benefits. The Inter-American Charter of Social Guarantees¹⁴³ was adopted by the same conference that produced the OAS Charter and the American Declaration. The Charter includes 38 substantive articles detailing labor rights written “in the belief...that it is to the public interest...to give workers guarantees and rights on a scale not lower than that fixed in the Conventions and Recommendations of the [ILO].”¹⁴⁴ As a detailed statement of rights contemporaneous with the American Declaration, the Charter is an additional indicator of the centrality of worker rights in the Americas.

c. Other international instruments also protect the fundamental right to nondiscrimination in the workplace for immigrant workers.

Other international treaties and declarations applicable to the United States also confirm that basic principles of nondiscrimination apply to workplace protections without distinction based on nationality or immigrant status.

Like the ICCPR and the instruments of the Inter-American system, Article 2(2) of the ICESCR forbids discrimination on the basis, *inter alia*, of national or social origin, birth, or other status, and expressly establishes rights that apply to all. Thus, Article 6 grants everyone the right to work; Article 7 grants everyone just and favourable working conditions; Article 8 ensures everyone the right to establish trade unions; Article 9 guarantees the right to social security for everyone, and Article 11 ensures the right of everyone to an adequate standard of living including adequate food, clothing, housing, and the continuous improvement of living conditions. The only exception to the principle of nondiscrimination recognized by the ICESCR is the Article 2(3) exception for developing countries, which is not applicable to discriminatory laws adopted by the United States.¹⁴⁵

The United Nations Committee on Economic, Social and Cultural Rights has addressed the situation of migrant workers in several contexts, making clear its determination to extend the protections of the ICESCR to this vulnerable group. In Concluding Observations reviewing state performance under the ICESCR, the Committee has expressed concern over foreign workers’ “appalling...working conditions,”¹⁴⁶ discrimination against immigrants and refugees in the workplace,¹⁴⁷ and acts of

¹⁴³ Inter-American Charter of Social Guarantees, The International Conferences of American States, Second Supplement, 1942-1954, 254 (1958).

¹⁴⁴ *Id.* at 255.

¹⁴⁵ ICESCR, *supra* note 100, art. 2(3) (“Developing countries, with due regard to human rights and their national economy, may determine to what extent they would guarantee the economic rights recognized in the present Covenant to non-nationals”). See Weissbrodt, 2002 Progress Report, *supra* note 107, ¶¶ 22-24.

¹⁴⁶ UN Doc. E/C.12/1/Add.15, ¶ 16 (1997) (Libya).

¹⁴⁷ UN Doc. E/C.12/1/Add.25, ¶ 13 (1998) (Netherlands); Concluding Observations of the Committee on Economic, Social and Cultural Rights: Sweden, ¶¶ 18, E/C.12/1/Add.70 (2001); Concluding observations

discrimination and racism against “illegal workers.”¹⁴⁸ Also in its supervisory capacity, the Committee has requested that States Party ensure that foreign workers enjoy specific rights, including: the right to hold trade union office;¹⁴⁹ to be “adequately compensated” after working legally, contributing to the social security system, and subsequently being expelled;¹⁵⁰ and the right to the same vocational guidance and training courses as those offered to nationals.¹⁵¹ The Committee has pressed specific states to “effectively” implement job security laws, “especially as regards the most vulnerable groups, including foreigners”¹⁵² and to allow foreign domestic helpers to “freely seek employment” upon expiration of their contracts.¹⁵³ The Committee has also monitored states’ efforts to further the integration of foreign workers.¹⁵⁴

The ILO Committee of Experts similarly has concluded that the fundamental principle of nondiscrimination in employment protected by Convention No. 111 applies to both nationals and non-nationals, and does not distinguish on the basis of an immigrant worker’s lawful or unlawful status.¹⁵⁵ In one case, for example, the Committee of Experts found that poor working conditions, violence, and abuse against unlawful agricultural migrant workers constituted “acts of discrimination on the basis of race, colour, religion and national extraction.”¹⁵⁶ As discussed further with respect to freedom of association, below, the ILO reiterated this view in its recent opinion on migrant workers.¹⁵⁷

Finally, in 1985, the U.N. General Assembly adopted, by consensus, Resolution 40/144 containing the Declaration on the Human Rights of Individuals Who are not Nationals of the Country in which They Live, which covers all non-nationals, including migrant workers, refugees, documented and undocumented aliens, and individuals who have lost

of the Committee on Economic, Social and Cultural Rights (Hong Kong): China, UN Doc. E/C.12/1/Add.58, ¶ 15(f) (2001).

¹⁴⁸ UN Doc. E/C.12/1/Add.2, ¶ 10 (1996) (Spain).

¹⁴⁹ Concluding observations of the Committee on Economic, Social and Cultural Rights: Senegal, UN Doc. E/C.12/1/Add.62, ¶ 44 (24 September 2001).

¹⁵⁰ UN Doc. E/C.12/1/Add.23, ¶ 11 (1998) (Nigeria).

¹⁵¹ UN Doc. E/C.12/1/Add.53, ¶ 19 (2000) (Portugal).

¹⁵² UN Doc. E/C.12/1/Add.52, ¶ 28 (2000) (Finland).

¹⁵³ Concluding observations of the Committee on Economic, Social and Cultural Rights (Hong Kong): China, UN Doc. E/C.12/1/Add.58, ¶ 15(f) (21 May 2001).

¹⁵⁴ UN Doc. E/C.12/1/Add.34, ¶ 10 (1999) (Denmark) (praising State Party's integration support); UN Doc. E/C.12/1/Add.25, ¶ 23 (1998) (Netherlands) (urging reduction of discrimination to improve integration).

¹⁵⁵ See, for example: CEACR, Individual Direct request concerning Convention No. 111, Poland, 1992; CEACR, Individual Observation concerning Convention No. 111, Denmark, 1991; CEACR, Individual Direct Request concerning Convention No. 111, Antigua and Barbuda, 2000; CEACR, Individual Direct Request concerning Convention No. 111, Germany, 2000.

¹⁵⁶ CEACR, Individual Observation concerning Convention No. 111, Spain, 2000; see also CEACR, Individual Observation concerning Convention No. 97, Spain, 2000.

¹⁵⁷ International Labour Office Governing Body, *Migrant Workers (Supplementary Provisions) Convention, 2975 (No. 143) (Article 9, paragraph 1 and Part I (Migration in abusive conditions))*, GB.285/18/1 (Report of the Director-General: First Supplementary Report: Opinions relative to the decisions of the International Labour Conference) (November 2002), ¶ 12, attached as Appendix D [hereinafter ILO Opinion on the Rights of Migrant Workers].

their nationality.¹⁵⁸ The Declaration provides for respect for fundamental human rights of all aliens, including equality before the courts and tribunals (Article 5), trade union rights, the right to safe and healthy working conditions and the right to medical care, social security, and education (Article 8).¹⁵⁹

Indeed, a comprehensive examination of the principle of equal protection for non-citizens under international law has led the United Nations to conclude as follows:

In general, international human rights law requires equal treatment of citizens and non-citizens. The exceptions to that non-discrimination principle are narrow and must be strictly construed. In general, differential treatment of non-citizens may be acceptable only if based on reasonable and objective criteria and designed to achieve a legitimate purpose. With respect to civil and political rights, in times of domestic stability States may distinguish among citizens and non-citizens only as to political participation rights and certain rights of entry and residence. Developing countries may, to the extent necessary, differentiate among citizens and non-citizens in the area of economic rights. . . .

The extent of permissible differential treatment among non-citizens is somewhat broader. Instances of differentiation of this type arise primarily in the regulation of entry, residence, and naturalization of aliens--areas in which States have traditionally exercised substantial discretion. Permissible distinctions among non-citizens would appear to be limited to preferences extended to the nationals of certain countries, such as other members of a supranational political or economic entity, rather than the imposition of more onerous conditions on citizens of selected countries.¹⁶⁰

B. U.S. Laws Discriminating Against Migrants Violate Freedom of Association Under International Law

In addition to violating the principle of nondiscrimination under international law, U.S. employment laws that fail to protect freedom of association for unauthorized and other immigrant workers also violate the fundamental international norm of freedom of association. As discussed below, the ILO has explicitly recognized freedom of association as one of four fundamental human rights that protect all workers, including unauthorized and undocumented workers. Other international instruments applicable to the United States likewise allow for exceptions to the principle of freedom of association only in a narrow range of circumstances that do not justify denying this right to aliens or unauthorized immigrants.

¹⁵⁸ G.A. Res. 40/144, U.N. GAOR, 40th Session, U.N. Doc. A/40/114 (1985). Article 1 defines the term “alien” as “any individual who is not a national of the State in which he or she is present” (emphasis added). Article 5, ¶ 1 grants “aliens” specific rights, without specifying any particular subgroup of aliens. Articles 9 and 10 refer to “no alien” and “any alien,” respectively.

¹⁵⁹ See David Weissbrodt, *Preliminary Study on the Rights of Non-Citizens*, U.N. Doc. E/CN.4/Sub.2/2001/20 (2001), ¶¶ 102-106.

¹⁶⁰ Weissbrodt, *2002 Progress Report*, *supra* note 107, ¶¶ 50-51.

1. *Freedom of association to protect labor union interests is a fundamental human right.*

Like nondiscrimination, the right to freedom of association, including the right to organize a labor union, bargain collectively, and strike, is a fundamental human right which is protected in a wide range of international human rights instruments, including many that are applicable to the United States, as follows:

American Declaration

Article XXII. Right of association:

Every person has the right to associate with others to promote, exercise and protect his legitimate interests of a political, economic, religious, social, cultural, professional, labor union or other nature.

American Convention

Article 16. Freedom of Association:

1. *Everyone* has the right to associate freely for ideological, religious, political, economic, labor, social, cultural, sports, or other purposes.
2. The exercise of this right shall be subject only to such restrictions established by law as may be necessary in a democratic society, in the interest of national security, public safety or public order, or to protect public health or morals or the rights and freedoms of others.
3. The provisions of this article do not bar the imposition of legal restrictions, including even deprivation of the exercise of the right of association, on members of the armed forces and the police.

OAS Charter

Article 45(c) & (g):

The Member States, convinced that man can only achieve the full realization of his aspirations within a just social order, along with economic development and true peace, agree to dedicate every effort to the application of the following principles and mechanisms:...

- c) *Employers and workers*, both rural and urban, have the right to associate themselves freely for the defense and promotion of their interests, including the right to collective bargaining and the workers' right to strike, and recognition of the juridical personality of associations and the protection of their freedom and independence, all in accordance with applicable laws; . . .

g) Recognition of the importance of the contribution of organizations such as labor unions, cooperatives, and cultural, professional, business, neighborhood, and community associations to the life of the society and to the development process;....

ICCPR

Article 22:

1. Everyone shall have the right to freedom of association with others, including the right to form and join trade unions for the protection of his interests.
2. No restrictions may be placed on the exercise of this right other than those which are prescribed by law and which are necessary in a democratic society in the interests of national security or public safety, public order (*ordre public*), the protection of public health or morals or the protection of the rights and freedoms of others. This article shall not prevent the imposition of lawful restrictions on members of the armed forces and of the police in the exercise of this right.

ILO Convention (No. 87) on the Freedom of Association and Protection of the Right to Organize¹⁶¹

Article 2:

Workers and employers, without distinction whatsoever, shall have the right to establish and, subject only to the rules of the organisation concerned, to join organisations of their own choosing without previous authorisation.

Article 9:

1. The extent to which the guarantees provided for in this Convention shall apply to the armed forces and the police shall be determined by national laws or regulations.

Article 11:

Each Member of the International Labour Organisation for which this Convention is in force undertakes to take all necessary and appropriate measures to ensure that workers and employers may exercise freely the right to organise.

ILO Convention (No. 98) regarding the Right to Organize and Collective Bargaining¹⁶²

¹⁶¹ ILO Convention Concerning Freedom of Association and Protection of the Right to Organize (No. 87), *supra* note 104. The United States has not ratified Convention No. 87, but it is binding on the United States as an obligation of membership in the ILO, as discussed below.

Article 1:

1. Workers shall enjoy adequate protection against acts of anti-union discrimination in respect of their employment.
2. Such protection shall apply more particularly in respect of acts calculated to--
 - (a) make the employment of a worker subject to the condition that he shall not join a union or shall relinquish trade union membership;
 - (b) cause the dismissal of or otherwise prejudice a worker by reason of union membership or because of participation in union activities outside working hours or, with the consent of the employer, within working hours.

Other international instruments applicable in some form to the United States which recognize the right to freedom of association include the ICESCR (Article 8), the Universal Declaration (Articles 20.1 and 23.4), and the North American Agreement on Labor Cooperation Between the Government of the United States of America, the Government of Canada, and the Government of the United Mexican States (NAALC) (Articles 2, 4).¹⁶³ These specific treaty clauses regarding freedom of association are set forth in Appendix C, Table 1, attached to this brief.

As discussed below, none of these instruments authorizes denial of the right to freedom of association based on alienage, unauthorized worker, or other immigration status, as discussed below. Because the ILO is the international body that has most specifically addressed this question, jurisprudence under the ILO conventions will be considered first, followed by the ICCPR and the American Convention.

2. *The right to freedom of association protected by the ILO applies equally to all workers, regardless of status.*

The principle of freedom of association in the labor context is set forth in greatest detail in ILO Conventions No. 87 and 98. The ILO has long considered freedom of association to be a core human rights provision relating to worker rights. The Preamble to the ILO Constitution recognizes freedom of association as a means of establishing peace,¹⁶⁴ while the Declaration of Philadelphia reaffirms that freedom of expression and association are essential to sustained progress.¹⁶⁵ Indeed, the principle is so important that for over 50 years, the ILO has maintained that the obligation to protect the right to freedom of

¹⁶² ILO Convention Concerning the Application of the Principles of the Right to Organize and to Bargain Collectively (No. 98), *supra* note 104. The United States has not ratified Convention No. 98, but it is binding on the United States as an obligation of membership in the ILO, as discussed below.

¹⁶³ Canada-Mexico-United States: North American Agreement on Labor Cooperation, Pub. L. No. 103-182, 107 Stat. 2057, 32 Int'l Legal Materials 1499 (1993).

¹⁶⁴ ILO Constitution, Preamble, available at <<http://www.ilo.org/public/english/about/iloconst.htm>>.

¹⁶⁵ Declaration Concerning the aims and purposes of the International Labour Organization, May 10, 1944, I(b), available at <<http://www.ilo.org/public/english/about/iloconst.htm#annex>>.

association is binding on all ILO members as a matter of membership, regardless whether states have ratified the relevant ILO conventions.¹⁶⁶ Furthermore, in its 1998 Declaration on Fundamental Rights and Principles of Work, the ILO recognized freedom of association, like nondiscrimination, as one of the four core labor rights that constitute fundamental human rights, and which are binding on all ILO members, regardless of their ratification records. Thus, like the ILO principle of nondiscrimination, the principle of freedom of association is obligatory on the United States as a result of its ILO membership, despite its failure to ratify the two relevant ILO conventions.¹⁶⁷ As the international body with the greatest expertise in the labor rights area, the ILO's interpretation of the principle of freedom of association is also relevant to the construction of freedom of association under other international instruments to which the United States is a party.

The ILO Conventions regarding freedom of association do not allow for any exception based on a worker's immigration status or employment authorization. Conventions No. 87 and 98 expressly recognize exceptions only for members of the national police and armed forces, an exception that is not implicated in this case.

Moreover, the ILO has interpreted the right to freedom of association as a fundamental right that cannot be denied even to migrant workers who are not lawfully present in a country. In the *Spain* case, for example, the ILO Committee on Freedom of Association (CFA) concluded that a Spanish law which provided that foreigners could exercise trade union rights only "when they obtain authorization of their stay or residence in the country" violated the fundamental right to freedom of association.¹⁶⁸ The CFA confirmed that Article 2 of Convention No. 87 "recognize[s] the rights of all workers, *without distinction whatsoever*, to establish and join organizations of their own choosing," with the only permissible exception relating to the armed forces and police.¹⁶⁹

In an opinion issued in 2002, the ILO likewise interpreted the Migrant Workers Convention (No. 143)¹⁷⁰ and Recommendation (No. 151)¹⁷¹ as providing that "illegally employed migrant workers are not deprived, by the sole reference to their undocumented

¹⁶⁶ The ILO Committee on Freedom of Association reviews state practice regarding the freedom of association obligations that arise from the ILO Constitution as obligations of membership. See discussion in Francis Maupain, *The Settlement of Disputes Within the International Labour Office*, JIEL 273, 177 (1999).

¹⁶⁷ See discussion *supra* note 104.

¹⁶⁸ Committee of Freedom of Association, Report No. 327 (Vol. LXXXV, 2002, Series B, No. 1), Spain, ¶ 561 (Case No. 2121 of 23 March 2001).

¹⁶⁹ *Id.*

¹⁷⁰ ILO Convention concerning Migrations in Abusive Conditions and the Promotion of Equality of Opportunity and Treatment of Migrant Workers (No. 143), June 26, 1975, available at <<http://www.ilo.org/ilolex/english/convdisp2.htm>>. The ILO noted that the ILO Constitution confers no special competence on the ILO to interpret conventions, although the organization may provide guidance to governments regarding the appropriate scope of convention provisions. *Id.* ¶ 2.

¹⁷¹ ILO Recommendation concerning Migrant Workers (No. 151), June 24, 1975, available at <<http://www.ilo.org/ilolex/english/recdisp2.htm>>.

status, of their rights in respect of the work actually performed.”¹⁷² In particular, the ILO reasoned that despite the authority of states to treat documented and undocumented migrant workers differently with respect to non-fundamental workplace rights, *all* migrant workers are entitled to equal treatment with respect to “basic human rights.”¹⁷³ These rights include the fundamental human rights contained in U.N. instruments, as well as the four core ILO worker rights and their eight accompanying conventions.¹⁷⁴ Although the Migrant Convention itself has not been widely ratified by ILO members, the ILO concluded that the decisions regarding application of the eight fundamental ILO conventions (including freedom of association and nondiscrimination), “apply to all workers, whether nationals or non-nationals, without distinction.”¹⁷⁵

3. *The Inter-American instruments and the ICCPR do not recognize exceptions based on a worker’s unauthorized status.*

a. The American Declaration and Convention

The principle of freedom of association under the American Declaration is potentially even broader than that recognized by the ILO, since Article XXII of the Declaration applies to “every person” and includes no express exceptions. On the other hand, the American Convention, the ICCPR, and the ICESCR all recognize that states may make exceptions to this right under certain circumstances. The American Convention applies to “everyone”, but recognizes exceptions for the armed forces and police as well as exceptions that are established by law and are “necessary in a democratic society, in the interest of national security, public safety or public order, or to protect public health or morals or the rights or freedoms of others.”¹⁷⁶ The ICCPR (Art. 22(2)) and ICESCR (Art. 8(1)(c) and (2)) contain similar language. And although these exceptions might be construed as allowing broad suspensions of trade union rights, international bodies have construed them very narrowly.

In the *Baena Ricardo* case, the Inter-American Court elaborated on the requirement that an exception be “necessary in a democratic society.” The Court interpreted the principle of freedom of association in the labor union context as protecting “the basic right to constitute a group for the pursuit of a lawful goal, without pressure or interference that

¹⁷² Opinion on the Rights of Migrant Workers, *supra* note 157 ¶ 6, attached as Appendix D.

Recommendation 151 regarding the rights of Migrant Workers provides that irregular migrant workers are entitled to equality of treatment “in respect of rights arising out of present and past employment as regards trade union membership and exercise of trade union rights.” Migrant Workers Recommendation, *supra* ¶ 8(2). The Recommendation further recognizes the entitlement of irregular workers to remuneration for work performed, severance payments ordinarily due, and employment injury benefits. *Id.* ¶ 34.

¹⁷³ Opinion on the Rights of Migrant Workers, *supra* note 157, ¶ 8, *quoting* Migrant Workers Convention (No. 143), art. 1.

¹⁷⁴ *Id.* ¶ 11. *See generally* ILO: “Migrant Workers”, Report of the Committee of Experts on the Application of Conventions and Recommendations, Report III (Part IB), International Labour Conference, 87th Session, Geneva 1999; ILO: “Migrant Workers”, Report of the Committee of Experts on the Application of Conventions and Recommendations, Report III (Part 4B), International Labour Conference, 66th Session, Geneva, 1980.

¹⁷⁵ Opinion on the Rights of Migrant Workers, *supra* note 157, ¶ 12.

¹⁷⁶ American Convention, art 16(3).

may alter or denature its objective.”¹⁷⁷ The Court noted that “in trade union matters, freedom of association is of the utmost importance for the defence of the legitimate interests of the workers, and falls under the *corpus juris* of human rights.”¹⁷⁸

The Court further concluded that the measures taken to deny the exercise of trade union rights in that case could not be justified under the Article 16 exceptions. In particular, the Court found that there was no evidence that the measures “were necessary to safeguard the public order in the context of the events, nor that they maintained a relationship to the principle of proportionality; in sum . . . such measures did not meet the requirement of being ‘necessary in a democratic society,’” as required by Article 16(2) of the Convention.

b. The ICCPR

The text of Article 16 of the American Convention was based on the ICCPR,¹⁷⁹ which also imposes rigorous requirements on the exceptions to freedom of association. Freedom of association with respect to trade union rights was expressly included in the ICCPR, despite its protection in the ICESCR and ILO conventions, in order to underscore its importance as a civil, as well as economic, right.¹⁸⁰ Like other ICCPR provisions, Article 22 applies to “[e]veryone,” and thus applies to equally to aliens and nationals alike under the Human Rights Committee’s General Comment on the Position of Aliens.¹⁸¹

None of the allowable restrictions on trade union activities under Article 22 of the ICCPR suggest that a state may deny the right to freedom of association based on alienage or other immigration status. Like the American Convention, restrictions on freedom of association under Article 22 must be “prescribed by law” (e.g., set down in sufficient definiteness by legislative act or the common law), and must be “necessary to a democratic society” for achieving one of the purposes set down in Article 22(2). According to the CCPR Commentary, necessity under the ICCPR imposes a strict requirement of proportionality; in other words, both the type and intensity of a restriction must be absolutely necessary to attain a legitimate purpose.¹⁸² The requirement that restrictions must comport with democratic principles further requires that restrictions serve basic democratic values of pluralism, tolerance, and broadmindedness.¹⁸³

¹⁷⁷ Inter-American Court of Human Rights, *Baena Ricardo, et al. (270 Workers v. Panama)*, Judgment of February 2, 2001, ¶ 156, available at http://www.corteidh.or.cr/seriecing/index_serie_c_ing.html (visited Dec. 16, 2002).

¹⁷⁸ *Id.* ¶ 158.

¹⁷⁹ CCPR COMMENTARY, ¶ 29, p. 397.

¹⁸⁰ *Id.*, § 22-11, p. 389.

¹⁸¹ *Id.* § 22-19, pp. 393-94. Indeed, several European states entered reservations under the article allowing them to restrict the political associational activities of aliens, consistent with Article 16 of the European Convention.

¹⁸² *Id.* § 21-20, p. 379.

¹⁸³ *Id.* § 22-21, p. 394; § 21-21, p. 379; *see also Handyside Case*, Judgement of the European Ct. of Human Rights of 7 Dec. 1976, Series A No. 24, ¶ 49.

Finally, any restriction must be “in the interests of national security or public safety, public order (*ordre public*) the protection of public health or morals or the protection of the rights and freedoms of others,” and must also be proportional – or precisely balanced to the reason for the measure.¹⁸⁴ More sweeping restrictions may be imposed only on members of the police and armed forces.¹⁸⁵

According to Human Rights Committee jurisprudence and the CCPR Commentary, the exception for national security refers narrowly to grave cases of political or military threat to the entire nation, where action is necessary to secure the smooth functioning of the military and other forces,¹⁸⁶ while public safety contemplates a specific threat to the safety of persons or things.¹⁸⁷ Public order (or the French concept of “*ordre public*”), refers to those “universally accepted fundamental principles, consistent with respect for human rights, on which a democratic society is based.”¹⁸⁸ This exception allows states to impose time, place and manner restrictions on trade union activities, including registration requirements and restrictions on general strikes that cripple the economic or public life of the state.¹⁸⁹ Finally, protection of the rights and freedoms of others refers to protection of fundamental individual rights, as well as issues of personal safety and physical integrity. It allows restrictions on freedom of association to protect private property rights and to prohibit advocacy of national, racial, or religious hatred.¹⁹⁰

c. The denial of meaningful remedies to unauthorized workers cannot be justified under the exceptions recognized by international law.

There can be little question that the United States Supreme Court’s decision in *Hoffman* that unauthorized workers may not recover back pay when they are improperly fired for union-related activities substantially eviscerates the right of freedom of association for unauthorized workers in the United States. Because unauthorized workers are not entitled to reinstatement when they are wrongfully terminated, back pay for lost wages is the *only* effective remedy available for violations of the NLRA for this group. Eliminating this remedy thus grants a *carte blanche* to employers to violate unauthorized migrant workers’ basic human rights with impunity, and eliminates any meaningful recourse for such workers. The *Hoffman* decision thus contravenes the United States’ obligation under international law to provide “adequate protection” against anti-union discrimination,¹⁹¹ and de facto eliminates the right to organize and bargain collectively for unauthorized migrant workers, regardless whether they are lawfully present in the United States.¹⁹²

¹⁸⁴ CCPR COMMENTARY, § 22-21, p. 394.

¹⁸⁵ ICCPR, art. 22(2); CCPR COMMENTARY, §22-30-33, pp. 397-98.

¹⁸⁶ *Id.* §12-34, p. 212.

¹⁸⁷ *Id.* § 21-23, p. 380.

¹⁸⁸ *Id.* §§ 21-24, 25, p. 381.

¹⁸⁹ *Id.* ¶ 23, p. 395.

¹⁹⁰ *Id.* §§ 22-26-27, p. 396; *id.* § 21-28-29, pp. 382-83. The restriction for public health or morals is not applicable here.

¹⁹¹ ILO Convention No. 98, art. 1(1).

¹⁹² For further discussion of the implications of the *Hoffman* decision on the freedom of association rights of migrant workers, see “Complaint presented by the American Federation of Labor and Congress of

Nor can the restriction on remedies for violations of freedom of association be justified under any exception in international law due to the migrants' status as unauthorized workers. The ILO conventions recognize no such exception, and even under the exceptions allowed by the American Convention, ICCPR and ICESCR, the U.S. rules limiting the freedom of association rights of unauthorized workers cannot be sustained. National security, public safety, health or morals, or the rights of others are all narrow exceptions which are not implicated by the *Hoffman* rule. Only the public order exception could arguably be invoked to justify denial of effective remedies to unauthorized workers in order to deter unauthorized immigration. Even that exception, however, does not comfortably accommodate an immigration justification. Moreover, an immigration control justification clearly would not satisfy international law's requirements that the remedy be proportional and necessary to a democratic society recognized both by this Court and the ICCPR. Denial of freedom of association benefits to immigrant workers is contrary to the principles of pluralism, tolerance and broadmindedness.

As discussed with respect to nondiscrimination, above, denial of effective remedies for trade union violations is in no sense necessary or proportional to the goal of immigration control. There is no indication that respecting the fundamental right to freedom of association for such workers will in any way thwart the effectiveness of U.S. immigration policy. Indeed, far from deterring unlawful immigration, denial of freedom of association rights to immigrants has precisely the opposite effect, creating an incentive for unscrupulous employers to recruit unauthorized workers, whom the employer knows effectively cannot organize or otherwise seek the protection of U.S. laws. The denial of the back pay remedy simply harms unauthorized workers, other workers who seek to assert their collective bargaining rights in the workplace, and scrupulous employers who are disadvantaged by the economic advantage gained by employers who are willing to exploit the reduced rights of unauthorized immigrants.

CONCLUSION

As noted in the introduction to this brief, the United States is the largest employer of migrant workers in the world. U.S. laws that discriminate against migrant workers in employment affect a tremendous number of OAS nationals, and subject them to significant forms of mistreatment and discrimination. Non-nationals in certain immigration categories and certain geographical locations are expressly excluded from the protections of vital labor and employment laws, including workers' compensation protections, the right of legal assistance to redress employment law violations, the protections of the Migrant and Seasonal Agricultural Worker Protection Act and the Unfair Immigration-Related Employment Practices Act. Moreover, unauthorized immigrant workers' rights to certain remedies for violation of their fundamental right to organize and to be free from discrimination are hampered by the *Hoffman* decision.

Industrial Organizations to the ILO Freedom of Association Committee against the Government of the United States of America for violation of fundamental rights of freedom of association and protection of the right to organize and bargain collectively concerning migrant workers in the United States," attached as Appendix E.

Unscrupulous employers use these pronouncements by courts to take unfair advantage of immigrant workers.

U.S. laws and court decisions depriving migrant workers of labor rights and other employee protections violate international nondiscrimination and freedom of association norms. International human rights law does not generally allow distinctions on the basis of alienage, or distinctions based on immigration status where fundamental rights such as nondiscrimination and freedom of association are implicated. Nor can these laws be justified by the government's border-control prerogative, because migration control is demonstrably not served by limiting worker protections for immigrants, and because the general protective purpose of employment laws is not served by distinctions drawn on the basis of nationality or immigrant classification.

The effect of exclusionary laws and court decisions is to both undermine workers' rights and enforcement of immigration law. Employers are encouraged to take unfair advantage of unauthorized workers, all to the detriment of the workers themselves and to the employers who abide by U.S. employment laws. The sheer number of OAS nationals who are implicated, the vulnerability of these workers, and the paucity of decisions regarding the employment rights of non-nationals in the OAS or elsewhere in the international system underscores the need for this Court to lend clarity to the provisions of the Inter-American system and to establish fundamental worker protections for all workers in the region.

Respectfully submitted by Rebecca Smith, National Employment Law Project, 407 Adams St. SE, Suite 203, Olympia, WA 98501, (360) 534-9160, fax (360) 534-9160, e-mail rsmith@nelp.org, Sarah Cleveland, 727 East Dean Keeton Street, Austin, TX 78705-3299, (512) 232-1720, fax (512) 471-6988, e-mail scleveland@mail.law.utexas.edu, and Beth Lyon, Villanova University School of Law, 299 N. Spring Mill Rd., Villanova, PA 19085-1682, (610) 519-6417, fax (610) 519-5173, lyon@law.villanova.edu.

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Appendix A

Additional Signatories to *Amicus Curiae* Brief

Appendix A: Additional Signatories to Amicus Curiae Brief (listed alphabetically)

ACORN (Association of Community Organizations for Reform Now)

American Federation of Labor and Congress of Industrial Organizations (AFL-CIO)

American Federation of State, County and Municipal Employees (AFSCME)

Asian Law Caucus

Asian American Legal Defense and Education Fund (AALDEF)

APALC (Asian Pacific American Legal Center)

Brennan Center for Justice at New York University School of Law

California Rural Legal Assistance Foundation

CASA of Maryland

Casa Marianella (Texas)

CATA (Farmworkers Support Committee) (New Jersey)

CAUSA (Coalition of grassroots immigrants' rights organizations in Oregon)

Center on Policy Initiatives – California

Center for Economic and Social Rights (Brooklyn, NY)

The Citizenship Project (Salinas, CA)

Chicago Interfaith Committee on Worker Issues

Coalition for the Human Immigrants Rights of Los Angeles

El Centro, Inc., Kansas City

Employment Unit at Greater Boston Legal Services (Massachusetts)

Equal Justice Center (Texas)

D.C. Employment Justice Center

Farmworker Justice Fund, Inc.

Friends of Farmworkers, Inc. (Pennsylvania)

Florida Immigrant Advocacy Center

Hotel Employees and Restaurant Employees International Union

Hispanic Organizations Leadership Alliance

Labor Council for Latin American Advancement (LCLAA)

IUE-CWA, the Industrial Division of the Communication Workers of America, AFL-CIO

International Labor Rights Fund

Legal Aid Society - Employment Law Center (California)

Migrant Farmworker Justice Project (Florida)

National Asian Pacific American Legal Consortium (NAPALC)

National Coalition of Hispanic Organizations

The National Council of La Raza (NCLR)

National Employment Lawyers Association (NELA)

National Immigration Project of the National Lawyers' Guild

National Lawyers Guild Labor & Employment Committee

Immigrants Legal Assistance Project - North Carolina Justice and Community Development Center

Oregon Law Center, Inc.

Oregon Public Employees Union SEIU Local 503

SEIU Local 503 Latino Caucus

PCUN – Pineros y Campesinos Unidos del Noroeste (Oregon)

Puerto Rican Legal Defense & Education Fund

Robert F. Kennedy Memorial Center for Human Rights

Service Employees International Union

Sweatshop Watch

International Union, United Automobile, Aerospace and Agricultural
Implement Workers of America (UAW)

United Electrical, Radio and Machine Workers of America (UE)

Teamsters Local 890

The Workplace Project

Virginia Justice Center for Farm and Immigrant Workers

United Farmworkers Union, AFL-CIO

Appendix B

Mexican-American Legal Defense and Education Fund and National Employment Law Project, *Used and Abused: The Treatment of Undocumented Victims of Labor Law Violations Since Hoffman Plastic Compounds v. NLRB* (January 2003)



MALDEF

Mexican American Legal Defense and Educational Fund

NELP

ADVOCATING for the working poor and the unemployed

**National
Employment
Law
Project**

Used and Abused: The Treatment of Undocumented Victims of Labor Law Violations Since *Hoffman Plastic Compounds v. NLRB*.

Introduction

In March 2002, the U.S. Supreme Court decided a case called *Hoffman Plastic Compounds v. NLRB*¹⁹³ that has generated concern among immigrant workers, communities, and advocates. In *Hoffman*, the Supreme Court held that a worker who is unauthorized to work in the United States could not recover the remedy of back pay under the National Labor Relations Act (NLRA).

The *Hoffman* case has had several impacts in the U.S., on workers, on law-abiding employer, and on the behavior of unscrupulous employers. It has encouraged unscrupulous employers to engage in retaliation against unauthorized workers who claim violations of their workplace rights, and to make more claims that these workers are unprotected by any labor laws. This in turn has a chilling effect on workers' enforcement of their remaining workplace rights. Court rulings that diminish protections for the undocumented encourage employers to hire and take advantage of undocumented workers, undermining immigration law enforcement. Finally, employers who would follow the labor and employment laws are harmed when their competitors are allowed to flout the law without suffering consequences.

Background: The U.S. Supreme Court's decision in *Hoffman Plastic Compounds v. NLRB*.

The *Hoffman* case involved a worker named José Castro who was working in a factory in California. Mr. Castro was fired in clear violation of the NLRA for his organizing activities. The National Labor Relations Board (NLRB) ordered the employer to cease and desist, to put up a posting that it had violated the law, and to reinstate Castro and provide him with back pay for the time he was out of work because of the illegal discharge.

¹⁹³ 535 U.S. 137, 122 S.Ct. 1275, 152 L.Ed.2d 271 (2002).

During an NLRB hearing, it came out that Castro had used false documents to establish work authorization and that he was actually undocumented. The D.C. Circuit Court of Appeals rejected the employer's argument that Mr. Castro should not receive back pay because he is undocumented and held that back pay can be awarded up to the date when the employer obtained "after-acquired" evidence of a worker's undocumented status. However, the Supreme Court held that Mr. Castro could not be awarded back pay because he was unauthorized to work and had used false documents to obtain work.

The Supreme Court stated that other remedies, such as posting of a notice explaining the workers' labor rights and orders requiring the employer to quit violating the law, would still be available to undocumented workers. Back pay, however, is the primary and most effective remedy afforded under the National Labor Relations Act. It serves as compensation, as an incentive for workers to complain about unfair and illegal practices, and deterrence against illegal labor practices. The likely impact of a denial of back pay as a remedy for immigrant workers will be to severely undermine labor protections, increase labor exploitation, and create a two tier workforce.

Post-Hoffman: Increase in Employer Arguments That Undocumented Immigrant Workers Have No Rights And in Employer Threats of Retaliation.

The US Supreme Court's decision has emboldened employers and their lawyers throughout the country to argue that undocumented workers have *no* labor rights. In addition, in the wake of *Hoffman Plastics*, there is an increase in the number of employers who threaten to call INS against immigrant workers who pursue claims against their employers, and a sharp rise in cases where employers request that courts considering employment cases order an inquiry into the immigration status of the employees. While some courts have rejected these requests as irrelevant and have issued protective orders against disclosure of the workers' immigration status, others have ordered immigrant victims of labor law violations to disclose their status in court and have substantially limited labor rights post-*Hoffman*. Uncounted other immigrant workers have been chilled in the exercise of their remaining labor rights by news reports of employer retaliation, threats of retaliation, and confusion created by the *Hoffman* decision. They are unwilling to complain about even the most egregious violations of their labor rights and their right to unionize.

The following is a nationwide summary of the arguments and abuses that immigrants are facing since the *Hoffman Plastic* decision.

Wage Cases

Four Peruvian farm workers filed a claim against their former employers for minimum wage and overtime violations, discrimination, and for housing them in substandard housing over a four-year period from 1997 through 2001. The workers claim that the employer failed to pay them for as many of thirty or forty hours of work per week. After their lawsuit was filed, the defendant's father contacted the INS, and repeatedly pressured the agency to take enforcement action against the plaintiffs, claiming that the unpaid workers are both undocumented and "terrorists." *Centeno-Bernuy v. Becker Farms*, W.D.N.Y.No. 01-CV-839(A)(filed November 8, 2001).

Macan Singh was recruited from India to come to work in the United States, and promised a place to live, tuition for his education and that he would eventually become the defendant's business partner. Mr. Singh worked for nearly three years, and received no pay at all. On the day after he settled a wage claim for \$69,000 in back wages, the employer reported Mr. Singh to the INS and he was arrested. In

a decision issued on August 2, 2002, the federal judge ruled that *Hoffman* did not bar the remedies of injunctive and declaratory relief, and compensatory and punitive damages, in a retaliation case under the Fair Labor Standards Act. One of the bases on which the court distinguished *Hoffman* is that the employer in *Singh* knew of the workers' undocumented status and continued to employ him for three years. *Singh v. Charanjit Jutla, et al.*, 214 F.Supp.2d 1056 (N.D. Cal. 2002).

In California, Juan Flores and seven other janitors brought a class action lawsuit under the Fair Labor Standards Act seeking unpaid overtime and minimum wages from a group of supermarkets that contracted with outside companies for janitorial services. The supermarkets countered that under *Hoffman*, the workers to disclose their immigration status and requested immigration documents from members of the class. Defendants argued that the information was necessary in order to deny the workers additional work in its stores. The court held that *Hoffman* did not apply to claims of unpaid wages, and noted that allowing such discovery was certain to have a chilling effect on the plaintiffs, causing them to drop out of the case rather than risk disclosure of their status. *Flores v Albertson's, Inc.*, 2002 WL 1163623 (C.D. Cal. 2002).

Shortly after the Court's ruling in *Hoffman*, Donna Karan International, Inc. made a discovery request for the disclosure of five Chinese garment workers' immigration status, in a class action case involving unpaid minimum wages and overtime under the Fair Labor Standards Act. In *Liu, et. al. v. Donna Karan International, Inc.*, the federal district court in New York denied the corporation's request on the grounds that release of such information is more harmful than relevant. *Liu v Donna Karan International, Inc.*, 207 F. Supp. 2d 191 (S.D.N.Y. 2002).

In Florida, Carmelina Martinez and three other workers from Guatemala and Mexico filed a class action lawsuit against their employer, who operated a tomato packing shed and a chili packing shed. Ms Martinez and the some other 300 workers in the sheds claimed that they were not paid wages owed them. The workers say that the employer stole the social security taxes that were deducted from their wages and failed to pay them for hours spent waiting for produce to arrive and equipment to be repaired. In its response to the motion for class certification, their employer claimed that the *Hoffman* decision means that undocumented workers are not covered by the Fair Labor Standards Act and the Migrant and Seasonal Agricultural Worker Protection Act. The case is pending in federal court in Florida. *Martinez v. Mecca Farms*, S.D. Fl. No 01-9096(Order Granting Motion for Class Certification November 25, 2002).

In Maryland, a research center argued that it did not owe Mr. Garcia-Lopez seven months of wages because Mr. Garcia-Lopez was not authorized to work in the United States during that period. The employer brought a summary judgment motion which is currently pending in Maryland District Court. *NAHB Research Center v. Federico Garcia-Lopez*, (No. 0502 0009849 2001, D. C. Maryland).

Discrimination Cases

Rivera et al v. Nibco is a Title VII language discrimination case in Fresno, California. After the *Hoffman* ruling, the defendant immediately filed a motion for reconsideration of the existing protective order, which prohibits defendant from inquiring into plaintiffs' immigration status. The federal district court denied the motion for reconsideration, but the Ninth Circuit Court of Appeals has granted the defendant's motion for appeal on *Hoffman's* impact on back pay and front pay under Title VII. 204 F.R.D. 647 (E.D. Cal 2001), (decision denying motion for reconsideration at 2001 WL 1688880) (E.D.Cal.)

Antonio Lopez worked in a hose-making factory in New York. He was diagnosed with kidney failure, had two surgeries, and began receiving kidney dialysis treatment. When he returned to work, he was told that he was fired. Mr. Lopez withdrew his request for back pay and reinstatement after the decision in *Hoffman*, and sought only compensatory damages for emotional distress and punitive damages. The employer moved to dismiss, claiming that after *Hoffman*, a plaintiff must plead that he is legally working in the United States, and must request back pay in order to receive other damages under the ADA. The court disagreed, but did not reach the issue as to *Hoffman Plastic's* applicability to ADA claims for compensatory and punitive damages. *Lopez v. Superflex*, 2002 WL 1941484 (S.D.N.Y. 2002).

Thirteen employees of a furniture manufacturing company filed a case against their former employers for violations of federal anti-discrimination, minimum wage and state minimum wage laws. The employer attempted to force them to disclose their immigration status at the time they were employed, arguing that the information was relevant to their claims for back pay under the discrimination laws. The Illinois federal court issued a decision in which it discussed the application of *Hoffman*, and found that the maximum application is to post-discharge back pay. It did not reach the discovery issues because it found that the employer's attorney had asked only for immigration documents at the time the workers were employed, and this was not relevant to any claim. *De La Rosa v. Northern Harvest Furniture*, 210 F.R.D. 237 (C.D. Ill. 2002).

In *Valadez v. El Aguila Taco Shop*, a wage and hour case, Rogelio Valadez had just won a judgment for unpaid wages in San Diego Superior Court when the court on its own motion reopened the case immediately after *Hoffman* was decided, requesting that the parties brief the impact of *Hoffman* on California wage and hour law. After intervention by the California Labor Commissioner and subsequent briefing, the court held that *Hoffman* does not apply to wages for work already performed under California law, and the worker's judgment was upheld. *Valadez v. El Aguila Taco Shop*, Superior Court, San Diego County, No.GIC 781170 .

Chavez-Perez, et al v. Willamette River Organics, is a class action brought by farm workers, most of whom are from Mexico, who allege that they were not paid the minimum wage due to illegal charges for substandard housing. They have claims under federal law and under Oregon's labor contractor law. At depositions, some of the plaintiffs asserted Fifth Amendment rights not to respond to certain questions concerning their legal status or authorization to work. The defendant moved to dismiss the wage claims of those workers under the theory that *Hoffman* precludes unauthorized workers from claiming wages owed, that work authorization is at issue, and that the workers failed to comply with discovery as to a central matter in the case. The court denied the employer's motion to dismiss. D. Or. No. 00-969-BR (Nov. 25, 2002, Order denying motion to dismiss).

Topo v. Dhir, 2002 U.S. Dist. LEXIS 17190 (S.D.N.Y.)(September 11, 2002) Ms. Dhir alleged that she was recruited from India to work as a domestic for defendant, and that she was paid the equivalent of \$.22 per hour for much of her employment. She brought her claims under minimum wage laws, and the Alien Tort Claims Act. Court granted plaintiff a protective order against defendant's attempts to discover her immigration status.

Albert Padilla sued his former employer for overtime wages and liquidated damages under the federal Fair Labor Standards Act. Padilla joined a suit by a number of other workers who had not been paid overtime, after learning that he was entitled to overtime pay. The employer countered with a request that he disclose his immigration status, arguing that after *Hoffman*, he had no rights under the Fair

Labor Standards Act. The judge declined to require Padilla to disclose his status. *Cortez v. Medina's Landscaping*, 2002 WL 31175471 (N.D.Ill. 2002).

Court granted plaintiff Jose Rodriguez' motion to deny the defendant the right to claim that he did not properly mitigate damages because of his immigration status. Court held that the claim had been waived, and said, "it surely comes with ill grace for an employer to hire alien workers and then, if the employer itself proceeds to violate the Fair Labor Standards Act...for it to try to squirm out of its own liability on such grounds." *Rodriguez v. the Texan, Inc.*, 2002 WL 31061237 (N.D.Ill. 2002).

Workers' Compensation and Personal Injury Cases

Carlos Astudillo worked as a maintenance helper for a Pennsylvania company. He was rendered unconscious after being struck with a steel beam in the head, neck and back, and sustained a concussion, head injury and back strain and sprain. He was ill for many months before being terminated by his employer. Apparently after the injury, the employer verified with the INS that Astudillo was unlawfully in the United States. It claimed that he was not entitled to workers' compensation. Although the Pennsylvania Supreme Court held that Mr. Astudillo is entitled to medical benefits, it found that illegal immigration status might justify terminating benefits for temporary total disability. *The Reinforced Earth Company v. Workers' Compensation Appeal Board*, 810 A. 2d 99 (Pa, 2002).

Alejandro Vazquez and David Sanchez both worked for a Michigan Company as laborers. Both were seriously injured in separate accidents at the workplace, suffering, respectively a joint separation and a hand injury requiring several surgeries. After the injuries, the employer received a letter indicating that the two did not have social security numbers, and questioned them about this fact in the workers' compensation proceedings. The employer fired both injured workers, and defended the workers' compensation claim on the basis that they are undocumented workers from Mexico. The court held that the workers were covered by the Michigan workers' compensation system. Under a state law that disallows time loss benefits to those workers who are unable to work because of commission of a crime, the court suspended time loss benefits from the time that the workers' status was discovered. *Sanchez v. Eagle Alloy*, 2003 WL 57544, ___ N.W.2d ___ (Ct. Apps. Mich. 2003).

Pedro Flores came to the United States from México in 1989. In 2002, he began work as a landscaper with a company called New Beginnings. He was injured when an intoxicated co-worker ran a red light and hit another car. The court did not reach the issue, raised for the first time in the United States since the Hoffman decision, that if Flores were undocumented, he would not be entitled to back pay in his negligence action. *Flores v. Nissen*, 213 F.Supp.2d 871 (N.D.Ill. 2002).

In Oakland California a workers' compensation attorney who represented a worker whose hand was severed by a defective saw reported that after *Hoffman*, the employer refused compensation and argued that even if the worker were entitled to lost wages, they should be Mexican wages, not U.S. wages. Without a hearing, the court ordered the employer to pay and said that under California law workers compensation benefits were "wages at the time of the injury."

In Texas, Mary Santana died in an automobile accident after leaving a client's premises. She was driving a company vehicle. Ms Santana was working without work authorization. Basing itself on *Hoffman*, the employer argued that the survivors were not entitled Death Income Benefits because the employment contract was void because it violated federal immigration law and Texas' Workers'

Compensation Act was in conflict and pre-empted by federal immigration law. A settlement was eventually reached and the family obtained benefits.

Stories from Immigrant Communities

A *Monterey County Herald* workplace law columnist has fielded numerous questions from immigrant workers afraid the *Hoffman* decision mandates mass firing of immigrant workers. See Jacqueline McManus, *Immigration Status Raises Concerns*, MONTEREY COUNTY HERALD, (May 7, 2002) at Business Section.

In New York, immediately after the Court's ruling, an employer's attorney cited *Hoffman* when he issued a written threat of litigation against a community group that had announced its intention to protest unpaid wages. The attorney stated that *Hoffman* had outlawed a demonstration by the group. Immigrant worker representatives around the country report an increase in employers firing of workers after receiving "no-match" letters from the Social Security Administration. Nancy Cleeland, *Employers Test Ruling on Immigrants*, LOS ANGELES TIMES (Apr. 22, 2002).

The United Food and Commercial Workers Union (UFCW) reported that a worker filing a sexual harassment complaint at a Kentucky poultry plant was asked for her immigration documents, as was a meatpacker in Nebraska who filed a workers' compensation claim. *Id.*, LOS ANGELES TIMES.

Twenty-two Mexican workers were recruited from California to work as carpenters on a power project in Texas. A local newspaper reports that after two weeks of work, the workers were told that they would not be paid, and that they must leave or the contractor would call the US Immigration and Naturalization Service. Workers were owed for two weeks of work at \$12 to \$16 per hour. See, *Undocumented Immigrants Leave Job without Paychecks*, BEAUMONT ENTERPRISE (Aug. 15, 2002).

Pedro, a chicken catcher employed at Perdue Farms, says that his efforts to organize a union of the workers were stopped after *Hoffman*. His supervisor overheard his discussion with four other workers about unionization, and reminded him of his illegal status in the U.S. When he and fellow Guatemalans, veterans of the region, approached the newcomers from Mexico about not being so meek and using the union to assert more leverage, their requests were met with stern silence after the *Hoffman* decision. Perdue Farms paid workers over \$10 million dollars in back pay in 2001. Alfredo Corchado and Lys Mendez, *Undocumented Workers Feel Boxed In*, DALLAS MORNING NEWS (Jul 14, 2002)

In Dallas, in the wake of *Hoffman*, an organization to protect legal and illegal workers injured on the job has disappeared, having slowly dwindled in membership from an estimated 100 people to less than 10. *Id.*, DALLAS MORNING NEWS.

In New York City, immediately after the Supreme Court ruling, leaders of an immigrant-rights group, Asocación Tepeyac, began hearing stories about employers who cited the Supreme Court ruling to intimidate and "straighten out" the more vocal undocumented workers. *Id.*, DALLAS MORNING NEWS.

The lawyer for a company found guilty of underpaying undocumented immigrant workers vows to take the case to the Nevada Supreme Court. saying, "I think certain people in the state are eventually going to have to answer to the federal government. Five Spanish-speaking carpenters were employed on a public works project in Clark County, Nevada. The Nevada Labor Commissioner required the company to pay almost \$12,000 in back wages to the workers, who testified that they were required to sign blank time sheets and endorse checks made out on the basis of the time sheets, but paid in cash for an amount much lower than that due them. A state judge recently upheld the Labor Commissioner's

ruling. Juliet Casey, *Public Works Construction Project: Judge upholds ruling on prevailing wages*, REVIEW-JOURNAL (Nov. 16, 2002).

Employers' Law Firms' Advice to Clients

Kilpatrick Stockton LLP, one the nation's 50 largest law firms, published a newsletter and web article explaining the ruling to its clients, stating that "the principles of *Hoffman* decision are *likely to be applied to remedies for violations of other laws as well*. Thus, the potential financial exposure of employers for such claims as employment discrimination and wrongful discharge may be substantially reduced when the charging party is found to be an illegal alien. . . Employers should remain alert to this possibility when defending claims for lost wages and benefits." Kilpatrick Stockton LLP, *Supreme Court Strikes Down NLRB's Back Pay Award to Illegal Aliens*, (April 2002), available at <http://www.kilstock.com/site/print/detail?Article_Id=1053> (emphasis added).

Greenberg Traurig LLP posted an alert stating "because the [*Hoffman Plastic*] Court did not expressly limit its holding to the NLRB and focused most of its opinion on IRCA's statutory scheme and federal immigration policy, it would appear that *the holding has broad application* to other federal agencies." Michael Lungaretti, Esq., Greenberg Traurig LLP, *GT Alert: U.S. Supreme Court Rules That Federal Immigration Law Prohibits NLRB From Awarding Back Pay to Illegal Workers* (April 2002) (emphasis added).

The *Employment Law Strategist* notes, "The [*Hoffman Plastic*] Court's determination that the policies embodied in the IRCA take precedence over an employee's remedies under the NLRA *opens the possibility that remedies available under other employment statutes*, such as Title VII of the Civil Rights *be available to undocumented workers*." Donna Y. Porter, 9 No. 12 EMPLST 1 (April 2002) (emphasis added).

Conclusion

In a nation that prides itself on the principle of equality, this limitation on legal remedies cannot survive. In many cases, courts will protect the remaining rights of undocumented workers. In others they will not. Employers will continue to seek revenge against workers who complain about poor wages and working conditions, and immigrants will be more fearful than ever to claim their legal rights. The decision, and others like it, thus has ill effects on workers and on employers who follow the law. Employers who fail to follow the law, by contrast, suffer no ill effects, and are encouraged to first hire, then abuse, and finally retaliate, against undocumented employees.

As a nation, the United States must decide to enforce labor and employment laws on an equal basis for all workers, if it intends to have a meaningful immigration policy. As this report shows, the present system not only harms workers and law-abiding employers, but it undermines immigration law and enforcement. Congress needs to act immediately to clarify that undocumented workers are covered under all labor-protective laws and entitled to the same remedies as their US citizen and lawfully present immigrant co-workers. Consistent with the position taken by the Bush Administration to support the NLRB action in *Hoffman*, the White House should work with Congress to enact as quickly as possible legislation to overturn the *Hoffman* decision.

Appendix C

Treaty Provisions Protecting Labor Rights of Workers in the United States

- Table 1: Binding Treaty Provisions Protecting the Right to Freedom of Association to Protect Labor Union Interests**
- Table 2 Binding Treaty Provisions Protecting the Rights to Equality Before the Law, Equal Protection and Non-Discrimination**
- Table 3 Binding Treaty Provisions Protecting the Right to Fair Remuneration**
- Table 4 Binding Treaty Provisions Protecting the Right to Proper Working Conditions**
- Table 5 Binding Treaty Provisions Protecting the Right to Effective Recourse Through Legal Aid**

Table 1: Binding Treaty Provisions Protecting the Right to Freedom of Association to Protect Labor Union Interests

Treaty	Article	Text	Basis of Obligation
American Declaration	Article XXII Right of Association	Every person has the right to associate with others to promote, exercise and protect his legitimate interests of a political, economic, religious, social, cultural, professional, labor union or other nature.	Binding by reference to the OAS Charter. (The United States ratified the OAS Charter in 1951.)
American Convention	Art. 16.1-16.2 Freedom of Association	1. Everyone has the right to associate freely for ideological, religious, political, economic, labor, social, cultural, sports, or other purposes. 2. The exercise of this right shall be subject only to such restrictions established by law as may be necessary in a democratic society, in the interest of national security, public safety or public order, or to protect public health or morals or the rights and freedoms of others.	Obligation not to defeat the object and purpose of the treaty by virtue of 1977 signature.
OAS Charter	Article 45(c) & 45(g)	The Member States, convinced that man can only achieve the full realization of his aspirations within a just social order, along with economic development and true peace, agree to dedicate every effort to the application of the following principles and mechanisms: (...) c) Employers and workers, both rural and urban, have the right to associate themselves freely for the defense and promotion of their interests, including the right to collective bargaining and the workers' right to strike, and recognition of the juridical personality of associations and the protection of their freedom and independence, all in accordance with applicable laws; (...) g) Recognition of the importance of the contribution of organizations such as labor unions, cooperatives, and cultural, professional, business,	Binding by virtue of U.S. ratification, 1951.

		neighborhood, and community associations to the life of the society and to the development process;	
International Covenant on Civil and Political Rights	Article 22	<p>1. Everyone shall have the right to freedom of association with others, including the right to form and join trade unions for the protection of his interests.</p> <p>2. No restrictions may be placed on the exercise of this right other than those which are prescribed by law and which are necessary in a democratic society in the interests of national security or public safety, public order (ordre public), the protection of public health or morals or the protection of the rights and freedoms of others. This article shall not prevent the imposition of lawful restrictions on members of the armed forces and of the police in their exercise of this right.</p> <p>3. Nothing in this article shall authorize States Parties to the International Labour Organisation Convention of 1948 concerning Freedom of Association and Protection of the Right to Organize to take legislative measures which would prejudice, or to apply the law in such a manner as to prejudice, the guarantees provided for in that Convention.</p>	Binding by virtue of U.S. ratification, 1992.
International Covenant on Economic, Social and Cultural Rights	Article 8	<p>1. The States Parties to the present Covenant undertake to ensure:</p> <p>(a) The right of everyone to form trade unions and join the trade union of his choice, subject only to the rules of the organization concerned, for the promotion and protection of his economic and social interests. No restrictions may be placed on the exercise of this right other than those prescribed by law and which are necessary in a democratic society in the interests of national security or public order or for the protection of the rights and freedoms of others;</p> <p>(b) The right of trade unions to establish national federations or confederations and the right of the</p>	Obligation not to defeat the object and purpose of the treaty by virtue of 1977 signature.

		<p>latter to form or join international trade-union organizations;</p> <p>(c) The right of trade unions to function freely subject to no limitations other than those prescribed by law and which are necessary in a democratic society in the interests of national security or public order or for the protection of the rights and freedoms of others;</p> <p>(d) The right to strike, provided that it is exercised in conformity with the laws of the particular country.</p> <p>2. This article shall not prevent the imposition of lawful restrictions on the exercise of these rights by members of the armed forces or of the police or of the administration of the State.</p> <p>3. Nothing in this article shall authorize States Parties to the International Labour Organisation Convention of 1948 concerning Freedom of Association and Protection of the Right to Organize to take legislative measures which would prejudice, or apply the law in such a manner as would prejudice, the guarantees provided for in that Convention.</p>	
ILO Convention 87	Article 2	Workers and employers, without distinction whatsoever, shall have the right to establish and, subject only to the rules of the organisation concerned, to join organisations of their own choosing without previous authorisation.	Defines freedom of association, one of four fundamental principles which, under the 1998 Declaration on Fundamental Principles and Rights at Work, the United States is bound to protect by virtue of ILO membership.
ILO Convention 98	Article 1.1	1. Workers shall enjoy adequate protection against acts of anti-union discrimination in respect of their employment.	Defines freedom of association, one of four fundamental principles which, under the 1998

			Declaration on Fundamental Principles and Rights at Work, the United States is bound to protect by virtue of ILO membership.
North American Agreement on Labor Cooperation Between the Government of the United States of America, the Government of Canada, and the Government of the United Mexican States (NAALC)	Article 2: Levels of Protection	Affirming full respect for each Party's constitution, and recognizing the right of each Party to establish its own domestic labor standards, and to adopt or modify accordingly its labor laws and regulations, each Party shall ensure that its labor laws and regulations provide for high labor standards, consistent with high quality and productivity workplaces, and shall continue to strive to improve those standards in that light.	Binding by virtue of U.S. ratification, 1993.
NAALC	Article 4: Private Action	1. Each Party shall ensure that persons with a legally recognized interest under its law in a particular matter have appropriate access to administrative, quasi-judicial, judicial or labor tribunals for the enforcement of the Party's labor law. 2. Each Party's law shall ensure that such persons may have recourse to, as appropriate, procedures by which rights arising under: * its labor law, including in respect of occupational safety and health, employment standards, industrial relations and migrant workers, and * collective agreements, can be enforced.	Binding by virtue of U.S. ratification, 1993.
Charter of the United Nations	Article 55(a)	With a view to the creation of conditions of stability and well-being which are necessary for peaceful and friendly relations among nations based on respect for the principle of equal rights and self-determination of peoples, the United Nations shall promote: a. higher standards of living, full employment, and conditions of economic and social progress and development;	Binding by virtue of U.S. ratification, 1945.

Universal Declaration	Article 20.1	Everyone has the right to freedom of peaceful assembly and association.	Considered to have become customary law.
Universal Declaration	Article 23.4	Everyone has the right to form and to join trade unions for the protection of his interests.	Considered to have become customary law.

**TABLE 2: Binding Treaty Provisions Protecting the Rights to
Equality Before the Law, Equal Protection and Non-
Discrimination**

Treaty	Article	Text
American Declaration	Article II	All persons are equal before the law and have the rights and duties established in this Declaration, without distinction as to race, sex, language, creed or any other factor.
American Convention	Article 1(1)	<p>The States Parties to this Convention undertake to respect the rights and freedoms recognized herein and to ensure to all persons subject to their jurisdiction the free and full exercise of those rights and freedoms, without any discrimination for reasons of race, color, sex, language, religion, political or other opinion, national or social origin, economic status, birth or any other social condition.</p> <p>2. For the purposes of this Convention, "person" means every human being.</p>
American Convention	Article 24	All persons are equal before the law. Consequently, they are entitled, without discrimination, to equal protection of the law.
International Covenant on Civil and Political Rights	Article 26	All persons are equal before the law and are entitled without any discrimination to the equal protection of the law. In this respect, the law shall prohibit any discrimination and guarantee to all persons equal and effective protection against discrimination on any ground such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.
International Covenant on Economic, Social and Cultural Rights	Article 2.2	The States Parties to the present Covenant undertake to guarantee that the rights enunciated in the present Covenant will be exercised without discrimination of any kind as to race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.
ILO Convention (No. 111) Concerning Discrimination in Employment	Article 1(1)	For the purpose of this Convention the term discrimination includes-- (a) any distinction, exclusion or preference made on the basis of race, colour, sex, religion, political opinion, <i>national extraction or social origin</i> , which has the effect of nullifying or impairing equality of opportunity or treatment in employment or occupation.
ILO Convention (No. 111) Concerning Discrimination in Employment	Article 2	Each Member for which this Convention is in force undertakes to declare and pursue a national policy designed to promote, by methods appropriate to national conditions and practice, equality of opportunity and treatment in respect of employment and occupation, with a view to eliminating any discrimination in respect thereof.
Universal Declaration	Article 2, cl. 1	Everyone is entitled to all the rights and freedoms set forth in this Declaration, without distinction of any kind, such as race, colour,

		sex, language, religion, political or other opinion, national or social origin, property, birth or other status.
Universal Declaration	Article 7	All are equal before the law and are entitled without any discrimination to equal protection of the law. All are entitled to equal protection against any discrimination in violation of this Declaration and against any incitement to such discrimination.

Table 3: Binding Treaty Provisions Protecting the Right to Fair Remuneration and Equal Pay

Treaty	Article	Text
American Declaration	Article XIV. Right to work and to fair remuneration	Every person has the right to work, under proper conditions, and to follow his vocation freely, insofar as existing conditions of employment permit. Every person who works has the right to receive such remuneration as will, in proportion to his capacity and skill, assure him a standard of living suitable for himself and for his family.
American Convention	Article 26. Progressive Development	The States Parties undertake to adopt measures, both internally and through international cooperation, especially those of an economic and technical nature, with a view to achieving progressively, by legislation or other appropriate means, the full realization of the rights implicit in the economic, social, educational, scientific, and cultural standards set forth in the Charter of the Organization of American States as amended by the Protocol of Buenos Aires.
OAS Charter	Article 34(g)	The Member States agree that equality of opportunity, the elimination of extreme poverty, equitable distribution of wealth and income and the full participation of their peoples in decisions relating to their own development are, among others, basic objectives of integral development. To achieve them, they likewise agree to devote their utmost efforts to accomplishing the following basic goals: (...) g) Fair wages, employment opportunities, and acceptable working conditions for all;
OAS Charter	Article 45(b)	The Member States, convinced that man can only achieve the full realization of his aspirations within a just social order, along with economic development and true peace, agree to dedicate every effort to the application of the following principles and mechanisms: b) Work is a right and a social duty, it gives dignity to the one who performs it, and it should be performed under conditions, including a system of fair wages, that ensure life, health, and a decent standard of living for the worker and his family, both during his working years and in his old age, or when any circumstance deprives him of the possibility of working;
International Covenant on Economic, Social and Cultural Rights	Article 7(a)(i)	The States Parties to the present Covenant recognize the right of everyone to the enjoyment of just and favourable conditions of work which ensure, in particular: (a) Remuneration which provides all workers, as a minimum, with: (i) Fair wages and equal remuneration for work of equal value without distinction of any kind, in particular women being guaranteed conditions of work not inferior to those enjoyed by men, with equal pay for equal work;
Charter of the United Nations	Article 55(a)	With a view to the creation of conditions of stability and well-being which are necessary for peaceful and friendly relations among

		<p>nations based on respect for the principle of equal rights and self-determination of peoples, the United Nations shall promote:</p> <p>a. higher standards of living, full employment, and conditions of economic and social progress and development;</p>
Universal Declaration	Article 23.2-23.3	<p>2. Everyone, without any discrimination, has the right to equal pay for equal work.</p> <p>3. Everyone who works has the right to just and favourable remuneration ensuring for himself and his family an existence worthy of human dignity, and supplemented, if necessary, by other means of social protection.</p>

Table 4: Binding Treaty Provisions Protecting the Right to Proper Working Conditions

Treaty	Article	Text
American Declaration	Article XI. Right to the preservation of health and to well-being.	Every person has the right to the preservation of his health through sanitary and social measures relating to food, clothing, housing and medical care, to the extent permitted by public and community resources.
American Declaration	Article XIV. Right to work and to fair remuneration.	Every person has the right to work, under proper conditions, and to follow his vocation freely, insofar as existing conditions of employment permit. Every person who works has the right to receive such remuneration as will, in proportion to his capacity and skill, assure him a standard of living suitable for himself and for his family.
American Convention	Article 26. Progressive Development	The States Parties undertake to adopt measures, both internally and through international cooperation, especially those of an economic and technical nature, with a view to achieving progressively, by legislation or other appropriate means, the full realization of the rights implicit in the economic, social, educational, scientific, and cultural standards set forth in the Charter of the Organization of American States as amended by the Protocol of Buenos Aires.
OAS Charter	Article 34(g)	The Member States agree that equality of opportunity, the elimination of extreme poverty, equitable distribution of wealth and income and the full participation of their peoples in decisions relating to their own development are, among others, basic objectives of integral development. To achieve them, they likewise agree to devote their utmost efforts to accomplishing the following basic goals: (...) g) Fair wages, employment opportunities, and acceptable working conditions for all;
OAS Charter	Article 45(b)	The Member States, convinced that man can only achieve the full realization of his aspirations within a just social order, along with economic development and true peace, agree to dedicate every effort to the application of the following principles and mechanisms: b) Work is a right and a social duty, it gives dignity to the one who performs it, and it should be performed under conditions, including a system of fair wages, that ensure life, health, and a decent standard of living for the worker and his family, both during his working years and in his old age, or when any circumstance deprives him of the possibility of working;
International Covenant on Economic, Social and Cultural Rights	Article 7(b)	The States Parties to the present Covenant recognize the right of everyone to the enjoyment of just and favourable conditions of work which ensure, in particular: (...) (b) Safe and healthy working conditions;

International Covenant on Economic, Social and Cultural Rights	Article 12.1, 12.2(b-d)	<p>1. The States Parties to the present Covenant recognize the right of everyone to the enjoyment of the highest attainable standard of physical and mental health.</p> <p>2. The steps to be taken by the States Parties to the present Covenant to achieve the full realization of this right shall include those necessary for:</p> <p>(b) The improvement of all aspects of environmental and industrial hygiene;</p> <p>(c) The prevention, treatment and control of epidemic, endemic, occupational and other diseases;</p> <p>(d) The creation of conditions which would assure to all medical service and medical attention in the event of sickness.</p>
Charter of the United Nations	Article 55(a)	<p>With a view to the creation of conditions of stability and well-being which are necessary for peaceful and friendly relations among nations based on respect for the principle of equal rights and self-determination of peoples, the United Nations shall promote:</p> <p>a. higher standards of living, full employment, and conditions of economic and social progress and development;</p>
Universal Declaration	Article 23.1	<p>1. Everyone has the right to work, to free choice of employment, to just and favourable conditions of work and to protection against unemployment.</p>

Table 5: Binding Treaty Provisions Protecting the Right to Effective Recourse Through Legal Aid

Treaty	Article	Text
American Declaration	Article XVIII. Right to a fair trial.	Every person may resort to the courts to ensure respect for his legal rights. There should likewise be available to him a simple, brief procedure whereby the courts will protect him from acts of authority that, to his prejudice, violate any fundamental constitutional rights.
American Convention	Article 8.1 Right to a Fair Trial	1. Every person has the right to a hearing, with due guarantees and within a reasonable time, by a competent, independent, and impartial tribunal, previously established by law, in the substantiation of any accusation of a criminal nature made against him or for the determination of his rights and obligations of a civil, labor, fiscal, or any other nature.
American Convention	Article 25. Right to Judicial Protection	1. Everyone has the right to simple and prompt recourse, or any other effective recourse, to a competent court or tribunal for protection against acts that violate his fundamental rights recognized by the constitution or laws of the state concerned or by this Convention, even though such violation may have been committed by persons acting in the course of their official duties. 2. The States Parties undertake: a. to ensure that any person claiming such remedy shall have his rights determined by the competent authority provided for by the legal system of the state; b. to develop the possibilities of judicial remedy; and c. to ensure that the competent authorities shall enforce such remedies when granted.
American Convention	Article 26. Progressive Development	The States Parties undertake to adopt measures, both internally and through international cooperation, especially those of an economic and technical nature, with a view to achieving progressively, by legislation or other appropriate means, the full realization of the rights implicit in the economic, social, educational, scientific, and cultural standards set forth in the Charter of the Organization of American States as amended by the Protocol of Buenos Aires.
OAS Charter	Article 45(i)	The Member States, convinced that man can only achieve the full realization of his aspirations within a just social order, along with economic development and true peace, agree to dedicate every effort to the application of the following principles and mechanisms: i) Adequate provision for all persons to have due legal aid in order to secure their rights.
OAS Charter	Article 45(b)	The Member States, convinced that man can only achieve the full realization of his aspirations within a just social order, along with economic development and true peace, agree to dedicate every

		<p>effort to the application of the following principles and mechanisms:</p> <p>b) Work is a right and a social duty, it gives dignity to the one who performs it, and it should be performed under conditions, including a system of fair wages, that ensure life, health, and a decent standard of living for the worker and his family, both during his working years and in his old age, or when any circumstance deprives him of the possibility of working;</p>
International Covenant on Civil and Political Rights	Article 2(3)	<p>3. Each State Party to the present Covenant undertakes:</p> <p>(a) To ensure that any person whose rights or freedoms as herein recognized are violated shall have an effective remedy, notwithstanding that the violation has been committed by persons acting in an official capacity;</p> <p>(b) To ensure that any person claiming such a remedy shall have his right thereto determined by competent judicial, administrative or legislative authorities, or by any other competent authority provided for by the legal system of the State, and to develop the possibilities of judicial remedy;</p> <p>(c) To ensure that the competent authorities shall enforce such remedies when granted.</p>
Universal Declaration	Article 10	<p>Everyone is entitled in full equality to a fair and public hearing by an independent and impartial tribunal, in the determination of his rights and obligations and of any criminal charge against him.</p>
Universal Declaration	Article 28	<p>Everyone is entitled to a social and international order in which the rights and freedoms set forth in this Declaration can be fully realized.</p>

Appendix D

**Complaint presented by the American
Federation of Labor and Congress of
Industrial Organizations to the ILO,
November 28, 2002**

**COMPLAINT presented by the American Federation of Labor
and Congress of Industrial Organizations
to the ILO Committee on Freedom of Association
against the Government of the United States of America
for violation of fundamental rights of freedom of association
and protection of the right to organize and bargain collectively
concerning migrant workers in the United States**

This complaint is submitted to the ILO Freedom of Association Committee by the American Federation of Labor and Congress of Industrial Organizations (AFL-CIO) against the Government of the United States. The AFL-CIO is a federation of 66 national and international unions in the United States. Collectively, these unions represent approximately 13 million working men and women whose rights are directly and indirectly affected by the actions of the U.S. government complained of herein.

In March 2002 the United States Supreme Court ruled 5-4 in the case of *Hoffman Plastic Compounds v. NLRB* that an undocumented worker, because of his immigration status, was not entitled to back pay for lost wages after he was illegally dismissed for exercising rights protected by the National Labor Relations Act (NLRA).¹⁹⁴ By this decision, millions of workers in the United States lost their only protection of the right to freedom of association, the right to organize, and the right to bargain collectively.

The Supreme Court overruled a decision by the National Labor Relations Board (NLRB) and a federal appeals court that granted back pay to the worker. The *Hoffman* decision and the continuing failure of the U. S. administration and Congress to enact legislation to correct such discrimination puts the United States squarely in violation of its obligations under ILO Conventions 87 and 98 and its obligations under the ILO's 1998 *Declaration on Fundamental Principles and Rights at Work*. From a human rights and labor rights perspective, workers' immigration status does not diminish or condition their status as workers holding fundamental rights.

Background

Hoffman Plastic Compounds Company hired Jose Castro in May 1988. In December 1988 Castro and his co-workers began a union organizing campaign. In January 1989, management laid off Castro and three other workers because of their effort to form and join a trade union. In January 1992, the NLRB ordered Hoffman to offer reinstatement and back pay for lost wages for these four workers.

¹⁹⁴ *Hoffman Plastic Compounds, Inc. v. National Labor Relations Board*, 535 U.S. ___, 122 S. Ct. 1275 (2002) (a copy of the decision is attached to this Complaint).

In June 1993, at a hearing to fix the amount owed each worker, Jose Castro acknowledged that he did not have proper work authorization papers. Because of this, reinstatement was no longer available as a remedy for Castro. However, earlier NLRB and court decisions left open the possibility of enforcing the NLRB's back pay remedy. Hoffman refused to pay back pay.

In September 1998, the NLRB decided that Hoffman should pay Castro back pay for the period of time between his discharge and the date of his admission that he lacked documentation. In that decision, the NLRB said, "the most effective way to accommodate and further [United States] immigration policies . . . is to provide the protections and remedies of the NLRA to undocumented workers in the same manner as to other employees."¹⁹⁵ The NLRB ordered Hoffman to pay \$66,951 in back pay to Jose Castro.

Hoffman refused to pay Castro and filed an appeal. In 2001, the federal court of appeals upheld the NLRB's order.¹⁹⁶ Hoffman appealed to the Supreme Court. In its March 2002 decision, the Supreme Court reversed the decisions of the appeals court and of the NLRB. By a 5-4 vote, the Supreme Court denied all back pay to Jose Castro after his unlawful dismissal. The Supreme Court held that for undocumented workers who suffer reprisals for union organizing activity, the immigration law's prohibition on unauthorized employment is superior to the labor law's protection of the right to form and join a union. This decision and its impact on the right to freedom of association of all workers is the subject of this complaint.

Convention No. 87

ILO Convention 87 protects the right of workers "without distinction whatsoever" to establish and join organizations of their own choosing. The *Hoffman* decision¹⁹⁷ creates a distinction based on immigration status – a clear violation of Convention 87.

The rights contained in Convention 87 are fundamental human rights that belong to all workers regardless of their immigration status. However, the *Hoffman* decision establishes a subclass of workers who cannot obtain the same remedies for violations of their rights available to all other workers. A majority of these workers in the United States are Mexican, making them the single largest national group affected by the decision.

¹⁹⁵ *Hoffman Plastic Compounds*, 326 NLRB 1060 (1998).

¹⁹⁶ *Hoffman Plastic Compounds, Inc. v. NLRB*, 237 F.3d 639 (2001).

¹⁹⁷ For the purposes of this complaint, all references to the *Hoffman* decision also should be understood to include the failure of the Administration to propose and the Congress to enact legislation remedying the injustice.

There are eight million undocumented workers in the United States.¹⁹⁸ Nearly 60 percent of them are migrant workers from Mexico.¹⁹⁹ Already subject to widespread exploitation and abuse in their wages and working conditions, they are now left with no protection whatsoever if they exercise rights of association, organizing and bargaining to defend themselves. The discrimination created by the *Hoffman* decision prevents these workers from exercising their right to establish and join organizations of their own choosing.

Convention No. 98

ILO Convention 98 requires “adequate protection against acts of anti-union discrimination.” The *Hoffman* decision nullifies such protection for millions of workers based on their immigration status.

Back pay for lost wages is an integral and necessary element of a system for protecting against acts of anti-union discrimination. This is especially true in the United States, where the NLRA allows no fines or other penalties against employers who violate workers’ trade union rights.

The United States falls far short of the Committee on Freedom of Association’s affirmation of “the need to ensure by specific provisions accompanied by *civil remedies and penal sanctions* the protection of workers against acts of anti-union discrimination at the hands of employers.”²⁰⁰ U.S. law provides only civil remedies such as reinstatement and back pay.²⁰¹

The Supreme Court earlier decided that undocumented workers who are illegally dismissed for union activity are not entitled to reinstatement to their jobs.²⁰² Back

¹⁹⁸ Unofficial estimates of the number of undocumented workers range from as low as five to as high as twelve million. The U.S. Census Bureau approximated the figure at eight million for the 2000 census. See Kevin E. Deardorff and Lisa M. Blumerman, “Appendix A: Estimates of the Foreign-Born Population by Migrant Status: 2000” in J. Gregory Robinson, *ESCAP II: Demographic Analysis Results*, U.S. Census Bureau, October 13, 2001. Using differing assumptions, the Census Bureau fixed the estimated number of unauthorized migrants at 8,490,491 (at p. A-10), 7,662,488 (at p. A-11) and 8,835,450 (at p. A-11). The census report is available at: <http://www.census.gov/dmd/www/pdf/Report1.PDF>.

¹⁹⁹ B. Lindsay Lowell and Roberto Suro, “How many undocumented: The numbers behind the U.S.-Mexico migrations talks,” report by The Pew Hispanic Center, March 31, 2002, available at: <http://www.pewhispanic.org/site/docs/pdf/howmanyundocumented.pdf>.

²⁰⁰ Digest of decisions and principles of the Freedom of Association Committee, Fourth (revised) edition (1996), para. 746 (emphasis in English original).

²⁰¹ In contrast, the Fair Labor Standards Act permits workers to obtain double back pay for certain minimum wage or overtime violations. Title VII of the Civil Rights Act of 1964, as amended, lets workers obtain compensatory and punitive damages in addition to back pay. Other remedial measures under the NLRA include an order to “cease and desist” the unlawful conduct, and an order to post a written notice on the company bulletin board stating “we will not” repeat the unlawful conduct. Experience has shown that these are not remedies taken seriously by employers and do not serve as any meaningful deterrent to prevent repeat violations. See Human Rights Watch, *Unfair Advantage: Workers’ Freedom of Association in the United States under International Human Rights Standards* (2002).

²⁰² See *Sure-Tan, Inc. v. NLRB*, 467 U.S. 883 (1984).

pay for lost wages was the *only* remedy available to such workers, and back pay was the *only* economic cost faced by an employer who illegally dismissed workers for union organizing activity – until the *Hoffman* decision, which ripped away this last defense.

Back pay does not only serve the purpose of compensating victims. It also serves a deterrent purpose. Back pay discourages employers from violating workers' rights because they know they will face an economic cost for violations. Other remedial measures under the NLRA include an order to “cease and desist” the unlawful conduct, and an order to post a written notice on the company bulletin board stating “we will not” repeat the unlawful conduct. Experience has shown that these are not remedies taken seriously by employers and do not serve as any meaningful deterrent to prevent repeat violations.²⁰³

We do not concede that back pay is a *sufficient* remedy for violations of workers' rights. Still, it is the *only* remedy with economic impact under U.S. labor law. In contrast to the NLRA's enforcement scheme, the Fair Labor Standards Act permits workers to obtain double back pay for minimum wage or overtime violations. Title VII of the Equal Employment Opportunity Act lets workers obtain compensatory and punitive damages in addition to back pay. But back pay is the only economic remedy available to workers under the NLRA.

Where undocumented migrant workers are involved, back pay is the only potential deterrent to unlawful discrimination, because reinstatement is not possible. Eliminating the back pay remedy grants *carte blanche* to employers to violate undocumented workers' rights with impunity, and discourages workers from exercising their rights. As the dissenting justices in the *Hoffman* case put it: “in the absence of the backpay weapon, employers could conclude that they can violate the labor laws at least once with impunity . . . [T]he backpay remedy is necessary; it helps make labor law enforcement credible; it makes clear that violating the labor laws will not pay.”²⁰⁴

The *Hoffman* decision belies earlier representations by the United States government and the U.S. business community to the ILO on U.S. commitment to workers' freedom of association. In its first followup report under the 1998 Declaration on Fundamental Principles and Rights at Work, the United States emphasized the importance of the back pay remedy to protect workers against acts of anti-union discrimination. Arguing that the U.S. was fulfilling its commitments under the Declaration, the U.S. report noted that the NLRB “has authority to order the payment of monies to compensate an individual for earnings lost as a result of

²⁰³ See Human Rights Watch, *Unfair Advantage: Workers' Freedom of Association in the United States under International Human Rights Standards* (2000).

²⁰⁴ See *Hoffman Plastic Compounds, Inc. v. International Union, UAW Local 1570*, 122 S. Ct. at 1287 (Breyer, J., dissenting).

employment discrimination by the employer.”²⁰⁵ The *Hoffman* decision strips that authority from the NLRB for millions of workers in the United States.

In a 1992 complaint to the Committee on Freedom of Association involving workers’ organizing rights in the United States, the U.S. government cited the back pay remedy as one of “the legal remedies available under the NLRA [that] are effective to redress violations of organizational rights” and noted further that “the NLRB has broad remedial authority to take such action as is necessary to effectuate the policies of the NLRA.”²⁰⁶ But the *Hoffman* decision eradicated such authority for millions of workers in the United States.

It is also relevant to note that in the same case, the main U.S. employer group at the ILO pointed to back pay as a pillar of U.S. labor law enforcement. The U.S. CIB pointed out that “hundreds of employers are expeditiously found by the NLRB to have engaged in unfair labor practices each year and such lawbreakers are required to pay more than \$34 million in backpay each year for these violations.”²⁰⁷

By eliminating the back pay remedy for undocumented workers, the *Hoffman* decision annuls protection of their right to organize. The decision grants license to employers to violate workers’ freedom of association with impunity. Workers have no recourse and no remedy when their rights are violated. This is a clear breach of the requirement in Convention 87 to provide adequate protection against acts of anti-union discrimination.

The fact that a judicial decision, rather than a statutory provision, has caused immigrant workers to lose their right to back pay is immaterial. Absent Congressional action to overturn the effect of *Hoffman Plastic*, that decision amends the NLRA, and it is no longer the case that back pay remedies are available to all workers covered by that statute. The result is the same as if Congress had amended the NLRA to condition back pay on immigration status. In fact, a recent report by the United States Government Accounting Office, the investigative arm of the U.S. Congress, concluded that “since back pay is one of the major remedies available to workers for a violation of their rights, the Court’s

²⁰⁵ See U.S. Government Annual Report for 1999 to the ILO concerning freedom of association and the effective recognition of the right to bargain collectively, p. 9.

²⁰⁶ Complaint against the Government of the United States presented by the United Food and Commercial Workers International Union (UFCW), the American Federation of Labor and Congress of Industrial Organizations (AFL-CIO) and the International Federation of Commercial, Clerical, Professional and Technical Employees (FIET) Report No. 284, Case No. 1523, paragraph 159 (1992).

²⁰⁷ *Id.*, para. 185.

decision [in *Hoffman Plastic*] effectively diminishes the bargaining rights of such workers under the NLRA."²⁰⁸

Declaration on Fundamental Principles and Rights at Work

In its landmark 1998 Declaration the ILO declared that “all Members, even if they have not ratified Conventions 87 and 98, have an obligation . . . to respect, to promote, and to realize the principles concerning the fundamental rights which are the subject of those Conventions, namely: freedom of association and the effective recognition of the right to collective bargaining.”

Instead of respecting, promoting and realizing these principles, the *Hoffman* decision mocks, impedes and abandons them. The lack of respect in the decision was evident during oral argument before the Supreme Court. Characterizing an NLRB attorney's defense of the agency's decision to award back pay to the worker, a Supreme Court justice said of the worker, “if he's smart he'd say ‘I can just sit home and eat chocolates and get my back pay.’”²⁰⁹

A more contemptuous attitude toward workers is hard to imagine. Perhaps some persons can sit home and eat chocolates while collecting their pay, but the workers denied back pay under the *Hoffman* ruling have to struggle for survival every day. Most work at minimum wage jobs with no insurance or pensions, and no vacations or holidays. They pay social security taxes for benefits they will never receive. Jose Castro, the victimized worker in the *Hoffman* case, was fired from his job in January 1989. It took the legal system thirteen years to decide his case and deny him back pay. Mr. Castro did not “sit home and eat chocolates” for thirteen years waiting for back pay.

Instead of promoting freedom of association, the *Hoffman* decision retards it with a profound effect on all workers, not just undocumented workers directly affected. Most undocumented workers are employed in workplaces with documented migrant workers and with U.S. citizens. Before the *Hoffman* decision, union representatives assisting workers in an organizing campaign could say to all of them, “we will defend your rights before the National Labor Relations Board and pursue back pay for lost wages if you are illegally dismissed.” Now they must add: “except for undocumented workers – you have no protection.” The resulting fear and division when a group of workers is deprived of their protection of the right to organize has adverse impact on *all* workers' right to freedom of association and right to organize and bargain collectively.

²⁰⁸ United States General Accounting Office, *Collective Bargaining Rights: Information on the Number of Workers with and without Bargaining Rights*, GAO-02-835 (September 2002) at 3-4. The report (at 20) found that *Hoffman Plastic* diminishes the rights of 5.5 million undocumented workers in the United States.

²⁰⁹ See transcript of oral argument before Supreme Court, *Hoffman Plastic Compounds, Inc. v. NLRB*, January 15, 2002, Alderson Reporting Company, p. 33 (available at http://www.supremecourt.us/oral_arguments/argument_transcripts.html).

The *Hoffman* decision also promotes new and perverse forms of discrimination. It creates an incentive for employers to hire undocumented workers because of their new vulnerability in union organizing efforts, rather than hire documented workers or citizens. As is universally the practice, the employer just takes a cursory look at false work papers so that he has a defense against sanctions for “knowingly” hiring an unauthorized worker.

The resulting discrimination is two-fold: discrimination in hiring against documented workers and citizens, but only so the employer can further discriminate against the undocumented. To stop an organizing campaign from even getting off the ground, employers can threaten to dismiss undocumented workers, telling them they have no protection under the NLRA. And then if workers do get a campaign off the ground, employers can carry out the threat, dismissing them with impunity.

Instead of realizing the principles of freedom of association, the *Hoffman* decision destroys the principles. The decision is a vengeful assault on workers’ fundamental rights. Instead of protecting workers’ rights, the Supreme Court’s decision penalizes workers who exercise fundamental rights. The decision rewards the violators and punishes the victims.

The issue is fundamental rights – not “balancing”

Both the NLRB and the Supreme Court treated the *Hoffman* case as one requiring a balancing of labor law and immigration law. The NLRB and the four-justice minority of the Supreme Court gave priority to labor law. The five members of the Supreme Court who voted to deny workers’ rights gave priority to immigration law, despite the fact, as pointed out by the four judges who dissented, that “*all* the relevant agencies (including the Department of Justice) have told us [that] the NLRB’s limited backpay order will *not* interfere with the implementation of immigration policy.”²¹⁰

A “balancing” approach is a fundamentally mistaken treatment of the case. Both the NLRB and the Supreme Court failed to take into account international human rights law and international labor rights norms. They also failed to consider U.S. obligations as a member of the ILO and as one of the strongest advocates of the 1998 Declaration. Still, the decision of the NLRB and the opinion of the four dissenting justices were consistent with ILO freedom of association principles, even if they were not based on those principles.

We are not asking the Committee on Freedom of Association to interpret or intrude on U.S. immigration law. The right of every country to establish immigration rules is not in question here. The question is whether countries can set immigration rules that violate human rights. The answer is clearly no.

²¹⁰ See *Hoffman Plastic Compounds*, 122 S. Ct. at 1285 (Breyer, J., dissenting) (emphasis on *all* and *not* are in original opinion).

Fundamental rights cannot be balanced against policy options. Human rights cannot be abrogated to achieve policy goals. Human rights must always have priority. Policy options must be formulated in compliance with basic human rights standards.

The Spain case

The Committee faced this issue recently in Case No. 2121 involving denial of the right to freedom of association of undocumented foreign workers in Spain.²¹¹ In that complaint, the Spanish labor federation Unión General de Trabajadores (UGT) called the Committee's attention to earlier cases in which the Committee stated the following:

- It is not within the Committee's competence to deal with measures derived from national legislation on foreigners, *unless these same have direct repercussions on the exercise of trade union rights.* (Case No. 658)
- While considering that measures adopted by the authorities to apply immigration and nationality law emanate from the sovereign right of every country to decide who may and who may not be admitted to its territory, the Committee expressed the opinion that *if the application of these measures could impact workers in connection with the free choice of their trade union, or result in the dismissal of certain workers, or other prejudice due to union membership,* such measures could constitute a violation of the right of workers to join trade unions of their own choosing. (Case No. 659)
- Even allowing that legislation prohibiting the involvement of foreigners in a country's internal affairs can be justified, the Committee finds it appropriate that such legislation be applied exclusively for the purposes for which it was promulgated and that *it may not be used in such a way as to hinder the free exercise of trade union rights.* (Case No. 660)²¹²

In the Spain case, the Committee observed that “the issue in this case consists of determining whether it is appropriate . . . to interpret broadly the concept of ‘workers’ used in the ILO Conventions on freedom of association.” The Committee concluded that “Convention 87 covers all workers” with the sole exception of the armed forces and the police, and that “unions must have the right to represent and assist workers covered by the Convention with the aim of furthering and defending their interests.”

This case has a similar posture. The *Hoffman* decision has direct repercussions on the exercise of trade union rights. The decision impacts workers in connection with the free choice of their trade union, results in the dismissal of certain workers, and creates other prejudice due to union membership. The decision

²¹¹ See ILO Governing Body, 327th Report of the Committee on Freedom of Association, Case No. 2121 (Spain), GB.283/8, para. 561 (March 2002).

²¹² Cited as cases nos. 658-660 in *Queja presentada por UGT ante el Comité de Libertad Sindical de la OIT contra el Gobierno de España*, March 23, 2001. These cases were not available on the ILO's web site.

applies immigration law in such a way as to hinder the free exercise of trade union rights. As such, the *Hoffman* decision constitutes a violation of workers' right to form and join trade unions and their right to adequate protection against acts of anti-union discrimination.

Effects since the *Hoffman* decision

The Committee should be aware of the devastating effects of the *Hoffman* decision in the months since it was issued. Employers have made threats against workers, telling them of the decision and emphasizing that they can be dismissed for trade union organizing with no right to reinstatement or back pay. Workers have abandoned many trade union organizing campaigns because of the fear instilled by the *Hoffman* decision. Employers have also threatened workers with dismissal if they complain about minimum wage or overtime violations, health and safety violations, or any other claim before a government labor law enforcement agency.²¹³

In the wake of the *Hoffman* decision, worker protection agencies such as the Department of Labor and the Equal Employment Opportunity Commission have reaffirmed their commitment to enforcing the laws under their jurisdiction without regard to immigration status.²¹⁴ Nonetheless, they have conceded that under the logic of *Hoffman*, they cannot seek back pay on behalf of undocumented workers for work not performed. Moreover, the fate of common law and statutory remedies such as damages for pain and suffering caused by sexual harassment, lost wages caused by the failure to promote an employee because of his or her nationality, and other remedies is now at stake. Employers will try to extend the logic of *Hoffman* to defeat any meaningful relief for victims of discrimination who lack proper work authorization or who are afraid to have their immigration status become an issue.

Conclusion

The United States Supreme Court has often been a tribune for the defense of human rights. But the Supreme Court is not infallible. It once decided that slavery is legal.²¹⁵ It once invalidated child labor laws.²¹⁶ It once ruled that legislation

²¹³ See Alfredo Corchado and Lys Mendez, "Undocumented workers feel boxed in; They say they have no rights to damages from labor abuses," *Dallas Morning News*, July 14, 2002, p. 1J; Nancy Cleeland, "Employers Test Ruling on Immigrants; Labor: Some firms are trying to use Supreme Court decision as basis for avoiding claims over workplace violations," *Los Angeles Times*, April 22, 2002, p. 1; David G. Savage and Nancy Cleeland, "High Court Ruling Hurts Union Goals of Immigrants; Labor: An employer can fire an illegal worker trying to organize, the justices decide. Exploitation is feared," *Los Angeles Times*, March 28, 2002, p. 20.

²¹⁴ See U.S. Department of Labor Wage and Hour Division, Fact Sheet #48, "Application of U.S. Labor Laws to Immigrant Workers: Effect of Hoffman Plastics decision on laws enforced by the Wage and Hour Division," July 12, 2002, at: <http://www.dol.gov/esa/regs/compliance/whd/whdfs48.ht>; and EEOC press release, "EEOC Reaffirms Commitment to Protecting Undocumented Workers from Discrimination," June 28, 2002, at: <http://www.eeoc.gov/press/6-28-02.html>.

²¹⁵ *Dred Scott v. Sanford*, 60 U.S. 393 (1857).

limiting the workweek to sixty hours was an unlawful interference with freedom of contract.²¹⁷ It once ruled that employers could make workers, if they wanted a job, sign an agreement never to join a union, and then prosecute trade unionists who helped those workers to organize.²¹⁸ Unfortunately, the *Hoffman* decision joins these infamous rulings giving judicial approval to human rights violations.

The executive and legislative branches had to act to overcome those earlier terrible decisions by the Supreme Court. Now the executive and the legislature must act to overturn the *Hoffman* decision. However, the administration has not promoted legislation to accomplish this, and Congress has thus far failed to act. As a result, the United States remains in clear and open violation of its obligations as a member of the ILO.

We ask the Committee on Freedom of Association to take up this complaint, to act swiftly to obtain the necessary response from the United States government, and to invite the United States to take the measures needed to fulfill its obligations regarding freedom of association and protection of the right to organize and bargain collectively for all workers without distinction whatsoever.

As a final step, we ask the Committee to take into account the statement of the United States at the end of its 1999 followup report under the Declaration. There the United States government said:

Federal legislation appears to be in general conformance with Conventions 87 and 98, although no recent in-depth tripartite analysis has been performed regarding these Conventions. To the extent that the ILO might be able to recommend relevant forms of tripartite technical cooperation, the United States would be interested in any such proposals.²¹⁹

In light of this offer, we urge the Committee to fashion recommendations for relevant forms of tripartite cooperation to be proposed to the United States regarding the issues raised in this complaint. If the Committee does so, we request further consultations with the organizations submitting this complaint for our views on relevant forms of tripartite technical cooperation.

²¹⁶ *Hammer v. Dagenhart*, 247 U.S. 251 (1918).

²¹⁷ *Lochner v. New York*, 198 U.S. 45 (1905).

²¹⁸ *Hitchman Coal & Coke Co. v. Mitchell*, 245 U.S. 229 (1917). Such agreements are known in U.S. labor history as “yellow dog contracts.”

²¹⁹ See U.S. Government Annual Report for 1999 to the ILO concerning freedom of association and the effective recognition of the right to bargain collectively, p. 19.

By: _____

John J. Sweeney

President

American Federation of Labor and
Congress of Industrial Organizations

Date: _____